GLOBAL ANTITRUST: ANALYSIS OF ACQUISITIONS

Kenji Aono

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Sources


Ping Lin, The evolution of competition law in East Asia, Competition Policy in East Asia 15, 17 (Erlinda M. Medalla editor) (2005).
I. Introduction

An international anti-monopoly law does not exist. When multinational corporations operate in a fashion that is considered monopolistic, it is left to individual jurisdictions to pass judgment. The main jurisdictions are that of the United States of America and the European Union, this is where almost all anti-monopoly decisions are made, where the rules are established, and where most companies are based.\(^1\) This has lead to the development of laws concerning monopolies and mergers to have a biased view that corresponds to that of Western culture. However, there is now a new player on the field, the People's Republic of China, who will brings differing concepts on how a monopoly should be dealt with.\(^2\) China has been considered a developing country, despite the fact that their economy is one of the largest in the world, their population is many times greater than the U.S., and they have been an established country for several millennia. Until recently, China did not have a unified law dealing with monopolies; they did create a law against unfair competition in 1993, and another law that dealt with product prices in 1998.\(^3\) Under this new Anti-Monopoly Law (AML) that was ratified in 2008, China enters the global field as an authority that has, among other things, the power to allow or deny mergers of corporations.

Why does this concern consumers or business people in the U.S.? Christopher Hamp-Lyons, in his October 2009 article, *The Dragon in the Room: China's Anti-Monopoly Law and International Merger Review*, published in *Vanderbilt Law Review* discusses why there is concern from the international community, and possible workarounds. In this paper, I will give some background information of how the current international merger system works, as

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2. Id. at 1578.
described by Mr. Hamp-Lyons, along with a summary of his paper. Following that, I will offer my evaluation of Mr. Hamp-Lyons' paper, and a reflection on this project as my conclusion.

II. Background

Prior to the introduction of China's AML, the main powers that controlled international mergers were of Western jurisdiction, namely the United States of America, and the European Union. The growth of corporations past national borders, and the maturing of economies prompted these governments to create laws and regulations that would ensure healthy competition, in order to protect consumers. The reason that these two entities have been the strongest voice is because they have the largest economies, and many of the affected businesses are based in the two areas.  Also, they are considered well-developed compared to other nations, and have extensive knowledge of how competition may affect a developed economy.

Although these two power, the U.S. and E.U., have similar views and priorities it is not a given that there will be no conflict. An example of this is the attempted acquisition of Honeywell by General Electric in 2001. The U.S. decided to allow the merger, but the E.U. opposed it, saying that the resulting company may be able to gain an unfair advantage in the aircraft business by bundling their products. The U.S. claimed that the E.U. wouldn't allow the merger only because the resulting company would become too efficient, and that the E.U. was favoring their own national companies instead of the overall global market and good to the consumers. This divergence of opinions due to a national issue is reason the international community is hesitant to allow China such great power so quickly. It is thought that their views will bring more turmoil and tension to the process of dealing with anti-competitive behavior.

4 Hamp-Lyons, supra note 1, at 1579.
5 Id. at 1588.
6 Id.
7 Id. at 1589.
Despite such concerns, China has proceeded to create their own AML, and they aren't the only country, as statistics have shown a tripling of countries that have competition laws between 1995 and 2003.\(^8\) However, despite some international reluctance, China ratified their new Anti-Monopoly Laws in 2008.

III. Summary of *The Dragon in the Room*

Hamp-Lyons writes this essay to inform readers about the current (before China) state of international mergers based on antitrust and anti competition theories, and the troubles it has. He then introduces China, and how their new AML may affect the current state, and offers suggestions to China as to how they should proceed.

A. More Background Information

To understand how the addition of China as an international power in the world of mergers will affect the global market, it is important to learn how the current system works. As stated earlier, the two main powers are the U.S. and E.U. both of which have similar standards procedurally. In the U.S, much of the power in controlling mergers comes from the Clayton Act (1914), while the E.U. depends on the EC Merger Regulation adopted in 1989.\(^9\) Both sources of law have similar purposes, and the established guidelines used by both agencies are even more similar.\(^10\) There are five basic steps, taken by both parties, to determine if a potential merger may be anti competitive.

