

Tensions Between Antitrust and Industrial Policy

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Introduction

Sound antitrust law and policy is in tension with industrial policy. Antitrust promotes consumer welfare whereas industrial policy promotes government intervention for privileged groups or industries. Unfortunately, industrial policy seems to be alive and well both within antitrust law and policy and within a broader competition policy worldwide. This Article identifies how industrial policy impacts both antitrust and competition policy. It provides examples from the United States, Europe and China as to how industrial policy has been used in antitrust. However, this article also makes a broader claim that the overt or subtle use of industrial policy in antitrust and a broader competition policy is a global phenomenon. The US experience teaches that industrial policy can be pushed to the margins in antitrust (and the failure to push such policy to the margins produces economic inefficiencies) and that successful competition advocacy can reduce the competitive distortions of a broader competition policy. This article first identifies the relationship between antitrust and industrial policy. It provides examples of industrial policy in the antitrust experiences of the United States, Europe, and China. Second, the article explores how a lack of procedural fairness in antitrust may be abused by inefficient competitors as a way to push industrial policy goals. Third, the article demonstrates how industrial policy hurts a broader competition policy and suggests potential competition advocacy interventions on the part of antitrust authorities to limit the anti-competitive effects of such policy. The article concludes with the suggestion that industrial policy is in fundamental tension with promoting consumer welfare and fostering long term economic growth and should be abandoned both explicitly and implicitly from the antitrust enterprise. Further, antitrust agencies should implement more competition advocacy interventions to stop the spread of industrial policy globally.

I. The relationship of antitrust and industrial policy

Industrial policy threatens consumer welfare. Yet, determining the scope of industrial policy may sometimes prove to be a challenge because industrial policy has multiple meanings.¹ For purposes of this article, industrial policy means political interference either within antitrust or from outside of antitrust (such as through the political process or sector regulation) in which non-industrial organization economic analysis may shape antitrust enforcement. Optimal antitrust enforcement requires that political factors not play a part of antitrust and that a technocratic antitrust² that has economically justified outcomes, predictability, administrability, and that respects due process and transparency be the driving forces of enforcement. Additionally, antitrust should try to limit the political impulse based on interest group capture in

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¹ See THOMAS K. CHENG, IOANNIS LIANOS AND D. DANIEL SOKOL, *COMPETITION AND THE STATE* (2014)(providing a series of viewpoints on antitrust and industrial policy broadly defined).

² Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159 (2008).

other parts of government as part of a broader competition policy to improve country competitiveness.³

Across the world, industrial policy takes a more central position in antitrust enforcement than in the United States. Such situations allow for implicit cases of industrial policy, as agencies may be able to strategically pick and choose the economics that they adopt based on the outcome, in which an agency reverse engineers a decision. In other situations, industrial policy is more subtle and due to case law that supports agencies with aggressive enforcement because the case law was based in part on industrial policy goals.⁴ In some systems, competitor effects still have some significant salience in antitrust analysis. At some level, this focus on competitors rather than on competition is a form of industrial policy because it may favor outcomes inconsistent with consumer welfare.⁵

A. There is industrial policy both within antitrust and as outside pressure of a broader competition policy

Government may intervene in the economy both within an antitrust system and outside of it. An antitrust regime that makes economic analysis of competitive effects the sole method for analyzing consumer harm takes out political factors from analysis as discretion shifts from antitrust authorities to the market. That is, the market will determine winners and losers rather than antitrust policy. From a normative standpoint, this is for the best because the incorporation of fairness related concerns may lead to results that hurt consumers. This is in part because “fairness” is highly variable in its meaning. Areeda and Turner identified fairness as “a vagrant claim applied to any value than one happens to favor.”⁶

Fairness in antitrust can be misapplied by less efficient competitors to promote their own goals at the expense of consumers. As such, such special interests can capture the antitrust system and antitrust enforcers, whom such competitors can misuse for their personal aims to extort protection.⁷

³ Australia’s Hilmer Report provides such an example. See Deborah Healey, *The Australian Experience with Competition Law: The State as Market Actor*, in COMPETITION AND THE STATE (Thomas K. Cheng, Ioannis Lianos and D. Daniel Sokol eds. 2014). Another example is the competition advocacy work of the FTC. See Todd J. Zywicki & James C. Cooper, *The US Federal Trade Commission and Competition Advocacy: Lessons for Latin American Competition Policy* in COMPETITION LAW AND POLICY IN LATIN AMERICA (Eleanor M. Fox and D. Daniel Sokol eds., 2009).

⁴ Mats Bergman et al., *Merger Control in the European Union and the United States: Just the Facts*, 7 EURO. COMPETITION J. 89 (2011)(comparing US and European merger enforcement and finding more aggressive enforcement in Europe perhaps because economists traditionally played a less pivotal role until the 2000s in Europe).

⁵ See, e.g., South African Competition Act 89 of 1998, as amended by Competition Second Amendment Act 39 of 2000, Chapter 1, § 2; Canadian Competition Act § 1.1 (R.S.C., 1985, c. C-34); Walmart Stores Inc. / Massmart Holdings Ltd. (73/LM/Nov10) (providing an application in the merger setting).

⁶ 4 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 21 (1980). See generally Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 966 (2001).

⁷ William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247, 250 (1985).

Antitrust is not an effective mechanism for these sorts of fairness trade-offs. Other areas of regulation are better suited to addressing such trade-offs than antitrust. Embracing antitrust economics allows for greater predictability and for outcomes that are less likely to be hijacked by overtly political concerns not based on competition economics, which allows for better predictability in antitrust and a narrow focus on what antitrust does best – promoting consumer welfare.

