The Practitioner's Guide to Antitrust in China

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About the Author

Photo by Andy Katz

Becky Koblitz is an American antitrust lawyer, whose life's path has brought her from the Antitrust Division at the Justice Department, to a corporate law firm in a Berlin still surrounded by the Berlin Wall, back to a corporate law firm in Washington, D.C., then to one of the largest property developers in a newly united Berlin, on to a law firm in Berlin practicing in financial transactions, and finally, for the last ten years, practicing corporate law in Beijing, China. She was born and raised in Tokyo, Japan and is a graduate of Stanford University and American University Law School. She was privileged to begin her legal career at the Antitrust Division working for Don Klawiter, later the chair of the American Bar Association's Section of Antitrust Law, prosecuting retail gasoline price-fixing cases, from grand jury to trials. She also reviewed merger filings in the energy sector of the Antitrust Division. Koblitz returned to her "antitrust roots" in Beijing as the only former federal prosecutor resident in China, where she manages and develops the antitrust, competition law and white-collar practices for the international law firm of Sheppard Mullin Richter & Hampton LLP. Her practice includes advising foreign companies on antitrust compliance as well as anti-corruption (FCPA) compliance, managing internal investigations and other measures to prevent or minimize risks.

Becky Koblitz is a member of the Washington, D.C. bar (1982).

Foreword

Like it or not, antitrust has gone global. A merger requiring antitrust clearance from multiple jurisdictions, a multinational company being fined on different continents for participation in a global price-fixing cartel, a technology firm negotiating licensing deals with companies located in different countries ... such headlines often fill the business news. With antitrust going global, so is the regulatory risk. A merger between two companies based in two countries may have to abandon the deal if they cannot obtain antitrust approval from a third country. The discovery of a cartel in one country may lead to follow-on investigations and fines in other jurisdictions. A licensing practice that might seem quite benign in one jurisdiction could face hefty antitrust fines in another. The globalization of antitrust has seen both convergence in legal principles and divergence in enforcement practice across an increasing number of antitrust jurisdictions, adding more complexity to the practice that not long ago was still almost entirely local.

Against this backdrop is China's Anti-Monopoly Law, which has only been in force for the last seven years. Yet there is no doubt China has emerged as an important player in the global antitrust arena in virtually all major areas of enforcement: mergers and acquisitions, joint ventures, cartels, abuse of dominance, transfer and licensing of intellectual property rights, and administrative monopoly. MOFCOM, NDRC, SAIC, these acronyms have become the buzz words in the antitrust world, joining the ranks of DOJ, FTC, and EC. Management and legal counsel of foreign companies operating in China as well as those outside China with Chinese business desperately need to keep up with the fast-paced antitrust developments in the most dynamic market in the world.

The author of this book, Becky Koblitz, is a seasoned antitrust lawyer for a major U.S. law firm in Beijing. She has decades of legal experience as a prosecutor at the Antitrust Division of the U.S. Department of Justice, as well as in-house counsel for a German subsidiary of a major American real estate development company and as a lawyer at law firms globally. Her rich experience in the U.S., Europe and China, now often regarded as the three centers of global antitrust, makes her the perfect candidate to write a book on China's antitrust development. Her book is a quick read that tells what there is to know about China's antitrust enforcement and includes practical

advice and examples for the various aspects of antitrust: dealing with competitors, dealing within the supply chain, mergers, etc. She writes in a straight-forward language such that non-antitrust lawyers can get beyond stock phrases like "illicit price coordination," "abuse of dominance," or "unilateral effect." Her book is a valuable and practical "cookbook" for antitrust compliance training and beyond. Another feature of the book is that it provides both legal and economic perspectives on antitrust analysis in China, which is important given that economic analysis is increasingly adopted by China's antitrust agencies and the Chinese courts. Thus understanding the logic and methodology behind economic analysis as is applied to Chinese cases is key to conducting proper antitrust legal analysis that is tailored to the Chinese context.

To write a book on the burgeoning antitrust enforcement and practice for the constantly evolving Chinese market is a real challenge. The trick, and it is not as easy as you would think, is to write simple declarative sentences, understandable to the antitrust layman, and at the same time not lose the rigor of antitrust analysis. I think this relatively short book is a remarkable achievement in meeting such a challenge, but I invite you to judge for yourself.

