ANTITRUST LAW IN CHINA, KOREA AND VIETNAM

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MARK FURSE

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Great Clarendon Street, Oxford OX2 6DP

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Guatemala Hungary Italy Japan Poland Portugal Singapore
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Published in the United States
by Oxford University Press Inc., New York

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First published 2009

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British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloging in Publication Data
Data available

Typeset by Cepha Imaging Private Ltd, Bangalore, India
Printed in Great Britain
on acid-free paper by
CPI Antony Rowe

ISBN 978–0–19–928586–0

1 3 5 7 9 10 8 6 4 2

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PREFACE

It is no longer the case that antitrust law[1] is the prerogative only of Western States with highly developed economies. As Haley has noted, the 'enactment of competition legislation has become a global phenomenon'.[2] The adoption by China in 2007 of a general antitrust law—the Anti-Monopoly Law—has attracted significant attention from the antitrust community at all levels, and has been the subject of symposia and conference presentations and discussion, and of a wide range of publications. The focus of the present book is on the practice of antitrust law in the five jurisdictions covered, rather than on antitrust policy, although the latter is not neglected given that practice will often follow policy. It is my hope that the many hours of work I have put into this will reduce the workload of busy practitioners grappling with the increasingly complex antitrust issues that may arise in the regimes covered.

I decided to embark on this project when, on a business trip to China in 2004, I picked up the English language *China Daily* newspaper in my hotel lobby to find the lead article on page one was headed, 'China Speeds Progress to Competition Law'. For a competition lawyer with a strong history of engagement in China this proved an irresistible temptation. I have spent, with the support of many people only some of whom are directly thanked below, a significant part of the last four and a half years researching this book, and have spent in total over a year in the jurisdictions covered collecting information, and speaking with those engaged in competition law. From July 2008 to January 2009 I worked exclusively in the jurisdictions on a period of research leave granted by my employer, the School of Law of the University of Glasgow, and I am indebted to the School for its support. This work was in part funded by a research grant from the Sino-British Fellowship Trust, and could not have been completed without that financial support.

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[1] With apologies to European readers the decision has been taken to use the term 'antitrust' consistently throughout this book. As used here the word refers to the control of anti-competitive agreements, abuse of dominant positions and monopolization, merger control, and related procedures. It does not extend to aspects of 'fair competition', such as false representations, and passing-off, although these are often to be found in 'competition' laws.

[2] Haley, JO, 'Competition Law for the Asia-Pacific Economic Cooperation Community: Designing Shoes for Many Sizes' (2002) *Washington University Global Studies Law Review*, vol 1, (1 & 2), 1 at 1.

Some explanation is required of the approach taken in this book and the choice of jurisdictions covered—there are other States in East and Southeast Asia which maintain antitrust law regimes. The law of China is at the heart of this book, which deals also with the proposed new law of the Special Administrative Region (SAR) of Hong Kong, and the law of Taiwan. The legal relationship between Taiwan and China is not discussed here; although this is a sensitive issue it should not concern the antitrust practitioner advising clients as to the legality of their commercial arrangements, or the legal risks they face in this area. The law of Taiwan, which enacted a Fair Trade Act in 1991, is the most developed of these three jurisdictions, and many aspects of this law will appear familiar to those schooled in EC or US antitrust law. In Hong Kong the decision was taken in 2007 to introduce a general antitrust law, although earlier policy had been determined on the basis that the economy was so open as to be self-correcting in the face of abuses of market power. The evidence suggests however that this is not the case. At the time of writing in early 2009 this law has not yet been brought forward, but the likely shape of the law is discussed in Part 3 of this book. While officially the two developments are unrelated, it is likely that Hong Kong policy-makers, having undergone a 'Damascene conversion' at least had an eye on moves in China. That China has adopted a general law of antitrust is remarkable given the history of the country over the last 50 years. The market reform processes and legal steps that have led to the adoption of the new law are discussed in Chapter 1-1 of this book, which introduces in broad outline the antitrust policies and legal regimes of the jurisdictions covered. Korea is a very near neighbour of China, and it is likely that those advising companies trading in and doing business with China will also be involved in advising companies on Korean law. Korea enacted antitrust law in 1980, and is thus in possession of what is by some way the oldest regime of those covered in this book. Like Korea, Vietnam is a close neighbour of China and the same considerations have applied to its inclusion here. Vietnam is also a relatively new member of the antitrust family, having adopted its antitrust law in 2004. However, the law in Vietnam is flawed, and although the sincerity of the Vietnamese Government in enacting the law can hardly be doubted, there is in practice little application of the law.