Some of the introduction of industrial policy in antitrust is due to the particular language of the enacting legislation that provides for multiple and sometimes competing goals for antitrust.⁸ These goals may create a path dependency in the case law, which then favors antitrust intervention even when such behavior may be economically justified on efficiency grounds. Yet, even when explicitly there is no industrial policy in antitrust law, in practice, implicit use of industrial policy in antitrust law and policy occurs on a regular basis in many jurisdictions around the world due to this path dependency in the case law.

For many antitrust regimes, multiple goals were part of the original statutory scheme. Over time this has changed in the more developed jurisdictions as multiple goals have fallen to the side as an economics driven goal (most often consumer welfare) has become the sole criterion for antitrust analysis.⁹

A. US Experience of Industrial Policy in Antitrust

Much of US antitrust enforcement from the 1950s and 1960s is by today's standards an embarrassment. Big was bad,¹⁰ merger efficiencies were ignored,¹¹ vertical restraints were per se illegal,¹² there was tightening of rules of refusals to deal,¹³ intellectual property was subject to the nine no-nos,¹⁴ horizontal restraints were unnecessarily applied,¹⁵ and aggressive Robinson Patman enforcement,¹⁶ among many misdeeds in antitrust. In all of these cases, industrial policy that favored inefficient competitors was a fundamental part of both case law and government

⁸ See INT'L COMPETITION NETWORK, REPORT ON THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER, AND STATE-CREATED MONOPOLIES 38 (2007), available at

<http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf>.

⁹ Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497 (2013); Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471 (2012).

¹⁰ *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *United States v. Brown Shoe Co.*, 370 U.S. 294 (1962).

¹¹ *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) (“Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies, but it struck the balance in favor of protecting competition.”).

¹² *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365.

¹³ *Klor's v. Broadway-Hale Stores*, 359 U.S. 207 (1959).

¹⁴ Bruce B. Wilson, Patent and Know-How License Agreements: Field of Use, Territorial, Price and Quantity Restrictions, Address Before the Fourth New England Antitrust Conference (Nov. 6, 1970).

¹⁵ *United States v. Topco Associates*, 405 U.S. 596 (1972).

¹⁶ D. Daniel Sokol, *Analyzing Robinson Patman*, [] GEO. WASHINGTON L. REV. [] (2015 forthcoming), Roger D. Blair & Christina DePasquale, “*Antitrust's Least Glorious Hour*”: *The Robinson-Patman Act*, 57 J.L. & ECON. 201 (2014); Kenneth G. Elzinga & Thomas F. Hogarty, *Utah Pie and the consequences of Robinson-Patman*, 20 J.L. & ECON. 427 (1978).

enforcement priorities. Such economically misguided and aggressive enforcement hurt American competitiveness and contributed to America's economic malaise.¹⁷

This approach in the case law began to change in the late 1970s, although the change specifically in merger case law lagged a bit relative to the abolition of per se rules regarding conduct.¹⁸ Such overt political antitrust considerations (those not based on competition economics) are no longer part of the current antitrust policy discourse within the case law or agency practices. The United States experience has been a narrowing of antitrust liability due to a better understanding of economics.¹⁹ Presently, antitrust analysis is driven by economic analysis.²⁰ As Judge Ginsburg has noted in the case law development:

Even in such cases where there is no consensus among economists, there is, nevertheless, virtually universal agreement among antitrust economists and lawyers alike, that the Court should answer questions of antitrust law with reference to economic competition—matters of consumer welfare and economic efficiency—rather than make political judgments about such economically irrelevant matters as the “freedom of traders,” or “the desirability of retaining ‘local control’ over industry and the protection of small businesses.”²¹

This transformation in case law removed certain doctrines that were not based on a modern economic understanding. Changes in priorities became embedded not merely in the case law but also in the agencies with the rise in the importance of economics and economists in agency analysis. In terms of how the incentives impact the role of industrial policy in antitrust, discretion in the hands of lawyers will play out differently than that of economists because discretion goes to questions of how central economic analysis will be in case selection. Froeb and colleagues explain that “Economic methodology is particularly well suited for predicting the causal effects of business practices and for determining the effects of counter-factual scenarios that are used to determine liability and damages.”²² If this analysis is the basis of enforcement decision making, it focuses on effects. In this sense, overt political control can be removed from

¹⁷ Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 FORDHAM L. REV. 2175, 2185 (2013) (“The old rules each likely deterred more anticompetitive conduct than the corresponding modern rules do now. But in general, the rules were modified for a good reason: they chilled cost reductions and other efficiency-enhancing conduct.”).

¹⁸ Hillary Greene & D. Daniel Sokol, *Judicial Treatment of the Antitrust Treatise*, [] IOWA L. REV. [] (2015 forthcoming).

¹⁹ William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000).

²⁰ Liran Einav & Jonathan Levin, *Empirical Industrial Organization: A Progress Report*, 24 J. ECON. PERSP. 145, 152 (2010) (“Thirty years ago, it was common for antitrust arguments to rest on simple summary measures of industry structure such as concentration ratios and Herfindahl-Hirschman indices. Nowadays, the Department of Justice and the Federal Trade Commission, which are tasked with reviewing proposed mergers, commonly undertake sophisticated econometric studies to define industry boundaries and to assess the likelihood of price increases or collusive behavior following a merger. These exercises often draw on academic research, and in turn have motivated the development of new empirical models.”); Vivek Ghosal, *Regime Shift in Antitrust Laws, Economics, and Enforcement*, 7 J. COMPETITION L. & ECON. 733 (2011) (finding evidence of structural shifts to economic analysis across mergers and conduct cases); D. Daniel Sokol, *Understand Robinson Patman*, [] GEO. WASHINGTON L. REV. [] (forthcoming 2015) (finding a structural shift in Robinson Patman enforcement based on the use of economic analysis in the predatory pricing context); Barak Orbach & D. Daniel Sokol, *Antitrust Energy*, 85 S. CAL. L. REV. 429, 439 (2012) (“The evolution of antitrust has been shaped by changing lines of economic thinking and ideologies.”).