“These steps are (1) defining the relevant market and measuring concentration in that market before and after the merger; (2) assessing the potential adverse competitive effects of the merger on the relevant market; (3) analyzing the possibility of other suppliers entering the

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\(^8\) *Id.* at 1582.

\(^9\) It should be noted that the E.U. did have language prohibiting certain anti competitive behavior in the original Treaty of Rome (1957), and individual countries had laws predating the treaty.

\(^10\) Hamp-Lyons, *supra* note 1, at 1583.
market to compete with the merged firm; (4) evaluating the efficiencies created by the merger; and (5) determining whether one of the firms would be likely to fail, and its assets to exit the market, unless the firms merge.”^{11}

The similarities between the two systems spans beyond the guidelines used by agencies during enforcement. In the U.S., firms are required to notify the proper agencies when they are considering an acquisition that will have measurable impact, as does the E.U.. One reason this is done is to ensure that the agencies have a chance to evaluate potential mergers before they happen. Another is that it allows agencies to exempt mergers from evaluation if they do not have a strong connection to the local community, thus saving time and money for all involved. Both systems also reserve the power to block potential mergers, if they are found to be of an anti-competitive nature.^{12}

Despite the overwhelming similarities in the two systems, their analysis does not always lead to the same conclusion. Besides the aforementioned General Electric and Honeywell incident, Hamp-Lyons discusses the Boeing and McDonnell Douglas merger in 1997.^{13} Neither company had production facilities in Europe and the acquisition of McDonnell Douglas by Boeing was permitted by the U.S. agency. However, the E.U. claimed it had a right to block the merger since the two companies did extensive business in the community, and did so because of contracts between the companies and airlines which were deemed exclusive and anti-competitive. There was much tension between the heads of the governments due to this disagreement, and that tension wasn't solved until the merger went through.

\(^{11}\) Id. at 1584.
\(^{12}\) Id. at 1585.
\(^{13}\) Id. at 1587.
It is this potential for disagreement, and the fear that the jurisdictions will have a tendency to favor their national economy, that has Hamp-Lyons concerned.\textsuperscript{14} As more countries begin to create their own versions of anti-competitive laws, the need to have an international convergence of opinions becomes more relevant, and it is clear that China's views have a tremendous amount of importance in guiding the international community towards the currently established Western standards, or modify it as needed.

**B. Reaching an International Agreement**

Realizing that there needs to be an international agreement is the first step, but that does not solve the problem. Currently, it is estimated by the International Bar Association, that even a merger that troubles no jurisdiction costs businesses, on average, USD 4.24 million.\textsuperscript{15} One of the most radical suggestions is to establish a supranational antitrust enforcement agency, which is tasked with reviewing international mergers.\textsuperscript{16} Although the potential benefits such as eliminating the need for reporting to multiple countries, having a single authoritative response, and allowing analysis of the competitive impact on a global scale are enticing, there are many impracticalities in this method. One major reasons being that countries are highly unlikely to submit their authority to a supranational agency, and even if they did, it is quite likely that there will be larger, more influential countries that will pressure the supranational agency to make decisions in their favor. Besides these issues, experts in the field warn that a rigidly unified international competition law would halt the evolution of competition law.\textsuperscript{17} Thus, Hamp-Lyons suggests that this proposal will never work in the real world, and continues with the analysis of

\textsuperscript{14} Id. at 1589.
\textsuperscript{15} Id.
\textsuperscript{17} Id. at 1591.
other possibilities. One of which is the use of binding international codes or treaties, which was attempted with the Munich Code. The Munich Code was developed by the International Antitrust Code Working Group, and relied upon the success of the General Agreement on Tariffs and Trade to get countries to create on standard international code. However, this has similar problems as the previous proposal, countries reluctant to give up powers, and the fact that they are unlikely to be able to settle on a single set of codes.

A currently used method is a bilateral arrangement, in which countries have formal arrangements to share information between their agencies, in order to streamline the process of making their decisions to allow or ban mergers. Although this may be useful for mergers involving jurisdictions that communicate readily, like the U.S. and E.U., it does not prevent the possibility of disagreements to rise, as mentioned earlier. As the economy moves from a national to global based operation, it becomes more important that mergers aren't blocked based on negative impact on a local market. With bilateral arrangements, “A merger that would be pro-competitive in one jurisdiction but is perceived as having anti-competitive effects in the other will likely be blocked, even where the net outcome of the merger, on a global scale, would be pro-competitive.” Also, with the explosion of growth in the number of countries participating in international merger reviews, setting up bilateral agreements between nations will be extremely time consuming, and will still end up costing businesses because of minor variances in the agreements. The review of previous proposals leads to the conclusion that although countries may want to act in a cooperative manner, they do not want to give up their powers and submit to other powers.

