

Book Review

A Contextual Analysis of Antitrust for Chinese Firms

Angela Huyue Zhang

Chinese Antitrust Exceptionalism: How the Rise of China Challenges Global Regulation

Oxford University Press 2021

Reviewed by Wentong Zheng

Unlike other treatises on the subject,¹ Professor Angela Zhang's newest book on Chinese antitrust law, *Chinese Antitrust Exceptionalism: How the Rise of China Challenges Global Regulation*, does not focus on the mechanics of Chinese antitrust law. Instead, it delves into the regulatory structures, both of China and of the West, in which antitrust law is deeply embedded. It explores the bureaucratic and political-economy contexts and idiosyncrasies surrounding antitrust for Chinese firms. Professor Zhang's work provides much-needed perspectives for understanding how antitrust is actually carried out for Chinese firms both inside and outside of China.

Because of the size of the Chinese market, Chinese antitrust has been one of the most significant additions to the global antitrust scene in recent decades. Scholars and practitioners have offered many treatments of China's 2007 Anti-Monopoly Law (AML), primarily based on how the law was written and enforced.² Few have dealt with the question of "why" in an in-depth manner. In her novel analysis, Professor Zhang addresses this question, and shows that China is exceptional, both in how it regulates its domestic markets and in how Chinese firms are being regulated in international markets.

Professor Zhang's book is divided into three parts. In the first part, Professor Zhang discusses the role bureaucratic politics plays in China's antitrust enforcement, and how Chinese antitrust agencies, particularly the all-powerful National Development and Reform Commission (NDRC), have leveraged their discretion and the media to overcome bureaucratic and capacity constraints in dealing with high-profile, challenging cases. According to Professor Zhang, Chinese antitrust regulators are rational actors who take advantage of their discretion under the AML to pursue power and prestige. Enforcement of the AML is heavily influenced by the missions, cultures, and structures of the AML regulatory agencies. Because of their vast administrative discretion, Chinese antitrust agencies can "hold hostage" firms operating in China to extract guilty pleas or

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Wentong Zheng is
University of Florida
Research Foundation
Professor, University
of Florida Levin College
of Law.

¹ See, e.g., JIANZHONG SHI & YANG YANG, *MERGER CONTROL IN CHINA* (2020); XIAOYE WANG, *THE EVOLUTION OF CHINA'S ANTI-MONOPOLY LAW* (2014); H. STEPHEN HARRIS ET AL., *ANTI-MONOPOLY LAW AND PRACTICE IN CHINA* (2011).

² See, e.g., Zhao Bingling & He Jing, *How China's Enforcement Agencies and Courts Are Shaping Antitrust Policies on Vertical Restraints*, 24 *Geo. Mason L. Rev.* 1171 (2017); D. Daniel Sokol, *Merger Control Under China's Anti-Monopoly Law*, 10 *N.Y.U. J.L. & Bus.* 1 (2013); Eleanor M. Fox, *An Anti-Monopoly Law for China—Scaling the Walls of Government Restraints*, 75 *ANTITRUST L.J.* 173 (2008); Xiaoye Wang, *Highlights of China's New Anti-Monopoly Law*, 75 *ANTITRUST L.J.* 133 (2008).

concessions through informal pressures, implicit threats of retaliations, and even public shaming on state-owned media. These tactics explain many idiosyncrasies of Chinese antitrust enforcement, including, most notably, the fact that firms tend to acquiesce to the demands of Chinese antitrust regulators without seeking judicial reviews of their decisions.