²¹ Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the Supreme Court: 1967 to 2007*, 3 COMPETITION POL'Y INT'L 1, 22 (2007).

²² Luke M. Froeb et al., *The Economics of Organizing Economists*, 76 ANTITRUST L.J. 569, 573 (2009).

case analysis because it is guided more by empirics. Lawyers, as part of an investigative team, may be less driven by the empirics of economics. More overt political goals might come into play in their analysis.

This is not to say that economists are not subject to political motivation. However, economists exercise it less than lawyers because populism was never part of industrial organization's mantra.²³ The greater institutionalization of economics as the central motivation for antitrust may have been a causal factor that changed the role of non-antitrust government intervention in antitrust. One can see this shift in particular in merger control and the shift in the US from hostility to eventual embrace of efficiencies in both the Merger Guidelines and case law analysis.²⁴

The U.S. experience is worth noting as an example for other jurisdictions, even those with significantly different institutional designs, largely because the important changes that the United States implemented. This includes the creation of a distinct group within the antitrust agencies of economists, including a chief economist and staff, who are not subordinate to the lawyers.²⁵ This institutional design allows for a distinct economic voice to influence case selection and analysis to help ensure that there is an economic basis for enforcement decisions.

Empirical work suggests that overt noncompetition economics-based politics has, for the most part, become a nonissue in U.S. merger enforcement in recent decades. As one economist notes, "Populism was forced to a fringe position."²⁶ Earlier studies of U.S. merger control that examined the 1980s suggested that there were noneconomic factors at play in merger control.²⁷ The same work also found that the recommendations of economists carried less weight than those of the lawyers. A greater role for economists merely shifts "political" antitrust from non-economic politics to "politics" within economics (how to decide the difficult cases "on the margins").²⁸

B. Industrial Policy in European Antitrust

In Europe, the path dependency based on multiple goals of antitrust remains a fundamental characteristic of European case law,²⁹ with more of an interventionist flavor than in

²³ Daniel Crane, *Technocracy and Antitrust*, 86 TEXAS L. REV. 1159–1211 (2008).

²⁴ See Greene & Sokol, *supra* note [].

²⁵ Luke M. Froeb et al., *The Economics of Organizing Economists*, 76 ANTITRUST L.J. 569 (2009).

²⁶ Malcolm B. Coate, Bush, Clinton, Bush: Twenty Years of Merger Enforcement at the Federal Trade Commission 24 (Sept. 2009) (working paper).

²⁷ Malcolm B. Coate, *A Test of Political Control of the Bureaucracy: The Case of Mergers*, 14 ECON. & POL. 1 (2002).

²⁸ See McChesney et al., *supra* note [].

²⁹ See e.g., BEN VAN ROMPUY, ECONOMIC EFFICIENCY: THE SOLE CONCERN OF MODERN ANTITRUST POLICY? THE ROLE OF NON-EFFICIENCY CONSIDERATIONS UNDER ARTICLE 101 TFEU (2012); Liza Lovdahl Gormsen, *The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC*, 3 EUR. COMPETITION J. 329 (2007); Alberto Pera, *Changing Views of Competition, Economic Analysis and EC Antitrust Law*, 4 EUR. COMPETITION J. 127 (2008); Heike Schweitzer, *Parallels and Differences in the Attitudes Towards Single-Firm Conduct: What Are the Reasons? The History*,

the United States.³⁰ This is due to the multiple goals of EC competition law in the books. These multiple goals include industrial policy concerns. Even if DG Competition states that its sole goal is consumer welfare,³¹ European case law remains far more favorable for a finding of a competition law infringement than in the United States where the shift to a singular goal of antitrust and the primacy of economic analysis has moved to more categorizations to a rule of reason analysis and non-intervention.³² The strong interventionist case law in Europe and the strong interventionist bent by European enforcers also operates in the shadow of the law as leverage to be used against firms that are under investigation to extract greater concessions in consent agreements.

An examination of European cases explains why European antitrust is more prone to industrial policy. The European Court of Justice (ECJ) first used the term “consumer welfare” in 2012 in its *Post Danmark A/S v. Konkurrencerådet* decision.³³ Far more common are European cases under TFEU 101 and 102 that have multiple goals as the basis for their analysis.³⁴ In the TFEU 101 context, the T-Mobile case explains, “[TFEU 101], like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.”³⁵ Similar language presents itself in the TFEU 102 context.³⁶ Until this case law is cleaned up akin to the shift in the United States from the mid-1970s to the present,³⁷ European enforcement will implicitly have an industrial policy flavor to it and attempts by government outside of antitrust to create political decisions may be the result of an area that is not viewed as

Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC, in EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82, at 119 (Claus Dieter Ehlermann & Mel Marquis eds., 2008).

³⁰ See generally FRANCESCO RUSSO ET AL., *EUROPEAN COMMISSION DECISIONS ON COMPETITION: ECONOMIC PERSPECTIVES ON LANDMARK ANTITRUST AND MERGER CASES 113-97* (2010) (analyzing and classifying all European Commission decisions from 1962 through 2009).

³¹ Blair & Sokol, *Welfare Standards*, *supra* note [] at 2513.

³² William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 *ANTITRUST L.J.* 377 (2003).

³³ Case C-209/10, 2012 ECJ EUR-Lex LEXIS 2559, ¶ 42 (Mar. 27, 2012) (“[I]t is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and *consumer welfare* in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.” (emphasis added)).

³⁴ Raimundas Moisejevas & Ana Novosad, *Some Thoughts Concerning the Main Goals of Competition Law*, 20 *JURISPRUDENCE* 627, 635 (2013) (“Analysis of the practice of the Court of Justice and the Commission does not allow identifying clearly the one main, dominating goal of the competition law. In most cases, courts mention goals such as protection of the effective competition, protection of the competitors and protection of the consumers.”).