18 Id. at 1592.
19 Id. at 1593.
20 Id.
This directed countries to the approach of creating a forum for the international community to reach convergence on antitrust enforcement, known as the International Competition Network (ICN). This forum does not require its members to adhere to strict rules; instead it allows individual members to use their own agencies and experiment, and uses the results to suggest an international norm.\(^{21}\) A significant strength of this approach is that it allows developing nations to have a voice in creating the norms, this is important because many of the countries that are new to the concept of anti competition laws are also considered developing nations, including China.\(^{22}\) By allowing developing countries to have a voice, it increases the development of anti competition laws, and also increases the likelihood that other countries will be willing to accept the recommendations of the ICN.

C. China's AML

Until China entered the World Trade Organization in 2001, it did not have anything substantial in the form of anti trust laws.\(^{23}\) By 2003, they had drafted the Provisional Merger and Acquisitions Rules, but officials decided that it would not be enforced. Since then, China has actively been asking for outside input as they drafted what would become the AML. It was passed in August of 2007, and went into effect August 2008.\(^{24}\) The law is designed to permit mergers only when, “the positive effect on competition is greater than the negative effect.” It, like the U.S. and E.U. systems, has several factors to consider when analyzing a merger, they are: (1) market share and ability to control the market, (2) merger concentration, (3) the effect on market entry and technological advances, (4) the effect on consumers and competitors, (5) the

\(^{21}\) *Id.* at 1594.


\(^{24}\) Hamp-Lyons, *supra* note 22 at, 1596.
effect on national economic development, and (6) any other factors deemed “worth consideration.” Particularly of interest is that the AML considers technology, competitors, and the national economy. This suggests that China is taking a slightly different approach to dealing with anti trust issues; Hamp-Lyons states that the inclusion of these provisions will allow China to further their “parochial” goals.

Besides some of these factors that it takes into consideration, the substantive standards, and the procedural requirements are very similar to the U.S. and EU. systems. However, China may have a legitimate reason for including such factors, mainly because of the differences in how they operate their economy compared to the Western cultures. Since they are a developing nation, and have comparatively unique social goals, it is important that their government has some power to prevent public sector interference, while allowing the private sector to grow healthily. Also, according to experts in Western competition law, there is no clearly ideal set of laws to apply in the case of China. This introduces some amount of fear in the international community, that the factor allowing consideration of 'national economic development' will not be used to level the playing field, but used as a tool by China to block mergers it doesn't like even if it may have a net positive effect on competition. In fact, there are claims that it has already happened, in the case of Coca-Cola's attempted merger with Huiyuan, the second largest juice company in China after Coca-Cola. China's claim is that the merger would give the resulting company an unfair advantage, and resulting in potential harm to smaller competitors. However, according to Western analysts, the fears were unfounded, as the combined market share would have little concentration and a total share of about 19%, and would most likely have been

25 Hamp-Lyons, supra note 1, at 1596
26 Id. at 1597.
27 Id.
28 Id. at 1601.
approved by U.S. and E.U. standards. The Western analysts further allege China of making their decision based on nationalistic reasons, such as public sentiment opposing the strengthening of foreign corporations, which China denies. Whatever criteria China did use in making their decision, it is clear that the rest of the world is afraid that there will be an abuse of their power against foreign investors.

D. Propositions for China
The suggestions made in section III.B are for the general market, and do not include specific suggestions for China, therefore it is important to consider how they may affect China. In developing the current law, China did take advice from foreign sources, most notably the U.S. and E.U., but has some differences than the ICN's “Recommended Practices.” This shows that bilateral and multilateral agreements were used when creating the AML. China is still a developing country, and has an economy that is not a complete parallel to the existing markets in the U.S. and E.U., thus they have decided to experiment by adding new elements to the currently existing multilateral agreements. Although current experts may disagree on the validity of these elements, by using them in practice it will give the global market a chance to evaluate their usefulness. Western observers will also note that the AML allows China the power to block mergers even if the acquired firm is not operating in China, and the acquiring firm is not based in China. The language only requires that the acquiring firm have assets within China. The problem is that China has already ratified the AML, and intends to use it.

