

By Oliver Zhong

If there is one defining trend in competition laws worldwide in the last decade, it is one of rapid internationalization. The momentum began, ironically enough, on the smoking ruins of GE/Honeywell, which in its day (2001) would have been the largest industrial merger in the world had it not been derailed by the European Commission's competition watchdog under the helm of the unimpressible Mario Monti. Particularly incensing to the United States, of course, was that both parties to the deal were American and the merger had already received clearance from the Justice Department. The decision from Europe was a shock, but the issue of conflict wasn't entirely unnoticed. The process which later would become known as "harmonization" had in fact begun a few years earlier, when the Justice Department commissioned a study which recommended the creation of a "Global Competition Initiative" to facilitate "greater convergence of competition law and analysis, common understanding and common culture." But it wasn't until after GE/Honeywell that the International Competition Network (ICN), supported by 14 major jurisdictions, was finally launched. Today, the ICN provides an invaluable platform for conflict reduction and policy consultation.

Convergence in rules is only one side of the movement; emergence of new power centers is the other. Gone are the days when major businesses need only heed Washington and Brussels. Competition authorities with relatively short histories have begun to demonstrate strength, particularly in industries where their countries take a keen interest. The prime example is the landmark fine and injunction levied against Microsoft in 2005 by South Korea's Fair Trade Commission (KFTC) for illegal bundling of the Windows operating system and applications such as the media player and the instant messenger.

The driving force behind both phenomena is globalization at its historic apogee. Jurisdiction derives from presence, and when business practices cross borders on an unprecedented scale, they draw national competition laws into conflict and confluence.

Which is why China's year-old Anti-Monopoly Law (AML) has piqued the interest of competition lawyers so acutely, probably more than what the Chinese authorities had anticipated. The world's second largest economy could certainly reach most major transactions if it chose to; it could enforce its decisions. How China intends to wield this newly-claimed power is anyone's guess. How potential subjects to the power will be able to participate and protect themselves no one is quite sure, especially given China's difficulties with the rule of law and often inadequate judicial process.

China's habit of doing things its own way adds to one's uncertainties. The Chinese are nimble at learning crafts (competition law, after all, gets technical) and better than many countries revere international norms, but when it comes to enforcing (especially foreign-related) laws, the national interest tends to predominate, and they have shown a skillfulness at deliberate pick and choose. It remains an open question how, in the long term, the Chinese competition law will share a "common culture" with leading jurisdictions. At the same time, it has been set in train and is already making a real impact. For example, China has famously used the law to prevent Coca-Cola from

buying a prized national brand of fruit juice. Given the population's antagonism against Microsoft, shouldn't Brad Smith, its top lawyer, start a legal arms race in Beijing sooner rather than later?

These issues illustrate that much more than a good translation of the statute is needed. A principled approach to understanding China's AML would encompass two steps. First, an intelligent analysis of the AML in context is necessary: what position does it occupy in the world of emerging competition law jurisdictions and, on a fine level of specificity, what influences does it draw upon? Second, antitrust experts and China law experts must join forces to predict and, more importantly, to influence the course of "domestication" of what is largely an alien concept into China's massive and vastly different administrative and legal fabric.

Professor Fox's article, which first appeared in 2007 when the law was enacted (it became effective a year later), remains a definitive work in analyzing the AML in context. In addition to her unparalleled experience in U.S. government service and private practice, Professor Fox is among a small group of U.S. lawyers who truly understand the globalization of competition law. She not only studies and lectures on established foreign competition laws, she has had actual experience advising emerging jurisdictions in drafting their own. This gives her tremendous insight on competition-law transplantation. In this article, she reveals not only *what* particular U.S.- or E.C.-law concepts are borrowed but *why*. She also has the ready appreciation of a development economist of structural deficits which commonly handicap emerging jurisdictions but are of little concern to more developed ones. Her comparison of the Chinese "administrative monopolies," a unique and controversial feature of the AML, to the Mexican private utility monopolies, for example, is particularly apposite.

China's AML is no small rabbit but big game. Professor Fox's is a fine anatomy of it, showing with authority what it looks like and is capable of. The appearance, however, may deceive and capabilities gained need not be capabilities spent. How ferocious it will learn to become, one asks? Fortunately it won't be too long before the world gets better evidence.

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