The structure of this book is to deal in Part 1 with the regimes in outline, addressing broader policy issues, and briefly presenting the development and current state of the antitrust law in each jurisdiction. Chapter 2 of this Part presents an overview of antitrust law in the US and in the EC, and is designed to provide a reference point to standard practices for those who are new to antitrust law. Some reference is made to this chapter throughout the text where the approach in the jurisdictions covered is related back to these more mature regimes. The text however is not a comparative one, and Parts 2–6 deal, in order, with the law in China, Hong Kong, Taiwan, Korea, and Vietnam. In each case I have taken as consistent

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an approach as is possible given the differences in the regimes, first introducing the regime and its institutional structure, then agreements, monopoly control, merger control, and finally procedure. Where there are idiosyncratic approaches in a particular regime that do not fit particularly well into this standard model I have inserted these at what appears to be the most appropriate juncture, but have signalled these elsewhere in the text as necessary.

As will be clear the maturity of the law in each of the jurisdictions covered differs significantly. At the time of completing this book the ink of the Hong Kong law is not yet on the page, whereas in Taiwan and Korea there is a substantial body of legislation, guidance, and, importantly, examples of implementation of the law. China's law has been in force for six months, and has not yet been implemented to any significant degree. Vietnam lies someway in between, but is more hesitant in its development of the law. This has had a substantial impact on the level of detail in this book, which is dependent on the information available. I have avoided speculating as to the development of the law and the way in which it will be applied where this is not yet clear, and have preferred to stick to the facts, although in the case of China some speculation has been unavoidable. This means that whereas the parts of the book dealing with Korea and Taiwan incorporate discussion of secondary materials and of decided cases and policy decisions, the treatment of the law in China and Vietnam is directed more towards explaining the legislation and the rules relating to its application published to date. I have also taken the decision not to deal with the legal systems in general, save where some understanding of these is essential to understanding the respective antitrust laws. Some have doubted the sincerity of the respective States in adopting antitrust law, and have questioned whether the law will be fairly and consistently applied, or indeed if it will be applied at all. In this book I have taken the approach, perhaps naively, of taking the laws at face value, and have discussed, I believe fairly, their content.

Where materials are published in English translations are not usually official. I have adopted a convention of relying first on materials published in English that emanate from the respective antitrust authorities. Where this is the case I have accepted their terms, albeit sometimes with reluctance. I have made minor corrections to English quotes of these materials in this book where the English is clearly incorrect (as, for example, in the dropping of the definite article), but have not rewritten the materials into fluent English as long as the original translated text is clear. Any lawyer who works regularly with foreign language jurisdictions will be aware of the difficulties that translation can give rise to. Some terms simply do not translate, and others may have different acceptable translations. Where the latter is the case I have used a consistent term, but have indicated in a footnote that there are other standard translations which may be encountered in different materials or texts.

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The difficulties of writing a practitioner text dealing with the laws of four jurisdictions in which English is not the official language, and in which very different legal and political cultures affect the transparency of the operation of the legal regimes, have been substantial. I have received most generous assistance from numbers of people in each jurisdiction who are engaged in antitrust law and who are able to work in English. The consultant editors, listed on the preliminary pages of this book, have provided invaluable assistance. Assistance has also been provided by graduate students in China during my many teaching visits to the country, and by my own PhD students at the University of Glasgow.