Su Sun, Ph.D.
Vice President, Economists Incorporated

Preface

My father, Kosaku Nao, was a Hebrew and Old Testament scholar and President of the Japan Lutheran Church. When he was a young seminarian he had to learn Aramaic, Greek, German, English and, of course, ancient Hebrew, to study the Old Testament, sometimes having to jump from language to language in the secondary sources to understand a passage in the Bible. He then spent twenty-five years writing a Hebrew-Japanese Lexicon of the Old Testament so that all Japanese seminarians who followed him could go directly from the original to their own language. My book is by no means comparable in stature and it took a mere twelve months to draft. But I hope it saves some of you the effort of sifting through the internet and chancing through various articles and court cases to appreciate the basic issues and most prominent sources on Chinese antitrust law. If my father were still alive perhaps he would recognize some of his famous and invariably stubborn dedication in these pages.

Antitrust is the part of law that has always captivated me, even if circumstances diverted me to real estate, corporate law and financing. It is simply a twist of fate that I should be practicing law in China at precisely the time when they introduced the first Chinese antitrust law in the very long history of this noble land. The Chinese have not invented the principles of antitrust, and much of what happens here is familiar from practice in the United States and Europe. But this wouldn't be China if they didn't have their special way of doing things and antitrust law, like the law in general here, is in the process of evolution, even if it has been long since promulgated.

Jim Zimmerman, my colleague at Sheppard, Mullin, gave me the idea to write this book and never let me lose faith. I am also grateful to my husband, Don, who doubled as my muse and my stand-in for the all-suffering end-users of this book (if it ends up frustrating you, he's let you down). I am also grateful to my antitrust colleagues who have taken the time to read through my manuscript, catch me from egregious errors and save me from various lapses. The ones that remain are all mine.

Becky Nao Koblitz
Beijing, China
April 2015

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CHAPTER 1
Introduction

§1.01 BACKGROUND

This book is for general legal practitioners who are advising foreign companies contemplating or already doing business in China. It sets forth the fundamental antitrust concepts in China and discusses how the Chinese antitrust enforcement agencies and judiciary enforce China's Anti-Monopoly Law (AML), which has only been in effect since 2008. The goal of this book is to help the general practitioner develop a basic understanding of antitrust and economic analyses as well as to provide practical tips so that potential problem areas can be anticipated, acted upon and minimized.

The approach is to begin with factual issues or business issues, as opposed to starting from legal theory. Companies do not think in terms of legal theories, but rather about how they can best do business. For example, they want to distribute a product and provide incentives for distributors to sell their products (they don't think in terms of restricting competition among distributors) or they want to merge with a company to get access to supplies or an asset (and don't think in terms of "entry foreclosure" or "unilateral effect"). In addition to the legal issues this book discusses the economic analytical tools that are increasingly important in antitrust cases. Enforcement investigations and merger review decisions are selected based on their relevance to foreign companies and, where possible, I try to generalize the issues on which Chinese enforcers have focused to make the advice applicable to all industries and companies rather than just those in the identical situation as the companies that were the subject of enforcement actions.

My goal is to help in-house counsel or general practitioners reach a level of understanding so they can spot antitrust issues, do some internal antitrust auditing (either by themselves or with outside help) and hopefully prevent a potential antitrust violation as opposed to having to belatedly react to a government investigation or a civil suit in court. Because my book is not intended to be a comprehensive treatise on

antitrust in China, I also guide readers to other sources if they want to go into more depth on specific issues. In this chapter I will discuss the origins of antitrust and the development of the Chinese antitrust regime. In Chapter 2, I discuss the enforcement framework: the law, who enforces the law and procedural aspects of investigations, civil actions and merger review. The subsequent chapters are substantive analyzes of Chinese enforcement: conduct related to interaction with competitors (Chapter 3), conduct within the supply chain—resale price maintenance (Chapter 4), conduct within the supply chain-monopolization (Chapter 5), merger review (Chapter 6), the intersection between intellectual property and antitrust (Chapter 7) and finally, abuse of administrative power (Chapter 8).

