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# Competition Policy for East Asia

John Owen Haley
*Vanderbilt University*

# COMPETITION POLICY FOR EAST ASIA

**JOHN O. HALEY***

Considerable effort has gone into the drafting and enactment of competition laws throughout East Asia during the past decade. Skeptics might say that much of this effort has been wasted. The problem, they might argue, is misplaced reliance on inappropriate models. Simply stated, the legislative paradigms used for national competition legislation throughout the region do not adequately address the basic underpinnings of monopoly power and barriers to free and competitive markets in East Asia or in most other developing states. Nor, some might add, can these models be reasonably transplanted into legal systems that lack the institutional and cultural infrastructures necessary for their effective implementation. The models themselves originated in the United States and Europe over a half-century ago. Indeed the history of antitrust in the United States, and the development of competition law in Japan and Europe, raise questions whether these models have any applicability to China and other parts of East Asia. Enacted under conditions and circumstances that simply do not apply to China, or much of East Asia today, these models were designed to deal with problems in advanced capitalist states in which the influence of private actors in national and international markets often seemed to outmatch the role of the state. The primary aim of these models was to regulate private actors in order to restore and maintain competition. None were concerned with state power or the need of the state to create conditions for effective market competition.

Many may agree with this or similar assessments of the applicability of American and European competition law models to China and East Asia, but still disagree that the effort has been fruitless. The proliferation of competition law in East Asia beginning in Japan over a half-century ago has had at least one overriding benefit. These legislative efforts have stimulated interest in and active concern for effective competition policy throughout the region. Such interest has in turn provided in each country that has enacted legislation the catalyst for study and research, and ideas and expertise on competition policy, regardless of how meaningful or effective such legislation ostensibly may appear. As awareness of the social and economic gains of effective competition policy grows, expertise

* Wiley B. Rutledge Professor of Law and Director, The Whitney R. Harris Institute for Global Legal Studies, Washington University School of Law in St. Louis.

will continue to expand and more meaningful approaches are apt to be considered and even more effective competition legislation enacted.

## THE PROBLEM

Statutory models based on United States and European law necessarily emphasize proscription of private anticompetitive conduct. Both late nineteenth century American and mid-twentieth century European legislation were designed to deal with concentrations of economic power and its abuse by private actors. As a result, both the prevailing American and European models fail to address barriers to competition created or maintained by the state. Proponents of an effective competition policy for China and other developing states in the region should first recognize that the state itself is the problem. Throughout the region, monopoly power and other significant impediments to competitive markets have long been sourced in state action, not private conduct. The development of meaningful competition law in East Asia thus should begin with a commitment by the state to create conditions of competition by eliminating or at least reducing state-imposed barriers to new entry, state practices that attempt to substitute official preferences for competitive market-determined outcomes, as well as state-directed and enforced private sector restrictions on competition.

## ECONOMIC EFFICIENCY AND POPULIST CONCERNS

Competition policy developed in the United States, Europe, and Japan to address two separate but related problems. The first was economic. Monopoly power—defined as the ability of a single actor, or multiple actors, taking action in concert to determine price in a relevant economic market—results in inefficient allocations of resources with corresponding reductions in goods and services that would otherwise have been produced. In each country, competition policy also reflected political aims. The Sherman, Clayton, and Federal Trade Commission Acts in the United States were also intended to redress imbalances in political influence that were perceived to result from concentrations of economic power in a few individuals. These perceptions became even more pronounced on the eve of war in Europe and the Pacific as the American public accepted a view of fascism as an alliance of ultranationalist political leaders, the military, and leading industrialists. Competition policy was thus viewed as an essential reform to create conditions for democratic governance in both Japan and Germany. “Excessive concentrations of economic power,” to

quote the language of the occupation statutes,[1] were viewed as significant barriers to the growth and vitality of democratic institutions.