Thanks are due to all of those who have assisted me in this research over the last five years, including those whose work I have read, and those who have been generous with their time in discussing with me aspects of antitrust law in the regimes covered here. The consultant editors have been most supportive of this project, and without their assistance this book could not have been completed. In China I would like to thank in particular Professor Xiaoye Wang of the Chinese Academy of Social Sciences, Dr Heng Wang of the South West University of Political Science and Law, and Miss Yun Lei of the South West University of Finance and Economics, for providing invaluable help and support. The School of Law of Sichuan University, Chengdu, provided me with a base in August and September 2008. Dr Zhou Zhaofeng contributed greatly to my discussion of Chinese antitrust policy during the course of his PhD studies at the University of Glasgow, and I have drawn in parts from his unpublished PhD thesis. In Hong Kong thanks are due in particular to the Asian Institute of International Financial Law at the School of Law of Hong Kong University, which hosted me in the autumn of 2008. In Korea thanks go to Professor Hyun Yoon Shin, of Yonsei University, Seoul who kindly facilitated a stay at Yonsei University as a visiting scholar, and effected introductions to the antitrust community in Korea. Yo Sop Choi, a PhD candidate at the University of Glasgow, has provided invaluable assistance, and has greatly helped in the writing of the Part of the book dealing with the law in Korea. Miss Sarah Louise Melaney, a final year LLB student at the University of Glasgow, provided sterling research assistance at the commencement of this project. Finally thanks must go to the staff at Oxford University Press who contributed to the production of this book, and who showed the patience of Job during its long gestation. All errors and omissions in this text are my sole responsibility.

This book is dedicated to my colleagues at the University of Glasgow who have provided an invigorating intellectual environment and support during its writing; to all of those who have contributed to the development of antitrust law in China, Hong Kong, Taiwan, Korea, and Vietnam and to my knowledge of it; and to Tim Frazer whose encouragement, guidance, and support has been fundamental to my career.

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I have endeavoured to ensure that this text is accurate and up to date, and as inclusive as possible given the difficulties of gathering material and information. It is my hope that this book will be followed by future editions, and I would be very grateful for any comments from readers of this book. In particular details of cases or developments would be most gratefully received. I may be contacted either through Oxford University Press, or through the University of Glasgow (m.furse@law.gla.ac.uk).

The law in this book is intended to be up to date as at 15 January 2009, although some later developments may have been incorporated into footnotes.

Mark Furse, BA, LLM, MSc, PhD
Professor of Competition Law and Policy,
School of Law, University of Glasgow

Adjunct Professor, South West University of
Political Science and Law, Chongqing
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LIST OF ABBREVIATIONS

AMC	Anti-Monopoly Committee (China)
AMEA	Anti-Monopoly Law Enforcement Agency (China)
APEC	Asia-Pacific Economic Cooperation
APM	Administrative Preventive Measures (Vietnam)
ASEAN	Association of Southeast Asian Nations
CCHC	Competition Case Handling Council (Vietnam)
CFA	Court of Final Appeal (Hong Kong)
CFI	Court of First Instance of the European Community
COMPAG	Competition Policy Advisory Group (Hong Kong)
CEDB	Commerce and Economic Development Bureau (Hong Kong)
CPRC	Competition Policy Review Committee (Hong Kong)
CR	Concentration ratio
DDB	Decree on Dealing with Breaches in the Competition Sector (Vietnam)
DOF	Decree on functions, duties, powers and organizational structure of the Vietnam Competition Administration Department
DOJ	Department of Justice (US)
EC	European Community
ECJ	European Court of Justice
ECMR	EC Merger Regulation
EDLB	Economic Development and Labour Bureau (Hong Kong)
FDI	Foreign Direct Investment
FFTA	Fair Franchise Transactions Act (Korea)
FTCA	Federal Trade Commission Act (US)
HHI	Herfindahl-Hirschmann Index
HKCC	Competition Commission (Hong Kong) [Proposed body]
ICN	International Competition Network
IP	Intellectual property
JV	Joint venture
KFSC	Korean Financial Supervisory Commission
KFTC	Korean Fair Trade Commission
KFTMC	Korean Fair Trade Mediation Committee
MIC	Ministry of Information and Communication (Korea)
MIT	Ministry of Industry and Trade (Vietnam)
MOFCOM	Ministry of Commerce (China)
MRFTA	Monopoly Regulation and Fair Trade Act (Korea)
NDRC	National Development and Reform Commission (China)
OECD	Organisation for Economic Cooperation and Development