³⁵ Case C-8/08, 2009 E.C.R. I-4529 ¶ 38. See also *GlaxoSmithKline Services v. Commission*, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 P, 2009 E.C.R. I-9291 at ¶¶ 62–64.

³⁶ *Konkurrensverket v. TeliaSonera Sverige AB* Case C-52/09, 2011 E.C.R. I-00527 ¶¶ 22–23; *Case C-280/08, Deutsche Telekom v. Comm’n*, 2010 E.C.R. I-09555, ¶ 176; *Sot. Lelos kai Sia EE v. GlaxoSmithKline AEEVE Farmakeftikon Proionton* Joined Cases C-468/06 to C-478/06, 2008 E.C.R. 7139; *Konkurrensverket v. TeliaSonera Sverige AB*, Case C-52/09, 2011 E.C.R. I-00527; Decision of the Court of Justice in C-95/04 *P British Airways v. plc Commission of the European Communities* [2007], ¶ 106.

³⁷ William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 *J. ECON. PERSP.* 43 (2000).

technocratic.³⁸ Further, this type of case law path dependency is a part of antitrust enforcement in Europe and threatens the economic growth of more dynamic economies in South and East Asia as these jurisdictions rely upon European case law in their respective competition systems for guidance.

Historical factors and path dependency explain the greater orientation toward industrial policy of EC merger control. The core of European competition law was to further market integration over other factors such as efficiency. This meant that efficiency played a lesser role in the original formulation of European competition law. One might suggest that a reading of *De Havilland / Aerospatiale*, a merger case in 1991 soon after the 1989 merger rules were put into place, about the failing firm defense expressed the tension between industrial policy and competition policy, at least regarding the appropriate use of efficiencies in the failing firm defense context.³⁹

Because lawyers played a significant role in merger enforcement, while economists played a minor role historically, the Commission's decisions to challenge mergers may have lacked a rigorous economic justification. This too has changed due to the institutionalization of greater economic analysis, including the creation of a chief economist and an economics staff not subordinate to lawyers, as well as a series of cases that reversed Commission challenges based upon insufficient economic analysis.⁴⁰

The earlier case law and institutional approaches have impacted on the current structure and nature of merger and conduct enforcement in Europe in terms of state intervention. Quantitative research supports that at present, Europe is a stricter enforcer of merger regulation than the United States.⁴¹ Path dependency and earlier non-efficiency legacy may play some role in this orientation toward greater enforcement. One could frame Europe's wariness regarding vertical restraints (including vertical mergers) as an expression of this same sort of legacy.⁴² Thus, more aggressive European challenges on mergers that are vertical may be as much political (based on a concern for the competitive process)⁴³ as economic and a key difference with the United States on competition law and economics.

A second factor that seems to have impacted the development of noneconomic factors in European merger control was what some claimed was an anti-American bias.⁴⁴ Empirical work that analyzes this earlier period found that there was protectionism involved in European merger control. DG Competition had a higher probability of intervention against non-European firms

³⁸ Tom Fairless, European Parliament Approves Google Breakup Resolution Nonbinding Decision Pressures EU Commission as it Probes Google's Search Practices, *Wall Street J.* Nov. 27, 2014.

³⁹ *Aerospatiale-Alenia/de Havilland* (91/619/EEC), 1991 O.J. (L 334) 42.

⁴⁰ Francesco Russo et al., *European Commission Decisions on Competition: Economic Perspectives on Landmark Antitrust and Merger Cases* (2010).

⁴¹ Bergman et al., *supra* note [].

⁴² James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 *INT'L J. INDUS. ORG.* 639 (2005).

⁴³ Eleanor M. Fox, *Mergers in Global Markets: GE/Honeywell and the Future of Merger Control*, 23 *U. PA. J. INT'L ECON. L.* 457 (2002).

⁴⁴ George L. Priest and Franco Romani, *The GE/Honeywell Precedent*, *Wall St. J.*, June 20, 2001.

when there were European competitors in the same market.⁴⁵ Aktas et al. examined if foreign acquiring firms were subject to increased antitrust interventions than domestic acquiring firms when local competitor firms were harmed. In their 2007 paper, they had observations of distinct cases from the period 1990-2000. They found that joint effect of a given bidder's nationality (foreign versus domestic European) and whether there were European competitors, showed abnormal stock returns. They concluded, "Faced with the empirical facts, a cynical observer may doubt the good intentions of European regulators."⁴⁶ Similarly, work by Dinc & Erel that analyzed the largest 25 merger targets as measured by the market capitalization of the respective target firms from the first 15 EU member states in the period 1997 to 2006, found "instead of staying neutral, governments of countries where the target firms are located tend to oppose foreign merger attempts while supporting domestic ones that create so-called national champions, or companies that are deemed to be too big to be acquired."⁴⁷ This legacy of European industrial policy has troubling implications for robust antitrust enforcement.

C. Industrial Policy in Chinese Antitrust

A number of authors claim that industrial policy plays a role in Chinese antitrust.⁴⁸ My previous empirical work on Chinese antitrust in the merger context demonstrates how political Chinese merger control can be.⁴⁹ The most important finding has to do with the direct intervention of other parts of government within MOFCOM's merger review process. Other government ministries need to sign off on merger approval. Many months can go by in terms of negotiations with MOFCOM and these other parts of governments (sometimes with the knowledge of the merging parties but not always). These other parts of government can have significant influence in putting certain conditions on the merger approval and may ask questions and force concessions of the merging parties that have nothing to do with competitive effects.