Compounding the economic and populist political concerns over the private exercise of monopoly power and concentrated wealth were the progressive attitudes of intellectual and political elites welcoming the expansion of state participation in the economy. In the United States, the massive public power projects of the Bonneville Power Administration and the Tennessee Valley Authority reflected the prevailing view within the progressive community that, in terms of the public welfare, government monopoly was as intrinsically benign as private monopoly was malignant.[2] Thus, at least from an American point of view, effective competition policy need only address the evils of private concentrations of economic power and private restraints of competition. Although the problems of governmentally imposed barriers to entry were occasionally noted, for the most part anticompetitive government action and policies were ignored in the legislative schemes that developed in the United States, Japan, and Europe.

## PRIVATE VERSUS PUBLIC BARRIERS TO ENTRY

Competition policy in the industrial world has thus had certain shared features. These include the predominant emphasis on *private* restraints of competition. For example, both the German Law against Restraints of Competition (GWB)[3] and the Japanese Anti-Monopoly Act[4] expressly exclude public monopoly and only prohibit private anticompetitive acts. In notable contrast, however, European Union regulations do subject public enterprises to EU competition rules.[5]

Nor did the Japanese Anti-Monopoly Act—the first competition law in East Asia—deal with the actual barriers to entry and impediments to competition that existed in Japanese state controls in the 1930s and 1940s.

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1. In Germany the relevant regulations were Law No. 56, 1947 (U.S. zone) Ordinance No. 78, Feb. 12, 1947 (British zone) and Ordinance No. 95, 1947 (French zone). Nearly identical regulations were enacted by the Japanese Diet ten months later as a statute entitled Kado keizairyoku shūshū haijo hō [Elimination of excessive concentrations of economic power law], Law No. 207.

2. *See, e.g.*, THURMAN W. ARNOLD, BOTTLENECKS OF BUSINESS 107-15 (1940); MERLE FAINSOD & LINCOLN GORDON, GOVERNMENT AND THE AMERICAN ECONOMY 346-61 (1941).

3. Gesetz gegen Wettbewerbsbeschränkungen [Law Against Restraints of Competition], v.27.7.1957 (BGB1.I.S1081).

4. *Shiteki dokusen no kinshi oyoki kōsei torihiki no kakuho ni kansuru hōritsu* [Law Concerning the Prohibition of Private Monopoly and Preservation of Fair Trade] Law No. 54, 1947.

5. *See* Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities & Certain Related Acts, Oct. 2, 1997, O.J. (C340) art. 86(1) (1997).

As the 1946 State-War Mission on Japanese Combines led by Corwin Edwards[6] discovered and reported, the critical constraint on competition in the Japanese economy during the intermediate prewar period was not concentration, cartelization, or collusion, but governmental controls and preferences and the ability of *zaibatsu* firms[7] to exclude competitors.[8] They did not, however, discover undue concentration in any industry nor did they find any pattern of effective price-fixing or production controls. Nineteen firms deemed *prima facie* to be *zaibatsu*[9] were identified and studied. None had significantly high market shares. The "strongholds" of *zaibatsu* power were the various linkages with government that had proliferated during the war. Through the control associations, government financial policies, and legally imposed restrictions on entry into banking and insurance, *zaibatsu* firms had been able to gain preferential positions in nearly all of the industries in which they operated. As indicated in occupation studies,[10] before 1935 the *zaibatsu* did not show significant growth in either profits or assets. After 1935, however, the gains were spectacular.[11] With easier access to important officials in economic ministries and in dominant positions in the control organizations, big business in Japan profited handsomely through subsidies, preferential procurement orders, and favorable allocations of capital and raw materials. Suppression of competition was the consequence of wartime constraints

6. The Mission on Japanese Combines (also known as the *Zaibatsu* Mission as well as the Edwards Mission) was sent to Japan in January 1946. It was chaired by Corwin Edwards. Robert Dawkins, legal adviser and consultant to the Federal Trade Commission, served as its Chief of Staff. The members included William B. Dixon, James M. henderson, and Samuel Neel from the Antitrust Division of the Justice Department, as well as R. M. Hunter, a legal consultant to the Federal Trade Commissioin and Professor of Law at Ohio State University, Raymond Vernon, of the Securities and Exchange Commission, and Benjamin Wallace, a special advisor to the Tariff Commission.