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OFT	Office of Fair Trading (UK)
R&D	Research and Development
RPM	Resale Price Maintenance
SAIC	State Administration for Industry and Commerce (China)
SAR	Special Administrative Region
SETC	State Economic and Trade Commission (China)
SME	Small and medium-sized enterprise
SSNIP	Small but significant non-transitory increase in price
SOE	State-owned enterprise
TFTA	Taiwan Fair Trade Act
TFTC	Taiwan Fair Trade Commission
UCRAM	Unfair Competition Regulatory Authority of Mongolia
US	United States
VCAD	Vietnam Competition Administration Department
VCC	Vietnam Competition Council
VLOC	Vietnam Law on Competition
WTO	World Trade Organization

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Part 1

INTRODUCTION

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1-1

INTRODUCTION

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1-1.01 Introducing the inaugural volume of the *Washington University Global Studies Law Review*, which dealt with antitrust law in the Asia-Pacific area, Haley drew attention to the fact that '[t]he enactment of antitrust legislation has become a global phenomenon. Antitrust law has, in effect, become the latest fashion.'[1] The reasons for this are complex, but are at least related to an increasingly generalized acceptance that liberal market economies (privatized where State ownership was common) are to be preferred over managed (socialist) economies. This trend is particularly prominent in East Asia, although there may remain uneasy tensions between the operation of the market and the retention by the State of relatively close management of economic objectives and actors. The relationship between antitrust policy and wider industrial policies is demonstrated in part by the response to the Asian economic crisis in 1998.[2] In September of that year Frederic Jenny suggested that:

> . . . the financial crisis has led to an economic crisis because not enough attention has been paid in the past in these countries to market competition as a means to promote economic efficiency and, on the other hand, that in order to restore the necessary confidence in their economies, East Asian governments must not only reform their financial sectors but also adopt a more comprehensive plan of market-oriented reforms. . . .

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[1] Haley, JO, 'Competition Law for the Asia-Pacific Economic Cooperation Community: Designing Shoes for Many Sizes', (2002) *Washington University Global Studies Law Review*, vol 1, (1 & 2), 1. See also Wu, P and Thomas, C, 'Taiwan's Fair Trade Act: Achieving the "Right" Balance?' (2005–2006) 26 *Northwestern Journal of International Law and Business* 643: 'Adopting competition laws is part-and-parcel of a global trend' (at 643).

[2] See generally (1999) 1:2 *OECD Journal of Competition Law and Policy*.

> Only lip service was given to competition as a means to promote an economically efficient industrial sector. It was generally considered that international competition was sufficient to force the export oriented firms to perform well. However, these firms were occasionally basing their export growth on easy credit facilities, cheap labour and domestic protection rather than on efforts to achieve high levels of productivity. . . . At the domestic level, it was generally considered to be more important to promote employment than to protect consumers against monopolistic practices. Concentrated domestic markets, sheltered to a certain extent from either domestic or international competition emerged.[3]

Later in this keynote speech (given at a symposium held in Seoul) Jenny made explicit the link between antitrust policy and sound economic development:

> To be sustainable in the long run, economic development has to be based on sound financial and economic principles rather than on the systematic promotion of short run growth. Therefore some disciplining mechanism is necessary, both in the financial area and on goods and services markets, to ensure an efficient allocation of resources among firms and industries. Government intervention is not entirely reliable to provide such a mechanism . . . To a large extent, market competition provides such a disciplining mechanism . . . the importance of permitting sufficient competition to allow market forces to guide the allocation of resources cannot be underestimated. Developing market competition . . . means allowing businesses to operate in an institutional and legal environment which will make it possible . . . for challengers, whether national or foreign, to confront incumbents and which will not allow either the undue exercise of market power or the indefinite protection of inefficient firms. In other words, what is required is an environment guaranteeing competition on the merits rather than through political clout.[4]

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1-1.02 International organizations, including the World Trade Organization ('WTO'), are influential in pressing the case for competition law, and the relationship between trade and competition is now recognized to be an important one. All the States whose regimes are discussed in this book are members of the WTO. Although China, whose adoption of antitrust law is discussed below, was not compelled by virtue of its accession to the WTO to adopt antitrust law, there is a clear link between the two events, and China speeded up progress towards the enactment of a general law of antitrust alongside the development of its membership of the WTO.[5]

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[3] Jenny, F, 'Competition Policy and the Asian Economic Crisis' (1999) 1:2 *OECD Journal of Competition Law and Policy* 13 at 14.