One important finding is the importance of third-party competitor complaints. If there is a Chinese company (particularly an SOE) that competes within the same relevant market or may at some point merely think of entering the market, the merger notification receives significantly more scrutiny. This is the case even if the competitive effects are negligible such that in other merger systems the deal would fall within a presumptive safe harbor because the market shares of the merging parties might be under 25 percent. As a result of these pressures, MOFCOM's decisions at times have been attempts to frame political concerns within the language of economic analysis, even when the economic analysis undertaken is more rudimentary than what one might find in Western Europe or North America.

⁴⁵ Nihat Aktas et al., *European M&A Regulation Is Protectionist*, 117 *ECON. J.* 1096 (2007); Nihat Aktas et al., Market response to European regulation of business combinations, 39 *J. FIN. QUANTITATIVE ANALYSIS* 731 (2004); Tomaso Duso et al., *The Political Economy of European Merger Control: Evidence Using Stock Market Data*, 50 *J.L. & ECON.* 455 (2007); Serdar Dinc & Isil Erel, *Economic nationalism in mergers and acquisitions*, 68 *J. FIN.* 2471 (2013). On the use of financial stock market return event studies for competition policy, see Tomaso Duso et al., *Is the Event Study Methodology Useful for Merger Analysis? A Comparison of Stock Market and Accounting Data*, 30 *INT'L REV. L. & ECON.* 186 (2010).

⁴⁶ Nihat Aktas et al., *European M&A Regulation*, *supra* note 45 at 1118.

⁴⁷ Dinc & Erel, *supra* note 45 at

⁴⁸ Angela Huyue Zhang, *Bureaucratic Politics and China's Anti-Monopoly Law*, 48 *CORNELL INT'L L.J.* [] (2014 forthcoming); Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 *GEORGETOWN L.J.* 665 (2015)

⁴⁹ D. Daniel Sokol, *Merger Control Under China's Anti-Monopoly Law*, 10 *N.Y.U. J. L. & BUS.* 1 (2013).

Industrial policy in China is the concern of a more recent practitioner analysis published by the US Chamber of Commerce. This report suggests that there is industrial policy at play in both merger and conduct cases in Chinese antitrust with regard to merger remedies, intellectual property-antitrust issues and other issues.⁵⁰ This report is not the only one that shows concern regarding industrial policy in Chinese antitrust. Similar reports by the US-China Business Council (USCBC)⁵¹ and the European Union Chamber of Commerce in China⁵² echo such concerns.

II. Lack of Procedural Fairness as a Way to Push Industrial Policy in Antitrust

The global pressure points in industrial policy include competitors misusing antitrust and taking advantage of lack of due process across antitrust authorities. Competitor complaints are sometimes the way in which agencies find out about potential anti-competitive behavior. However, competitors also have the incentive to use complaints to get an investigation started even when the conduct in question is not anti-competitive. By getting government to expend its own resources of a case, this allows antitrust to be misused. What aids in this misuse are procedural issues that do not allow firms targeted for investigation to know what the nature of the complaint is. This Part explain the importance of transparency and due process in antitrust. Without a robust procedural fairness regime, antitrust can develop an implicit industrial policy that favors inefficient competitors rather than an antitrust policy that promotes consumer welfare. Systems with limited procedural fairness are ripe for abuse of third parties who might use antitrust strategically. A number of companies may front local firms to raise concerns to antitrust authorities as a way to punish more efficient rivals around the world as a way to raise the costs of their efficient competitors.⁵³

Procedural fairness is an important issue for the rule of law and for effective antitrust. In her keynote at the American Bar Association Antitrust in Asia conference in June 2014, Federal Trade Commission Chairwoman Edith Ramirez explained, “Good process leads to effective decisions and bolsters the legitimacy of competition enforcement. In contrast, deficient process contributes to suboptimal decisions and breeds disrespect for competition law and for competition agencies.”⁵⁴ She then articulated four aspects of procedural fairness that are central to the practice of transparency and due process in the United States:

⁵⁰ US Chamber of Commerce, *Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy* (2014), available at <https://www.uschamber.com/report/competing-interests-chinas-competition-law-enforcement-chinas-anti-monopoly-law-application>.

⁵¹ U.S.-China Business Council, *Competition Policy and Enforcement in China* (2014), available at <https://www.uschina.org/reports/competition-policy-and-enforcement-china>.

⁵² European Chamber releases statement on China AML-related investigations, 2014-08-13, available at <http://www.europeanchamber.com.cn/en/press-releases/2132>.

⁵³ D. Daniel Sokol, *Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689 (2012).

⁵⁴ Edith Ramirez, *Core Competition Agency Principles: Lessons Learned at the FTC*, Keynote Address by FTC Chairwoman Edith Ramirez, Antitrust in Asia Conference, ABA Section of Antitrust Law and Expert Advisory Committee of the Anti-Monopoly Commission of the State Council, Beijing, China, May 22, 2014 available at http://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf.

[Procedural fairness permits] legal representation for the parties under investigation, including allowing the participation of local and international counsel; notifying the parties of the legal and factual bases of an investigation and sharing the evidence on which the agency relies; facilitating direct and meaningful engagement between the parties and the investigative staff and decision-makers; and ensuring internal checks and balances on decision-making within the agency.⁵⁵

Concerns regarding the need for procedural fairness in antitrust (whether mergers, cartels or other conduct) are not unique to the US experience. Rather, the issues associated with procedural fairness have been echoed in various international antitrust organizations. In 2012, the OECD Competition Committee released a report on Procedural Fairness and Transparency, based on a 2010 roundtable.⁵⁶ Similarly, the International Competition Network (“ICN”) released a report in 2013 on Competition Agency Transparency Practices.⁵⁷ The business community has also pushed for increased procedural fairness. The ICC issued a recommended framework for international best practices in competition law enforcement proceedings highlighting seven different themes for best practices.⁵⁸ More recently, the ICN established an Investigative Process Project, which is co-headed by the US FTC and the European Commission’s DG Competition. Further, a number of free trade agreements include procedural fairness as among the provisions in their competition policy chapters.⁵⁹