Several versions of the Mission's classified report appear to exist. *See generally* Harry First, *Antitrust in Japan: The Original Intent*, 9 PACIFIC RIM L. & POL'Y J. 1 (2000) (citing an undated copy in the National Diet Library microfilm collectin of the SCAP archives ostensibly transmitted to the Joint Chiefs of Staff on May 28, 1946). Another version, dated March 1946, is available through the University of North Carolina (Chapel Hill) Library.

7. The word *zaibatsu*—a compound of the Chinese characters for "assets," "money," and "wealth," and "clique" and "lineage," literally "money clique"—was apparently coined by Japanese journalists to describe the family-controlled conglomerates that had emerged by the mid 1920s (Koreans adopted the same character compound pronounced *chaebol* for the similar family-controlled conglomerates fostered, as noted below, by the South Korean government in the early 1970s).

8. First, *Original Intent*, *supra* note 6, at 37-38. The March 1946 version of the Edwards Mission Report makes the point at 53-55. The report emphasizes *zaibatsu* ownership of Japan's principal commercial banks as a principal source of their capacity to restrict new entry.

9. The nineteen firms were: Mitsui, Mitshubishi, Sumitomo, Yasuda, Kawasaki, Nissan, Asano, Fuji Industrial, Shibusawa, Furukawa, Okura, Nomura, Riken, Nippon Soda, Nippon Nitrogenous, Hitachi, Nichiden, Manchurian Investment, and Oji Paper. First, *Original Intent*, *supra* note 6, at 37.

10. *See, e.g.*, JEROME B. COHEN, JAPAN'S ECONOMY IN WAR AND RECONSTRUCTION (1949).

11. *Id*. at 508, 509.

on access to capital and raw materials, accompanied by growth of close personal and institutional ties between the economic ministries (especially between the Ministry of Commerce and Industry on one hand, and the *zaibatsu* and other dominant enterprises and control associations on the other). By the end of World War II, Japan established what Yukio Noguchi[12] tellingly refers to as the "1940s system," a complex network of government and distribution controls that functioned through quasi-autonomous cooperatives, industry associations, and mandatory control organizations.

For East Asia today, perhaps the most relevant external source of ideas is the German intellectual experience. The intellectual forebears of German competition law—or do-liberals of the Freiburg School—viewed competition in constitutional terms.[13] They emphasized both the economic and social goals of competition policy and did not question its role in fostering economic growth and the public welfare. They also understood that public monopoly could be as serious an evil as private monopoly.[14]

For China and other socialist-market economies in East Asia, the problem of anticompetitive state action is obviously even greater than pre- or postwar Japan or Germany. For China as a socialist-market economy, the state still remains the dominant economic actor. Without an extraordinarily strong commitment by the state to the creation of conditions for competition, exercises of monopoly power by state actors as well as the enforcement of regulatory regimes that enable or promote effective exercise of monopoly power seem inevitable. The problem is not limited to China or the other socialist states of East Asia; throughout the region, large conglomerate firms have emerged. The extent to which these conglomerate groups engage in anticompetitive practices is open to question. One can argue, for example, that as potential competitors in many fields of business overall, they function as important impediments to monopoly power by other large, incumbent firms. Be that as it may, in all instances these conglomerate firms have received special benefits from the state and raise issues of political concern. The development of the Korean *chaebol*,[15] for example, was an intentional feature of President Park Chun

12. NOGUCHI YUKIO, *1940 NEN TAISEI*: SARABA SENJI KEIZAI [1940 SYSTEM] (1995).

13. *See generally* DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS (1998).

14. *See, e.g.*, JOHN OWEN HALEY, ANTITRUST IN GERMANY AND JAPAN: THE FIRST FIFTY YEARS, 1947-1998 44-46 (2001).

15. *See supra* note 7.

Hee's developmental policies.[16] Similar examples of state intervention to both aid and protect private economic interests, which have serious political implications and at least potential anticompetitive effects, can be cited in nearly every country in the region. As in Japan, state action has seemed necessary to restrain what otherwise appear to be very healthy conditions of firm rivalry.