[4] Ibid at 17–18.

[5] See, eg Wang, X and Tao, Z, 'WTO Competition Policy and Its Influence in China' (2004) *Social Sciences in China*, Spring, 43; Wang, X, 'China's Accession to WTO and the Formulation of Competition Law' (2003) *Legal Research* vol 2; Li, KX and Du, M, 'Does China Need Competition Law?' (2007) *Journal of Business Law* 182 at 186; Wu, Z, 'Perspectives on the Chinese Anti-Monopoly Law' (2008) 75 *Antitrust Law Journal* 73 at 79: 'The [Anti-Monopoly Law] should reflect the opening-up policy and adapt to China's WTO entry and the new trend in economic globalization.' While China's accession into the WTO did not create a legal obligation to enact antitrust law a number of States expressed concerns as to the difficulties China 'would face . . . in complying with

1-1.03 The introduction of a general antitrust law in the People's Republic of China (hereinafter 'China') on 30 August 2007, taking effect on 1 August 2008, is perhaps the most significant evidence of this trend. While the policy reasons that led to the adoption of the new law, the substantive provisions of which are discussed in some detail in Part 2 of this book, are not entirely transparent, and although the efficacy and consistency with which the law will be applied may be doubted,[6] this development is undoubtedly an important one. Harris has noted that 'it is difficult to overstate the potential importance, to China and the world economy, of China's adoption, implementation, and rigorous and fair enforcement of a modern competition law'.[7] In March 2007 the Special Administrative Region of Hong Kong (hereinafter 'Hong Kong') announced that it too was to enact a general law of antitrust, following a period in which this policy had been expressly discarded in favour of a sectoral approach on the basis that the Hong Kong economy was so open as itself to regulate and mitigate against anti-competitive conduct, whether

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the WTO's requirements of transparency and non-discrimination' (Harris, SH, 'The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China' (2006–2007) 7 *Chicago Journal of International Law* 169 at 176). These concerns were not lessened by reports within China that one of the spurs for a new Anti-Monopoly Law lay in the abuses of dominant positions being perpetrated by foreign companies trading in China. *China Daily* reported on 25 May 2004 ('Monopoly law badly needed, says report') that Tetra Pak, Microsoft, and Kodak in particular were identified as monopolists acting anti-competitively. See also *Wall Street Journal*, 11 June 2004, A7, 'China Hurries Antitrust Law', in which it was reported that a number of international firms were concerned that they would be the first to face action under the Law. If WTO obligations are to be complied with China will be required to apply the Anti-Monopoly Law in a non-discriminatory manner wherever there is a nexus between the application of the Anti-Monopoly Law and international trade.

It is also the case that the move to the enactment of antitrust law in Taiwan was affected by pressure brought from its trading partners 'to balance trade, including the adoption of more effective mechanisms to prevent unfair competition . . .' (Liu, LS, 'Fostering Competition Law and Policy: A Façade of Taiwan's Political Economy' (2002) *Washington University Global Studies Law Review*, vol 1, (1 & 2), 77 at 78). In the event Taiwan enacted the Taiwan Fair Trade Act ('TFTA') some eleven years before joining the WTO.

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[6] See in particular, Williams, M, *Competition Policy and Law in China, Hong Kong and Taiwan* (Cambridge: Cambridge University Press, 2005). Williams, an academic based at the Polytechnic University of Hong Kong with significant expertise in the region, is particularly sceptical of the ability of China to apply its competition law with rigour and consistency. However, Williams accepts that while '[c]ompetition law is clearly no panacea for China's economic problems . . . it might form a valuable component in the ongoing reformation of the Chinese economic system, if implemented fairly and competently' (at 119). See also Dabbah, MM, 'The Development of Sound Competition Law and Policy in China: An (Im)possible Dream?' (2007) 30:2 *World Competition* 341, who is critical of the Anti-Monopoly Law and notes in particular that 'China's clear aim of instituting an effective system of competition law will not be achieved with the mere enactment of the [Anti-Monopoly Law]' (at 363).