§1.02 THE ORIGINS OF ANTITRUST LAW AND CHINESE ANTITRUST LAW

Antitrust law, or competition law as it is often referred to in many jurisdictions, has its origins in the United States, back in the 1880s.[1] The U.S. antitrust laws came about as a grassroots movement based on the basic premise that we should all be free to engage in fair competition. The words "competition," "corporation," "trust," "cartel," "monopoly," "combination," and the concept of "restraint of trade" were already common vocabulary back then. During the industrial revolution in the United States, "competition... became more and more fierce, as existing firms fought for capital, customers, and raw material. The individual entrepreneur and the small partnership were steadily replaced by the corporation, the trust, and the cartel as the customary forms of business organization."[2] By 1887 the first federal statute was enacted to outlaw abuses such as the pooling arrangement, short-haul and rebate discrimination in the railroad industry.[3] "Small businessmen, labor, and agrarian groups quickly organized an attempt to extend this pattern of regulation from the railroads to all trusts and monopolies."[4]

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1. "Overall, the U.S.-American antitrust Law can be understood to be a kind of 'original parent legal system' from which the other competition law regimes are derived." *See* Wernhard Moeschel, *US versus EU Antitrust Law*, MANNHEIM DOC, available at *http://ftp.zew.de/pub/zew-docs/veranstaltungen/rnic/papers/WernhardMoeschel.pdf*.
2. Earl W. Kintner and Mark R. Joelson, AN INTERNATIONAL ANTITRUST PRIMER: A BUSINESSMAN'S GUIDE TO THE INTERNATIONAL ASPECTS OF UNITED STATES ANTITRUST LAW AND TO KEY FOREIGN ANTITRUST LAWS: (New York: Macmillan Publishing Co. Inc., 1974), at p. 3.
3. *Id.* at pp. 7-8. "Under the pool procedure a number of railroads would function together and actually divide up the market. The pool would arrange with a group of shippers for the carriage of a certain percentage of goods by each particular road; in return for the agreement the shippers would receive various forms of rebate from the carriers...The practice of varying rates between the so-called short haul and long haul had a significant anticompetitive effect. It is reported that millers in Minneapolis were able to secure carriage of their flour to New York City at considerable cheaper rates than millers in Rochester, New York. In substance, it was alleged by critics—and there is much evidence in support—that the power to discriminate by area could and did actually determine the future economic existence of whole communities...Under the practice of granting rebates, in the form of anything valuable, to certain favored shippers, the railroad often had the power to decide who should live and who should dies in terms of business survival. By way of illustration, it has been estimated that this form of discrimination was so grave that the favored shippers benefitted by as much as 50 per cent in comparison with announced freight rates."
4. *Id.* at p. 3.

This movement led to the drafting of legislation to combat conspiracies and monopolies. Eventually, when the original bill was introduced by Senator Sherman (hence the name "the Sherman Act") on August 14, 1888, Senator Sherman summed up the public's mood:

> The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. These combinations already defy or control powerful transportation corporations and reach State authorities. They reach out their Briarean[5] arms to every part of our country...Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life.[6]

Less than two years thereafter, on July 2, 1890, President Harrison signed the Sherman Act. One section of the Act prohibited "every contract, combination in the form of trust or otherwise, or conspiracy, in the restraint of trade."[7] "Another section made it a criminal offense to monopolize or attempt to monopolize any part of interstate commerce."[8] Antitrust laws are not regulatory, i.e., the antitrust laws are not there to restructure an industry, market or a company but rather, to cure or prevent a violation of the antitrust laws. The laws provide the parameters of fair competition, which serves as the basis for a free market economy.

The Sherman Act is 120 years old and China's AML is a mere seven years old[9] but in some ways its enactment is every bit as much a revolution. Unlike other jurisdictions such as Germany and Japan, where the introduction of antitrust laws was a result of the U.S. occupation after the defeat of the respective nations in World War II and thus part of the reformation of these countries, China's adoption of the antitrust laws was a carefully thought-out, negotiated, strategic development dictated by the central government, a process that started almost twenty years ago. It represents a dramatic recognition of the need to address distortions inherent in a wholly unregulated market economy. China has moved from a centrally planned command economy, to one that is largely, despite the existence of state-owned enterprises (SOEs) as major players, a free market economy. The AML is the ultimate recognition on the part of the Chinese government that free and fair competition in the market place is in the essential interest of the Chinese people. Elsewhere this might be routine. But in the twenty-first century China it is a watershed testament to the need for an effective free market. The following discussion of the evolution of competition policy in China, treatment of SOEs and the