A recent survey conducted by the US Chamber of Commerce found that globally there were some problems as to transparency and due process. Roughly two thirds of the respondents identified that competition authorities were either inconsistent in their due process or lacked sufficient procedural safeguards.⁶⁰ Similarly, practitioners expressed concerns as to why certain information remains confidential, consistency and timeliness of transparency,

⁵⁵ Id. Procedural fairness has been a significant issue for both US agencies. See Christine Varney, Procedural Fairness, 13th Annual Competition Conference of the International Bar Association, Fiesole, Italy, September 12, 2009 (“Regardless of the substantive outcome of a government investigation, it is important that parties involved know that the process used to reach that outcome was fair. The two concerns—substance and process—go hand in hand. Complaints about process lead to concern that substantive results are flawed, whereas a fair, predictable, and transparent process bolsters the legitimacy of the substantive outcome.”). DOJ Antitrust also has made procedural fairness an important issue. See Christine A. Varney, *Procedural Fairness* (Sept. 12, 2009), available at <http://www.justice.gov/atr/public/speeches/249974.htm> (noting that “a fair, predictable, and transparent process bolsters the legitimacy of the substantive outcome.”).

⁵⁶ OECD, *Procedural Fairness and Transparency* (2012), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc892.pdf>.

⁵⁷ ICN, *Competition Agency Transparency Practices* (2013), available at <http://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1560&context=facultypub>.

⁵⁸ ICC Commission on Competition, *Recommended framework for international best practices in competition law enforcement proceedings* (2010), available at <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2010/Recommended-framework-for-international-best-practices-in-competition-law-enforcement-proceedings/> (highlighting Transparency, Engagement, Confidentiality, Due process/fairness, Non-discrimination, Accountability and the Role of the courts).

⁵⁹ See e.g., US-Chile Free Trade Agreement (2004), article 16.1.2. For a coding of these agreements in terms of their content, see D. Daniel Sokol, *Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements*, 83 CHI.-KENT. L. REV. 231 (2008).

⁶⁰ US Chamber of Commerce, *The Treatment of Confidential Information in Competition/Antitrust Administrative Proceedings: A Practitioner’s Survey*, April 2014, available at https://www.uschamber.com/sites/default/files/A%20Practitioner%E2%80%99s%20Survey%20on%20the%20Use%20of%20Confidential%20Information%20in%20Competition%20Proceedings%20-%20April%202014_1.pdf.

Procedural concerns have emerged at times in the United States⁶¹ and Europe.⁶² However, issues of procedural fairness and transparency have emerged most noticeably in reports regarding Chinese antitrust by the US Chamber of Commerce,⁶³ and US-China Business Council (USCBC)⁶⁴ and a statement by the European Union Chamber of Commerce in China.⁶⁵ These documents raised concerns on process regarding Chinese antitrust. The types of due process concerns raised in these reports relate to the lack of effective representation, the use of industrial policy by third parties, and procedural tools that do not allow for the most effective advocacy to lead to efficient outcomes.

Though China remains a focus point for the need to improve due process (and its potential abuse for industrial policy purposes),⁶⁶ what has been less public but just as concerning is that many of these concerns regarding due process are not distinct to China. As other authorities increase their enforcement activity taking ever complex and high-profile cases, the often inadequate procedural safeguards and lack of due process come into sharper focus. For example, we have seen high profile cases with procedural fairness issues raised in other jurisdictions, such as Europe⁶⁷ and Korea,⁶⁸ Japan,⁶⁹ and elsewhere.

⁶¹ See e.g., J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Reflections on Procedure at the Federal Trade Commission (Sept. 25, 2008), available at <http://www.ftc.gov/speeches/rosch/080925roschreflections.pdf>; D. Daniel Sokol, Antitrust, Institutions, and Merger Control, 17 Geo. Mason L. Rev. 1055, 1079 (2010).

⁶² See e.g., Jaime Flattery, *Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing*, 7 COMPETITION L. REV. 53 (2010); David Anderson & Rachel Cuff, *Cartels in the European Union: Procedural Fairness for Defendants and Claimants*, 34 FORDHAM INT'L L.J. 385 (2011); Kyriakos Fountoukakos and Camille Puech-Baron, *What Happens in Luxembourg Stays in Luxembourg: Confidentiality Issues in Competition Law Proceedings Before the EU Courts*, 5 J. EURO. COMPETITION L. & PRACTICE 331 (2014).

⁶³ US Chamber of Commerce, *Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy*, available at https://www.uschamber.com/sites/default/files/aml_final_090814_final_locked.pdf.

⁶⁴ U.S.-China Business Council, *Competition Policy and Enforcement in China* (2014), available at <https://www.uschina.org/reports/competition-policy-and-enforcement-china>.

⁶⁵ European Chamber releases statement on China AML-related investigations, 2014-08-13, available at <http://www.eurochamber.com.cn/en/press-releases/2132>.

⁶⁶ D. Daniel Sokol, *Merger Control Under China's Anti-Monopoly Law*, 10 N.Y.U. J. L. & BUS. 1 (2013).

⁶⁷ ICC, *DUE PROCESS IN EU ANTITRUST PROCEEDINGS*, Comments on and Analysis of the European Commission's and EU Courts' Antitrust Proceedings, 15 April 2014, available at <http://www.iccindiaonline.org/policy-statement/may2014/DueProcessPaper.pdf>; Giacomo Di Federico, *The role of the hearing officer in antitrust cases. A critical assessment of the new mandate and practice after 2011*, working paper (2014), available at http://www.ascola-conference-2014.wz.uw.edu.pl/conference_papers/Giacomo_Di_Federico.pdf; Sebastian Peyer *Mission impossible: access to agency information in antitrust litigation*, working paper (2014), available at http://www.ascola-conference-2014.wz.uw.edu.pl/conference_papers/Mission_impossible.pdf; Maciej Bernatt *The Compatibility of Deferential Standard of Judicial Review in the EU Competition Proceedings with Article 6 of the European Convention on Human Rights*, working paper (2014), available at http://www.ascola-conference-2014.wz.uw.edu.pl/conference_papers/Maciej_Bernatt_EU_Courts.pdf.