[7] Harris, n 5, above, at 229. See also Robertson, JR, 'Symposium: The Anti-Monopoly Law of the People's Republic of China—Editor's Note' (2008) 75 *Antitrust Law Journal* 67, at 68: 'That China now has an [Anti-Monopoly Law] to help it regulate competition within its massive economy is nothing short of amazing'; and Fox, EM, 'An Anti-Monopoly Law for China—Scaling the Walls of Government Restraints' (2008) 75 *Antitrust Law Journal* 173, at 174: 'China has adopted a major law that promises to anchor its markets in a pro-competitive environment.'

multi- or unilateral. At the time of writing Hong Kong has yet to bring forward this new law and Part 3 of this book discusses the likely developments in the light of material currently available. Part 4 deals with the law in Taiwan, which is, for the purposes of this text, treated as a separate jurisdiction from that of China.[8] The decision has also been taken in this text to deal with the law of China's near neighbours, and fellow 'tiger' economies, South Korea and Vietnam. The former, the law of which is discussed in Part 5, has operated its present antitrust law regime (albeit subject to frequent amendment along the way) since 1980. Vietnam introduced a law of antitrust in 2004 (taking effect in 2005), although at the time of writing it has not completed the process of fully developing the necessary framework—both institutional and legal—for the new law to operate effectively and with rigour. There are substantial disparities in the regimes covered in this book, in terms of size, economic development, and legal cultures, and these factors will have an impact on the shape and operation of the antitrust regimes in the respective States. Table 1-1.1 sets out basic economic data.

1-1.04 In each Part of this book, where the law is sufficiently developed, a consistent approach has been adopted. The relevant regime will be introduced, and its broad structure and legal framework set out; the substantive areas relating to the control of agreements, monopolies, and mergers will be explained; and finally the relevant procedural law, including both public powers and private rights, if these exist, will be dealt with. All relevant legislation (the core legislation is reproduced as appendices), guidelines, and other official materials (including preparatory materials) will be referred to as appropriate, and where possible relevant cases will be discussed. Inconsistencies in the depth of analysis provided in this text reflect both different levels of development of the relevant regimes, and differences in the transparency with which the regimes operate. International agreements which relate to the operation of antitrust law, and approaches to territorial jurisdiction will also be dealt with as appropriate. Some reference will be made to relevant literature, and an extensive bibliography is given at the end of the book, but this text is primarily intended for the practitioner, rather than the academic community,

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[8] The relationships, both *de jure* and *de facto*, between China and Taiwan are deliberately excluded from consideration in this book. For the purposes of the application of competition law they may be treated, at the present, as being functionally separate regimes. The Nationalist regime in China was replaced by the Communist Regime on 1 October 1949. The island of Taiwan remained in the control of the Nationalist Party under the leadership of Chiang Kai Shek. There is general consensus in international law that Taiwan does not constitute a 'State' but it does, *de facto*, operate as a distinct legal and economic regime. Note that although Taiwan is excluded from membership of many international bodies (but not from membership of the WTO in its capacity as a customs territory), the Taiwan Fair Trade Commission ('TFTC') has entered into a number of bilateral arrangements relating to the application of antitrust law.

Table 1-1.1 Core economic data

	China	Hong Kong	Taiwan	Korea	Vietnam
Population (m)	1,321.3	7.0	22.7	49.0	85.9
GDP (US$bn)	3,241.8	206.7	383.3	969.8	70.7
FDI (% of GDP)	3.0	18.0	0.4	0.8	5.2
Leading markets	US, Hong Kong, Japan	China, US, Japan	China, Hong Kong, US	China, US, Japan	US, Japan, Australia
Leading suppliers	Japan, South Korea, Taiwan	China, Japan, Taiwan	Japan, China, US	China, Japan, US	China, Singapore, Japan

Source: Economist.com, Country Briefings. Figures actual or estimated for 2007.

such that reference to secondary literature will be less than would be the case in an academic monograph.