In the second part of the book, Professor Zhang explores the treatments Chinese firms receive from antitrust regulators in the Western markets. Professor Zhang focuses on two specific issues: the European Union's probes into mergers and acquisitions by Chinese state-owned enterprises (SOEs) and U.S. courts' tackling of state compulsion as a defense against claims of price fixing by Chinese vitamin C producers. Both issues are manifestations of the challenges posed by the close relationships between Chinese firms and the Chinese government. The EU merger probes focused on whether Chinese SOEs were so controlled or influenced by the Chinese government that they should be treated as a single entity for merger review purposes. In the U.S. vitamin C litigation, the inquiry was about a similar question: whether the Chinese government compelled Chinese vitamin C producers to increase their sales prices to avoid antidumping liability in overseas markets. In both cases, Chinese firms were subject to this special scrutiny because of China's unique politico-economic system, often referred to as "state capitalism."³

In the third and final part of the book, Professor Zhang recounts China's strategic use of antitrust in response to U.S. executive actions under the Trump administration against Chinese technology firms. According to Professor Zhang, China's antitrust authorities held up large mergers between foreign multinational corporations, amended the AML to allow higher monetary fines and criminal liabilities, and threatened to impose antitrust penalties on foreign companies that restricted supplies of key components to Chinese technology companies. Antitrust became a weapon in this U.S.-China "tech war," leading to what Professor Zhang refers to as "regulatory interdependence." However, Professor Zhang is optimistic that China is constrained by its need to attract foreign investment and will not use antitrust as a "weapon of mass retaliations."

Professor Zhang's contextual analysis of Chinese antitrust law provides valuable perspectives on how antitrust law is actually enforced in China. In a country that does not boast well-developed legal norms, the contextual factors affecting the enforcement of a law are as important as the black-letter law. Granted, some of the contextual factors analyzed by Professor Zhang have been overtaken by events. NDRC, the agency at the center of Professor Zhang's analysis, has been stripped of its antitrust enforcement authority. The change of administration in the United States has reduced the chances of directly confrontational trade and tech wars, relieving, to a degree, pressures on China to use antitrust as a retaliatory tool. Yet the deeper contextual factors revealed by Professor Zhang, such as the haphazard nature of bureaucratic politics and the lack of judicial constraints, will continue to affect Chinese antitrust enforcement for generations to come.

While contextual factors do matter for antitrust enforcement, the structural forces that determine the trajectory of an antitrust law should not be overlooked, either. One reason why contextual factors have been so important for Chinese antitrust enforcement is that the structural forces that would lead to a potent, competition-oriented antitrust law have not been particularly strong in

³ For more in-depth treatment of the relationship between Chinese firms and the Chinese government, see Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665 (2015).

China.⁴ In recent years, however, there are signs that this might be beginning to change. Since 2015, the Chinese government has been pushing for “supply-side” reforms aimed at correcting some of the deep-rooted distortions in the Chinese economy. Since December 2020, the Chinese government has elevated antitrust as a top priority to prevent the “disorderly expansion” of capital.⁵ Unlike in the past, the government has set its sights on China’s largest domestic companies, particularly those in the internet industry.⁶ It remains to be seen how these structural forces will interact with the contextual factors in shaping the future of antitrust in China. ●

⁴ I analyzed some of the structural forces that prevented China from developing a coherent antitrust jurisprudence in an earlier article. See Wentong Zheng, *Transplanting Antitrust in China: Economic Transition, Market Structures, and State Control*, 32 U. PA. J. INT’L L. 643 (2010).

⁵ See 中央经济工作会议：强化反垄断和防止资本无序扩张 [Central Government Economic Summit: Strengthening Antimonopoly and Preventing Disorderly Expansion of Capital], Xihua News Agency (Dec. 18, 2020), <https://finance.sina.com.cn/china/gncj/2020-12-18/doc-iiznezxs7652258.shtml>.

⁶ On April 10, 2021, China imposed a record fine, equivalent to U.S. \$2.8 billion, on Alibaba Group Holding, China’s largest e-commerce platform, for abusing its dominant market position over rivals and merchants. Keith Zhai, *Alibaba Hit with Record \$2.8 Billion Antitrust Fine in China*, WALL ST. J. (Apr. 10, 2021), <https://www.wsj.com/articles/alibaba-hit-with-record-2-8-billion-antitrust-fine-by-chinas-market-regulator-11618018830>.