Absent state intervention there is little, if any, evidence of effective restraints of competition in East Asian markets. Most private enterprises are small or medium-sized and operate in fiercely competitive markets. Except for Japanese firms and the Korean *chaebol*, few large-scale enterprises exist in the region. Most of these are mutually competing conglomerate groups. Moreover, all enterprises in the region, with the exception of Japanese firms, are family-controlled. Even the largest, such as the Korean *chaebol*, are family-controlled. As in the case of the prewar *zaibatsu* in Japan, family-owned operations tend to be even more competitive. The most common forms of anticompetitive conduct thus appear to be exclusionary practices, which rarely succeed without government support, rather than concerted anticompetitive action.

For many governments in the region, the problem has been too much, rather than too little, firm rivalry. Thus, in attempting to promote economic growth, governments have tried to emulate Japan's industrial policies designed in the 1950s to reduce "excessive competition" and promote the creation of internationally competitive firms.

Many government officials in the region have thus considered vigorous competition policy to be antithetical to economic growth and development. Fortunately, protectionist barriers to investment and trade have steadily declined. The sort of investment and trade policies once prevalent in Japan and throughout the region have become less common. New entry by both foreign firms, as well as newly established enterprises, has become a regional characteristic as the national economies in the region have grown. Indeed, East Asia, not the United States or Europe, has become the best laboratory to test the proposition that competition leads to development.

## COMPETITION POLICY AND DEVELOPMENT

The historical context within which competition law developed first in the United States and Canada, and then in Japan and Europe, did not

16. *See, e.g.*, LEE Y. YEON-HO, THE STATE, SOCIETY AND BIG BUSINESS IN SOUTH KOREA (1997).

require much consideration as to the relationship between competition law and development. The question as to whether a vigorous competition policy inhibits or retards economic growth was not a major concern within the developed economies in which competition laws were first enacted. Although it can be argued that because exercises of monopoly power result in misallocation of resources, with corresponding reduction of the production of goods and services, it then follows that monopoly power and its exercise damage the economy and, at least in theory, restrain economic growth. On the other hand, the historical record in the United States and Europe offers very little support either for, or for that matter against, the theory. There was intense debate in Germany over the relationship between economic growth and competition, with more enduring echoes in Japan.[17] In fact, competition policy in both Germany and Japan commenced with vigorous debate within the allied camp over this issue. Proponents of a vigorous competition policy, expressed in terms of the need to eliminate excessive concentrations of economic power and cartels, faced opposition from those who feared that these policies would significantly retard postwar economic recovery. In both countries, deconcentration efforts stalled and either the effective enforcement (Japan) or the enactment of competition legislation (Germany) was postponed until economic recovery and high rates of economic growth had been achieved. In addition, in both countries, opponents of vigorous competition law enforcement expressed concern over the benefits of economies of scale and the frequent need for enterprises to cooperate to eliminate over-capacity.

Moreover, the perceived evils of monopoly power and restraints of competition have been viewed largely as the ills of advanced industrial states. Until recently, few advocated the need for any competition legislation for less industrialized states. Consequently, the proponents of strong competition policies find it difficult to single out a case in which the effective implementation of competition legislation preceded economic development. Whether competition policies either inhibited or aided economic recovery and growth in either Japan or Germany remains contested. As a result, were we to rely on the American and European experience, we would be left in the rather discomforting position of having to rely largely on theory, rather than empirical data, to test the basic proposition of whether competition policy is indeed compatible with development.

17. *See* HALEY, *supra* note 14, at 24-63.

Fortunately, the rapid economic growth of China and other parts of East Asia during the past two decades enables us to reexamine the role of competitive markets and development. Rapid movements of capital in response to new investment opportunities and the expansion of trade and new entrants in a multitude of fields, suggests very healthy conditions of competition in the private sector. None of this is necessarily new. We perhaps need to be reminded that unlike merchant guilds in Europe, those of nineteenth century China were organized on the basis of common regional identity rather than a common trade. Thus by definition, the Chinese trade groups fostered competition by enabling and encouraging new entry. One suspects that similar relationships and affiliations throughout the Chinese diaspora continue to operate in ways that make the private acquisition and exercise of monopoly power quite difficult. In conclusion, the East Asian experience is most likely to demonstrate that economic growth and development is best served by competition policies that restrain state intervention and allow market forces to operate freely.