1-1.05 This chapter provides a broad introduction to the antitrust law regimes of the five jurisdictions dealt with, and sets out the relationship of that antitrust law to the wider legal regime. Table 1-1.2, below, sets out the schema of discussion of the substantive areas of law, excluding Hong Kong in respect of which the discussion is a speculative one. It is, of course, not possible here to provide a full treatment of the five legal regimes in their entirety. There are similarities between the regimes under discussion, although the extent of that similarity varies. Reasons for this similarity include the common purposes of antitrust law, common external legal influences (such as the models of other regimes, and the advocacy of the same international bodies), and some shared cultural traditions, particularly in the case of Taiwan and Korea, and to a slightly lesser extent China, where Confucian traditions of governance are commonly held. Chapter 1-2 provides a general

Table 1-1.2 Antitrust provisions and coverage in text

	China	Taiwan	Korea	Vietnam
Horizontal agreement	AML, arts 13, 16 [2-2]	TFTA, art 14 [4-2]	MRFTA, chs 4, 6, 8 [5-2]	VLOC, arts 8, 47 [6-2]
Vertical agreement	AML, art 14 [2-2]	TFTA, ch III [4-2]	MRFTA, chs 5, 7 [5-2]	VLOC, arts 8, 42, 44 [6-2]
Abuse of dominance/ monopoly	AML, chs III, V [2-3]	TFTA, art 10 [4-3]	MRFTA, ch 2 [5-3]	VLOC, arts 13, 14 [6-3]
Merger control	AML, ch IV [2-4]	TFTA, arts 11–13 [4-4]	MRFTA, ch 2 [5-4]	VLOC, arts 16–24 [6-4]

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introduction to antitrust law, with particular reference to the regimes of the United States ('US') and the European Community ('EC'), both of which have been influential on the development of antitrust law elsewhere.[9]

Antitrust Law in China[10]

1-1.06 Following reforms introduced by Deng Xiaoping after the end of the rule of Mao Tse Tung China is, today, a socialist market economy: art 1 of the Anti-Monopoly Law of the People's Republic of China makes reference to the need to promote 'the healthy development of the socialist market economy'. This is in accordance with the Chinese Constitution, art 15, first sentence, which, following an amendment in 1993, replaced the concept of central planning with that of the socialist market economy. China remains an economy in transition: rapidly industrializing, developing and exploiting high-tech industries, and admitting both private ownership of the means of production and inward foreign investment. It has been noted that until as recently as 'the late 1970s, China possessed a planned and highly centralised economy . . . the market played virtually no role, and competition itself was out of the question, let alone a government policy encouraging such competition'.[11]

---

[9] It is clear, for example, that some jurisdictions will be influenced not only by the broad policies adopted in the US and the EC, but also by the terms in which that policy finds expression. See for example Liu, n 5, above, at 96: 'Foreign practices, such as various US Department of Justice and Federal Trade Commission guidelines also influenced the [Taiwan Fair Trade Law]'. The results in particular cases may also be influenced by overseas actions. The approach taken by the Korean Free Trade Commission ('KFTC') to Microsoft Corp's bundling of Media Player with the Windows operating system in 2006 was remarkably similar to that adopted by the EC Commission. In its reporting of the KFTC action the *Financial Times* noted that the approach taken by the KFTC 'closely followed the precedent' set by the EC (23 August 2006). In that case the KFTC fined Microsoft Won33bn for abusing its market position, Microsoft agreed a US$30m settlement with a complainant, and released a version of Windows XP compliant with the KFTC's Decision. It is worth noting that in Taiwan an administrative settlement agreement was entered into between the TFTC and Microsoft, which in part imported into Taiwan the terms of the US consent decree entered into by Microsoft. These two cases clearly demonstrate the extent to which less well developed jurisdictions may rely on case precedents from the more developed jurisdictions of the EC and US.

[10] The difficulties encountered when working with legal texts produced in a language other than English was noted in the preface to this book. Particular note should be made in regard to the difficulties in working with translations of Chinese texts. Not only are many terms vague in the original, but translating such vague terms may compound problems of understanding: 'the laws and rules in existence contain a number of inadequately defined terms and concepts, and often in practice the meaning of these terms is distorted when translating from Chinese to English. This, in turn, leads to inconsistency when attempting to understand the same rule by reading it in both Chinese and English' (Dabbah, n 6, above, at 351).