5. From Greek mythology, Briareus was a gigantic figure with 100 arms and 50 heads.
6. Earl W. Kintner and Mark R. Joelson, AN INTERNATIONAL ANTITRUST PRIMER: A BUSINESSMAN'S GUIDE TO THE INTERNATIONAL ASPECTS OF UNITED STATES ANTITRUST LAW AND TO KEY FOREIGN ANTITRUST LAWS: (New York: Macmillan Publishing Co. Inc., 1974), at p. 4.
7. *Id.* at p. 11.
8. *Id.*
9. Anti-Monopoly Law of the People's Republic of China (adopted at the 29th Sess. of the Standing Comm. of the 10th National People's Congress on August 30, 2007, effective August 1, 2008). [hereinafter "AML"].

role local governments play in competition policy will further help put the AML in perspective.

The concept of competition in China has different roots compared to the United States. During the time that the economy was centrally planned,[10] the term "competition" was regarded as a "capitalist monster."[11] Subsequently, competition was adopted as a positive principle, but there was an underlying policy to support the development of "national champions," i.e., those SOEs with prospects to survive and prosper. For example, in 1980, the State Council issued for the first time regulations promoting and protecting competition but the SOEs were exempted. The State Council regularly issues policy statements, which, among other things, encourage consolidation of companies within industries to develop "national champions" that can thrive in a global business sphere.[12]

Even though China promoted SOEs, at the same time it recognized that it had to promote fair competition within the private sector to become a global player. The concept of competition was promoted through the passage of laws such as those relating to unfair trade practices,[13] pricing,[14] procurement and bidding[15] as well as patents.[16] The Anti-Unfair Competition Law (AUCL) promoted fair competition but focused on the operational level of business as opposed to competition in the broader sense of markets. Similar to the United States Federal Trade Commission Act, the AUCL prohibits, among others, unfair trade practices such as misusing trademarks, tying of purchases, bribery, false advertising, and disclosure of trade secrets, predatory pricing, and bid-rigging.[17] China's Price Law's promoted pricing based on the market for those items not subject to government price-setting. It defined market-regulated prices as prices set independently by enterprises based on market competition.[18] The Price Law

10. Wentong Zheng, *Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control*, 32 U. Pa. J. Int'l L. 643 (2010): "The chief mechanism through which a market economy allocates resources is price. In a command economy, however, price is determined by administrative fiats, not by the interaction of market supply and demand. Prior to the launching of economic reforms in 1978, China's economy was a typical command one." p. 652.
11. *See* Wang Xiaoye, *The New Chinese Anti-Monopoly Law: A Survey of A Work in Progress*, Antitrust Bulletin Vol. 54, No. 3, 580 (2009).
12. For example, the January 22, 2013 policy guidelines issued by thirteen agencies (including the agencies responsible for enforcing the AML) contain broad sweeping statements about how consolidations will put Chinese companies on a better footing to compete globally. They identify nine key industries dear to China: automobile, steel, cement, shipbuilding, electrolytic aluminum, rare earths, electronic information, pharmaceuticals and agricultural processing.
13. Anti-Unfair Competition Law of the People's Republic of China (adopted September 2, 1993, at the 3rd Meeting of the Standing Comm. Of the 8th National People's Congress, effective December 1, 1993) [hereinafter the "AUCL"].
14. Price Law of the People's Republic of China (adopted December 29, 1997, at the 8th National People's Congress, effective May 1, 1998) [hereinafter the "Price Law"].
15. Tender Law of the People's Republic of China, issued by Standing Committee of the National People's Congress August 30,1999, effective January 30, 2000 [hereinafter "Tender Law"].
16. Patent Law of the People's Republic of China (adopted March 12, 1984, at the 4th Sess. Of the Standing Comm. of the 6th National People's Congress, amended December 27, 2008 at the 6th Sess. Of the Standing Comm. Of the 11th National People's Congress) [hereinafter the "Patent Law"].
17. AUCL, at Arts. 5–11, 15.
18. Price Law, at Art. 3.