29 Id.
30 Id. at 1603.
This leads to Hamp-Lyon's conclusion, that the powers given to China through the AML should be phased in.\textsuperscript{32} He states that by having China practice this law locally, it will allow them to evaluate whether it accomplishes their goals or not, and to get them better prepared for international mergers.\textsuperscript{33} The market diversity in a country as large as China is such that it allows the government to experiment, within national borders, on procedural tasks and substantive rules. By phasing in the law from the local level before moving to the international stage, it will build the confidence of consumers in China that such competition laws can actually be beneficial.\textsuperscript{34} It will also allow authorities tasked with analyzing mergers to gain experience, before dealing with international mergers which may cause tension between nations.\textsuperscript{35} Any doubts about the efficacy of the AML can be cleared up by testing it in China's own local economy, and the lessons learned by them will be beneficial to the international community in converging on a set of anti-trust laws that is not only beneficial to developed, industrial countries, but also to the many developing countries of the world. \textsuperscript{36}

\textbf{IV. Analysis}

The purpose of this article, I believe, is to inform readers about how China's AML differs from the traditional Western laws that are in place, and to present some risks that it poses. The writing style is easy to follow, and nearly every mention of specific dates, facts, or expert opinion, is footnoted, making it easier to double-check certain statements. There is extensive background in the current system, with over a third of the paper dedicated to explain how the U.S. and E.U. systems currently operate, and how even though they are similar, they still have

\begin{itemize}
\item \textsuperscript{32} \textit{Id.} at 1614.
\item \textsuperscript{33} \textit{Id.} at 1615.
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} \textit{Id.} at 1617.
\item \textsuperscript{36} \textit{Id.} at 1620.
\end{itemize}
trouble reaching the same conclusion at times. This explains why there is so much hesitance by
the rest of the world to let China create their own AML, especially because it appears to have
such far-reaching powers. The paper also includes some current theories and practices that are
being considered to help make merger analysis easier and how they may or may not be useful in
practice. This background is critical to have, or the reasoning for Hamp-Lyons concluding
suggestions are impossible to follow.

The paper is well organized, and it has an easily understandable format and good flow
with simple language. I did find that the paper is repetitive; many of the suggestions and
arguments presented in the last sections of the paper were already introduced and explained
earlier. If one already has knowledge of how the current system works, the bulk of this paper's
usefulness is contained within the closing sections, about seven pages worth. Reading through
the article, I noticed that Hamp-Lyons has misspelled 'acknowledgment' as 'acknowledgement'
which had me distracted for a while.\textsuperscript{37} The author's conclusion is that China should not
immediately work on international mergers; rather they should focus on their national anti trust
enforcement, and amend their rules as needed first. I agree with this conclusion, not because of
arguments which Hamp-Lyons makes, but because it seems like common sense that one should
be granted gradually increasing responsibilities, instead of having them dumped on them all at
once. It seems that such a conclusion is obvious though, so I am not sure if this article is very
useful. Instead of offering people's opinions and so much theory on what is good for the
economy, I would have liked to see some more numbers or statistical facts on how certain

\textsuperscript{37} Christopher Hamp-Lyons, \textit{The Dragon in the Room: China's Anti-Monopoly Law and International Merger
practices have been effective and others have not. Hamp-Lyons did provide opinions to both
sides, which helps show that he isn't trying to be biased when making his suggestions.

V. Concluding Remarks

The system of international merger review, without the addition of China, and how it may
be improved to deal with an increasing number of participating countries has been described.
Christopher Hamp-Lyon's paper, The Dragon in the Room: China's Anti-Monopoly Law and
International Merger Review, gives the background for this information, and suggests that China
be slowly phased in as another authority on international mergers. Whether any of the fears of
nationalistic priorities taking precedence over unbiased reviews will turn out to be a real issue
with China is not yet clear.

I have learned some basics as to how the current system works, and some of the attempts
at coming to an international consensus on methods to analyze mergers. Given more time, I
would like to study how other major countries are implementing their laws, and how the
international community has responded to them. In particular, I am interested in the systems
employed in Australia and Japan.