Women & Antitrust

Voices from the Field

Vol. II Curation & Foreword by Kristina Nordlander

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Lilla Csorgo is a senior consultant to Charles River Associates. She was most recently head of economics and policy for the Hong Kong Competition Commission. Her previous roles include chief economist for the New Zealand Commerce Commission, vice president with Charles River Associates, an economic adviser to the Commissioner of the Canadian Competition Bureau and economist member at the Canadian Competition Tribunal. Dr Csorgo has comprehensive knowledge of the theory and application of microeconomics, particularly industrial organisation, including competition, antitrust, and regulation. Dr Csorgo obtained her PhD in economics from the University of Toronto.

Do you believe that local market conditions should inform competition law? If yes, how? If not, why not?

Yes, I have always believed that the law should be read in context, and competition law enforcement should be responsive to the local market conditions. Competition agencies need to adopt careful case-by-case analysis by looking into the local market conditions in order to decide how to achieve the optimal enforcement outcome.

What do you see as the biggest difference between the US and EU approach to competition law, and the biggest difference between these two jurisdictions and the approach taken in China?

In my opinion, the biggest difference lies in the different judicial approach in cases relating to abuse of dominance. EU judges take a more deferential approach to agencies' decisions (although small adjustments have been made in light of *Intel*), while US courts require antitrust authorities to satisfy a much higher burden of proof. As for China, I would have to say that the key difference here is the near absence of judicial scrutiny over agency decisions and, as a result, we lack information as to whether the administrative agency has taken a decision with good reason.

What role do the underlying economic principles of competition economics play in Chinese antitrust/competition enforcement?

Chinese competition law enforcement can be divided into two major spheres: public enforcement, which is mainly handled by administrative agencies; and private enforcement, which is administered by the courts. Chinese courts have been more willing to employ economic principles in civil antitrust cases compared with the administrative agencies, and to this end underlying economic principles have played a crucial role in driving the decisions of some landmark civil cases.

Given the opaque nature of the administrative decision-making process, it is quite difficult to observe the role that economics has played in public enforcement. Based on the final decisions released by agencies, some former agencies appear to be more willing to engage in economic reasoning than others. The *Tetra Pak* case is an example in which the State Administration for Industry and Commerce conducted extensive economic assessment and consultations before arriving at a decision.

What factors other than underlying economic principles inform antitrust/competition enforcement in China?

Chinese antitrust enforcement is largely driven by administrative agencies, and because agencies decisions are rarely subject to appeal, they possess significant discretion in handling cases. As I elaborate in my forthcoming book *Chinese Antitrust Exceptionalism* (OUP, forthcoming early 2021), the bureaucratic mission, culture and structure of Chinese agencies play an important role in shaping their enforcement priority and outcome. And the formal and informal bureaucratic constraints will continue to influence Chinese antitrust enforcement in the years to come.

Do you see the approach taken in China to antitrust/competition enforcement to be wholly incompatible with that taken by Western competition authorities?

The approach taken by Chinese agencies is not always compatible with that taken by Western competition authorities. And such incompatibilities are deep-seated in China's unique political and economic institutions. For instance, the law is generally perceived as a regulatory tool in a communist country. So it is not surprising that Chinese competition law has also been used to reduce and stabilise prices at times of inflation.

What are the most salient distinguishing features of Chinese firms, and are Western competition authorities up to addressing those features in their enforcement actions?

The most conspicuous feature that distinguishes Chinese firms from their counterparts is the degree of independence that such businesses have from the government. This feature again is deeply rooted in the Chinese political economy, where the state continues to play a pervasive role in directing and influencing the national economy. This has left foreign competition authorities with lingering thoughts about the extent of state control and many have found it difficult to delineate the boundary of the so-called "China, Inc" appropriately. Antitrust law was not designed with Chinese state capitalism in mind and so both the EU antitrust regulators and US judges have struggled to address and engage Chinese firms in a way that is compatible with their own principles and laws.

What do you see as Western competition authorities' best course of action to enforcing competition law against Chinese firms?

I think that Western authorities' best course of action in enforcing antitrust involves two factors: the first is remaining calm and not panicking. There is this common misconception in the West that all Chinese firms are managed and controlled by the Party. Although all Chinese firms appear to have the same owner – the Chinese state, they actually belong to different levels of governments in different regions with competing and divergent interests. This explains why we often observe cut-throat competition between Chinese firms at home and abroad. The second is, be consistent. It is perfectly understandable for Western authorities to be concerned about Chinese firms acquiring dominance in critically vital sectors, but Western competition authorities need to avoid applying a double standard to Chinese firms. Otherwise it will be difficult to convince their Chinese counterparts that antitrust enforcement should be free from political influence.

Given varied competition laws and approaches to enforcement across nations, how can a multinational firm best ensure it stays on the side of the law?

I think it is important for multinational firms to take a more holistic approach to legal compliance and understand the limits of law. Often the differences between law enforcement across nations is driven by the varied institutional environments, which are in effect shaped by the pertinent local political and economic factors. Lawyers advising multinational companies should be sensitive to the contemporary context in which law is being enforced.

How do you see the COVID-19 pandemic and deterioration in US and Chinese relations impacting the enforcement of competition law in regard to multinational firms operating within China and Chinese firms outside China?

There is a heightened risk that antitrust law will be politicised in light of growing Sino-US tensions and the COVID-19 pandemic. As I elaborate in *Chinese Antitrust Exceptionalism*, Chinese antitrust law has been employed as an economic weapon that forms part of China's tit-for-tat strategy against aggressive US sanctions. Similarly, Western regulators have begun employing their competition laws to address issues of trade and national security. For example, in June 2020, the EU released a White Paper proposing a new form of merger control related to state-back acquisitions; this seems to directly target acquisitions initiated by Chinese firms in Europe.

Setting aside these relatively recent developments, considering incompatibilities between Western and Chinese political and market systems, can one expect an eventual decrease in conflicts in approaches and uses of competition law?

Yes, I think so. Despite the conflicts we see in the way China regulates and is regulated, I still remain hopeful that a peaceful outcome will

prevail. As I argue in *Chinese Antitrust Exceptionalism*, the solution to such conflicts lies in the exchange of hostages, that is, as Chinese authorities hold foreign firms hostage through aggressive application of antitrust law, foreign regulators can do the same to Chinese firms, not necessarily through antitrust law but also through trade and foreign investment rules. These dual outcomes will be conducive to compromise and cooperation.

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Leading competition professionals from around the world present reflections and forecasts on topical issues in antitrust and competition law and policy in this second volume of Women & Antitrust. Over a series of candid conversations, enforcers, in-house counsels, lawyers and academics take on questions about an extraordinary year. Nestled among the exchanges are insights into the professional paths of the women interviewed. Through personal anecdotes, they share perspectives on their chosen roles, if and how gender has informed their career choices, and offer advice to young practitioners interested in joining this field.

This volume has been published in cooperation with Women's Competition Network (WCN). Another volume was previously published in cooperation with W@Competition.

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