⁶⁸ ICC, *Recommended framework for international best practices in competition law enforcement proceedings* (2010) at fn1. See also attempts by the KFTC to improve due process concerns. Jae-Chan Jeong, *Korea: Korea Fair Trade Commission, The Asia-Pacific Antitrust Review 2015*, available at <http://globalcompetitionreview.com/reviews/69/sections/235/chapters/2755/korea-korea-fair-trade-commission/>.

⁶⁹ Shuya Hayashi, *A Study on the Amendment to the Antimonopoly Act in 2013 – Procedural Fairness under the Japanese Antimonopoly Act*, working paper (2014), available at http://www.ascola-conference-2014.wz.uw.edu.pl/conference_papers/Huyashi.pdf.

The lack of effective procedural fairness impairs effective competition law and policy. The lack of procedural fairness also makes it more difficult for businesses to plan effectively because of the risk involved in antitrust enforcement that is based not on the particular conduct in question but on the uncertainty due to uneven enforcement. Yet, in addition to lack of procedural fairness hurting economic performance and efficiency, it also hurts antitrust authorities.

Procedural fairness should not be conceptualized as merely preventing downside risk for an antitrust authority. Rather, there are tangible benefits to antitrust authorities fully embracing it. The benefits of increased procedural fairness include better information gained from evidence gathered through improved procedural fairness. Such information can assist an antitrust authority to better shape its competition policy and enforcement prioritization. This better information gathering in turn allows cases to move more smoothly through the pipeline with more predictability on timing and key stages for both merger and conduct cases. It also allows for firms under investigation to have a sense of how to respond effectively to agency requests for information and help agencies in their decision-making.

III. Bad industrial policy leads to bad competition policy

A concern of the mixing of economic and non-economic goals of regulation is that the mixture allows for more ready regulatory capture by the sector regulator. The extensive literature on public choice provides both theoretical and empirical support to the regulatory capture thesis of sector regulators.⁷⁰

Regulatory capture by sector may be more severe than those of antitrust enforcers for two reasons. The first is that sector regulators have more concentrated interest groups, which makes capture more likely. The multiple missions (including noneconomic ones) of sector regulators also creates additional political pressure points for the executive or legislative branches of government to use to leverage noncompetition concerns. This may impact the outcome of particular cases. Competition advocacy can be used as a way to reduce the competitive harms of such regulation.⁷¹

The second factor that compounds the capture is the pursuit of “public interest” or merely the veneer of public interest. Whereas some notion of efficiency may be (at least in practice) the only factor that determines outcomes in many antitrust systems, sector agencies may need to balance efficiency concerns with the preservation of competitors who may provide consumer choice and diversity.⁷² Sometimes these concerns may be valid, but sometimes they may result from rent seeking. The point is not to distinguish between the two but merely to note that sector regulation has divergent interests from antitrust that are not based on some sort of efficiency analysis. There are a number of areas where sector regulation in Europe seems to be leading to

⁷⁰ See generally DENNIS MUELLER, PUBLIC CHOICE III (2003).

⁷¹ Eleanor M. Fox & Deborah Healey, *When the State Harms Competition — The Role for Competition Law*, 79 ANTITRUST L.J. 769 (2014).

⁷² Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 394 (2006).

outcomes that do not necessarily promote consumer welfare. These include data privacy⁷³ and remedies in mergers not due to anti-competitive concerns.⁷⁴ Both are areas in which there is pressure from other parts of government to have a competition law “solution” for what is not a competition problem.⁷⁵

This behavior abroad contrasts with the US experience. Antitrust policy has become so technocratic that in recent administrations, Presidential statements on antitrust have been sparse.⁷⁶ Consequently, it is quite telling that President Obama recently called out the European Union for industrial policy in the competition policy and consumer protection arenas.⁷⁷ In an interview, President Obama explained, “[S]ometimes their vendors — their service providers — who can’t compete with ours, are essentially trying to set up some roadblocks for our companies to operate effectively there. . . . We have owned the Internet. Our companies have created it, expanded it, perfected it, in ways they can’t compete. And oftentimes what is portrayed as high-minded positions on issues sometimes is designed to carve out their commercial interests.”⁷⁸ European competition law and policy will continue to suffer from industrial policy so long as Europe does not clean up its case law and take a more active stance in its competition advocacy. The same can be said for other jurisdictions.

III Conclusion

This Article proposes a broader competition policy system that is neutral. This means the adoption of a standard of antitrust based exclusively on consumer welfare rooted in economic efficiency.⁷⁹ Antitrust law and policy should become completely technocratic in a way that antitrust concerns are the only ones that are taken into account. Any concerns regarding industrial policy, national security, and so on should become a separate screen taken outside of the antitrust law context. This will allow antitrust law to remain more technocratic and non-political and to move non-competition economic considerations to those areas more prone to public choice concerns, such as sector regulation, the legislative process, or executive fiat, that are better equipped than antitrust to deal with political trade-offs.

⁷³ Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88 (“For a preview of just how chilling that effect might be, consider the fact that the right to be forgotten can be asserted not only against the publisher of content (such as Facebook or a newspaper) but against search engines like Google and Yahoo that link to the content.”).

⁷⁴ Nicolas Petit, *State-created Barriers to Exit? The Example of the Acquisition of Alstom by General Electric*, working paper 2015, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2521378.

