

China's National Innovation System: The Role of Competition Policy

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Foreign Direct Investment and Innovation

A key tenet of China's policy has been to welcome foreign investment:

China's absorption of foreign investment is an important part of China's fundamental principle of opening up to the outside world, and an important component of Deng Xiaoping Theory. [It] is one of the great practices of building up socialist economy with Chinese characteristics.

- Ministry of Commerce
(June 14, 2004)

More recently, a key innovation objective
has been “Indigenous Innovation”

自主创新

Zi Zhu Chuang Xin

The Role of Foreign Direct Investment

[We shall] encourage foreign enterprises especially large-scale multinationals to transfer the processing and manufacturing processes with higher technology levels and higher added value and research and development organizations to China, ... to develop the technology spillover effect, and strengthen the independent innovation ability of Chinese enterprises.

- National Development and Reform Commission,
11th Five Year Plan for Use of Foreign Investment, (November 2006)

The Role of Antimonopoly Policy

The transition to more innovation-driven growth based on stronger intellectual property rights also requires a modern, properly enforced anti-trust law.

- OECD Review of Innovation Policy: China Synthesis Report
 - August 27, 2007

CHINA'S ANTIMONOPOLY LAW -- BASICS

- AML enacted August 30, 2007, effective August 1, 2008
- Governs “monopolistic conduct” --
 - Ø In China
 - Ø Outside of China if it eliminates or restricts competition in China
- “Monopolistic conduct” means
 - Ø Monopoly agreements between undertakings
 - Ø Abuse of a dominant market position by undertakings
 - Ø Concentrations (mergers and acquisitions) that eliminate or restrict competition

DOMINANT MARKET POSITION

- Definition of dominance: ability of a firm in a relevant market to --
 - Ø Control the price or quantity of products or other transaction terms, or
 - Ø Block or affect access of other firms
- Factors for determining dominance
 - Ø Market share and competitive standing
 - Ø Ability to control sales or raw materials purchasing
 - Ø Financial and technical status
 - Ø Reliance on the firm by other firms
 - Ø Difficulty of market entry
- Mathematical formula for inferring dominance
- Determinations are at the discretion of the law's administrators

ABUSE OF DOMINANT MARKET POSITION

- Selling products at “unfairly high” prices.
Could this apply to licensing fees for IPR that are deemed “too high?”
- Buying products at “unfairly low” prices
- Selling below cost “without any justification.”
Does this mean below average cost, marginal cost, or some other measure of “cost?”
- Refusing to trade with relative parties “without any justification.” Does this mean the refusal to transfer technology/IPR to Chinese enterprises?

ABUSE OF DOMINANT MARKET POSITION

- n Limiting relative trading parties to exclusive deals with the dominant firm or designated parties without any justification. **How does this apply to existing distribution arrangements?**
- n Tie-in sales “without any justification.” **How will this apply to complex IT systems or biotech patent families?**
- n Discriminatory prices or other transaction terms to relative trading partners. **Does this apply to differential pricing in different national and regional markets?**

Antimonopoly Policy and Indigenous Innovation

[We shall] prevent the abuse of intellectual property that unfairly restricts the market mechanism for fair competition ...

*- State Council of the People's Republic of China,
Outline of the National Medium-and Long-Term Program on
Scientific and Technological Development (2006-2020)*

Antimonopoly Policy and Indigenous Innovation

[I]t is much easier for [multinational companies] to obtain a dominant and even monopoly position in the Chinese market. Their current or potential anticompetitive practices will certainly disturb fair competition in the market and infringe upon the legal rights and interests of consumers as well as other businesses.

*- Office of Antimonopoly, Fair Trade Bureau,
State Administration of Industry and Commerce,
“Anticompetitive Practices of Multinational Companies in China and Countermeasures”
(May 2004)*

Antimonopoly Policy and Indigenous Innovation

The AML will help restrict multinationals, curb their competition restricting-behavior such as product price and quality-manipulation and abuse of market dominant position.

- Cong Bin and He Yicheng,
NPC Standing Committee members

Antimonopoly Policy and Innovation – IPR

In order to provide an incentive for innovators to bear the substantial risks and cost associated with R&D, it is necessary to give them the legally-enforceable right to exclude others from appropriating their inventions.

IP holders may refuse to license proprietary technologies to anyone, or to license to some enterprises but not others, without running afoul of antitrust law, while IP holders are free to charge royalties which are as high as the market will bear without fear of antitrust challenge.

These principles are fully consistent with the basic pro-competitive thrust of the antitrust laws, since they foster innovation, one of the most important elements underlying dynamic and competitive markets.

Antimonopoly Policy and Indigenous Innovation

AML as a vehicle of national competition policy should have a sole goal, which is to increase economic efficiency and consumer welfare through protecting effective competition.

AML shall not be assigned with too many tasks nor is it able to address all problems.

National economic security issues stemming from FDI inflow should be address by specific FDI administrative laws.

- Professor HUANG Yong,
University of International Business and Economics,
(a consultant to the AML drafting panel)
(July 5, 2007)

Antimonopoly Policy and Indigenous Innovation

Other countries through having their own protective industrial policies, do not codify them into antitrust law, otherwise the antitrust law will be regarded as targeting FDI only.

- Sheng Jiemin
Peking University Professor
(a consultant to the drafting panel of AML)

Administration of the AML and Innovation

Some conclusions:

- Industries dominated by SOE's are exempt from the law
- Foreign firms could become primary targets for AML prosecution
- Any major foreign firm could be found "dominant" with respect to any product in which it has a strong intellectual property position
- This would affect FDI – both quantity and quality, and could slow innovation in China

谢谢

Xie Xie

Thank You