⁷⁵ For a recent formulation of antitrust, consumer protection and data protection, see Maureen K. Ohlhausen and Alexander Okuliar, *Competition, Consumer Protection, and the Right (Approach) to Privacy*, [] ANTITRUST L.J. [] (forthcoming 2015).

⁷⁶ Crane, *Technocracy*, *supra* note [].

⁷⁷ Liz Gannes, *Obama Says Europe’s Aggressiveness Toward Google Comes From Protecting Lesser Competitors* (“Obama said the European companies were sore losers and were using their governments to gain footing against American rivals.”), Feb. 14, 2015 available at <http://recode.net/2015/02/13/obama-says-europes-aggressiveness-towards-google-comes-from-protecting-lesser-competitors/>.

⁷⁸ *Id.*

⁷⁹ Although elsewhere I have argued for a total welfare standard, here my broader point is that the sole standard for antitrust should be the political choice between an antitrust-specific welfare standard, not between antitrust economics and other non-antitrust economics considerations. The easier standard to adopt globally based on administrability concerns is consumer welfare.

With regard to these types of trade-offs that effect a broader competition policy, antitrust can aid in a robust manner by reducing the economic distortions that interest group trade-offs create. Areas such as consumer protection and data privacy,⁸⁰ disruptive technologies such transportation (e.g., Uber),⁸¹ and professional regulation⁸² are areas in particular need of support of greater competition advocacy.

The legacy of industrial policy within antitrust case law can be solved in part with more (and better) economic analysis, through an iterative process that improves over time. As the sophistication of an antitrust agency's economic analysis improves, this will lead to more efficient outcomes. Privileging the overt sort of state intervention within antitrust through the explicit inclusion of non-economic concerns would set back antitrust law and policy in many jurisdictions and decrease consumer welfare. Cleaning up case law to reflect economic principles and putting economists on an equal footing with lawyers within agencies serves as another way to provide a check on the implicit potential creep of industrial policy into antitrust.

As great as the problem is in the regular set of antitrust cases, the impact of industrial policy in case law and agency action is even more pronounced in the dynamic economic setting, particularly in fast moving markets where intervention may be more consumer welfare reducing. In the high-tech setting, agencies must be particularly careful to analyze the market and the facts to ensure that merger control does not reduce the incentives of firms to innovate or chill investment decisions that would lead to enhanced innovation.⁸³ These markets are ones in which there is rapid technological change and innovation. The innovation can be in new products, services, and/or platforms. As high tech markets change rapidly, market power may be transient.⁸⁴

The idea of the ephemeral nature of market power has its origins in Schumpeter's views on creative destruction.⁸⁵ Due to the nature of technological change, firms compete for a market through innovation and other strategies that are highly disruptive to existing markets. This is competition for the market rather than competition in the market. In these circumstances, prediction is more complex and difficult. Should there be no clear theory of harm and no facts to

⁸⁰ James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 B.U. L. REV. 1555 (2010).

⁸¹ Daniel A. Crane, *Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism*, [] IOWA L. REV. [] (2015 forthcoming).

⁸² Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093 (2014).

⁸³ Thomas Cotter summarizes the potential trade off as "The obvious problem, once we accept the principle that any conduct that threatens some harm to innovation or creativity (no matter how speculative) properly could give rise to antitrust liability, is knowing where to stop." Thomas F. Cotter, *Innovation and Antitrust Policy*, in THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS VOLUME 2 at 147 (Roger D. Blair & D. Daniel Sokol eds. 2014).

⁸⁴ Renata B. Hesse, Deputy Assistant Att'y Gen. for Criminal & Civil Operations, U.S. Dep't of Justice, Remarks as Prepared for the Conference on Competition & IP Policy in High-Tech. Indus.: At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement, (Jan. 22, 2014), <http://www.justice.gov/atr/public/speeches/303152.pdf>.

⁸⁵ JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 83 (3d ed. 1950). See also Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575, 587 (2007); ("As a general rule, competition does not just lead firms to produce more and charge less; it encourages them to innovate as well.")

support such a determination, aggressive intervention risks chilling pro-competitive innovation. In some cases the best remedy may be no remedy. This has been the case across the United States,⁸⁶ Europe,⁸⁷ and other leading jurisdictions⁸⁸ in a number of cases or merger transactions.

Given the focus of many antitrust agencies and international organizations on antitrust issues in China, it is important to note that industrial policy is not just a China problem. Focusing merely on China at the exclusion of other countries in Asia, Europe and the Americas allows competition authorities in other regions to “slide under the radar” and to perpetuate industrial policy, which harms consumer welfare.

⁸⁶ Statement of the Federal Trade Commission Regarding Google’s Search Practices, In the Matter of Google Inc. FTC File Number 111-0163 January 3, 2013, *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googlesearch-practices/130103brillgooglesearchstmt.pdf. (“Product design is an important dimension of competition and condemning legitimate product improvements risks harming consumers. Reasonable minds may differ as to the best way to design a search results page and the best way to allocate space among organic links, paid advertisements, and other features. And reasonable search algorithms may differ as to how best to rank any given website. Challenging Google’s product design decisions in this case would require the Commission—or a court—to second-guess a firm’s product design decisions where plausible procompetitive justifications have been offered, and where those justifications are supported by ample evidence.”).

⁸⁷ Judgment in Case T-79/12, Cisco Systems Inc. and Messagenet SpA v Commission, 11 December 2013 at ¶76, *available at* <http://curia.europa.eu/juris/liste.jsf?num=T-79/12>.

⁸⁸ David S. Evans & Vanessa Yanhua Zhang, *The Qihoo v. Tencent Landmark Decision, Qihoo 360 v Tencent: First Antitrust Decision by The Supreme Court*, CPI Asia Column (Oct 21, 2014).