[11] Jiang, X, 'Promoting Competition and Maintaining Monopoly: Dual Functions of Chinese Industrial Policies during Economic Transition' (2002) *Washington University Global Studies Law Review*, vol 1, (1 & 2), 49. For a general discussion of changes in China see Gittings, J, *The Changing Face of China: From Mao to Market* (Oxford: Oxford University Press, 2006).

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1-1.07 Notwithstanding the scale of the changes which have been made in recent years, the legacy of this planned and highly centralized economy remains. This finds expression primarily in the relatively high number of state-owned enterprises ('SOEs')—it is believed that approximately one-third of Chinese GDP flows from SOEs[12]—and also in the number of economic activities exclusively reserved to the State, or other legal authorities that in other economies would be left to the private sector to undertake in a competitive fashion. It is also evidently the case that China suffers from regional protectionism, where local enterprises are supported in the face of competition coming from those outside the area.[13] It is the case in particular that a significant proportion of local taxation revenues may derive from locally based firms, providing an incentive for local governments to insulate them from vigorous competition. This issue is addressed to some extent in the provisions relating to the abuse of administrative monopoly in the new Anti-Monopoly Law (see further Chapter 2-3, below).

1-1.08 It has long been recognized that China's economy has been a victim of widespread anti-competitive practices which have been endemic domestically, although the spur to the recent legislation has been at least in part as a response to a perceived unfairness of conduct engaged in by international companies trading into, and within, China. Thus in 1995 it was noted that:

> Cartel activities have been widely reported in the official press and have been growing in frequency and influence . . . agreements for jointly setting prices, dividing the market, limiting production, and bid-rigging are also prevalent.[14]

Although the enactment of the Anti-Monopoly Law in 2007 is without precedent in modern times the concept of the regulation of competition is not new to China. See Liu, n 5, above, at 83:

> . . . competition policy is not a foreign import to traditional China. Before the First Emperor unified China, scholars such as Guan Chung already had warned the Prince of the threat posed to the throne, farmers and small businessmen by merchants owning thousands of gold bullion. The Tang Dynasty saw the first codification of some form of competition policy: the criminal prohibition against cornering the market. Article 33 of the miscellaneous provisions of the Tang Code, enacted in 737 AD, prohibited any person selling or buying goods from forcibly creating a barrier of entry into the marketplace, fixing the prices of goods they would buy or sell, or misrepresenting the prices of such goods. A violation could lead to eighty floggings and mandatory disgorgement of the offender's illegal profits. (Internal footnotes omitted)

[12] Harris, n 5, above, writes that 'a large percentage of these entities have not, in any meaningful sense, been transitioned into participants in the market economy'. Although noting that there have been reforms and that 'the formerly robust relationship between the government and SOEs has weakened, and money-losing SOEs have been bankrupted or privatized' it remains the case that 'many of the largest and most profitable SOEs have been retained in state hands and represent a substantial share of the Chinese economy' (at 174). Some of the strongest of China's firms are SOEs, even though these may take the form of joint-stock companies. Examples include China Mobile, Sinopec, and Lenovo.

[13] See, for example, Hu Weiwei, 'Anti-monopoly law is a necessity in China' (1995) 3 *Jurisprudence* 35.

[14] Bing, S, 'Competition Policy in a Transitional Economy: The Case of China' (1995) 31 *Stanford Journal of International Law* 387 at 401.

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As late as 1998 the State Economic and Trade Commission ('SETC') officially approved the practice of industries adopting 'self-disciplinary' practices—in effect price-fixing cartels.[15]

1-1.09 It was in the mid-1980s that discussions first began in China relating to the enactment of an antitrust law that adhered to international standards. This however did not find expression in a comprehensive single piece of legislation. Prior to the enactment of the 2008 Anti-Monopoly Law there existed in China a plethora of legislative instruments which related to competitive conduct, some general in nature, and some either practice- or sector-specific.[16] The new legislation has not immediately repealed this. For example, the Price Law of the People's Republic of China was brought into effect on 1 May 1998.[17] Article 14 of this law provides that business operators may not 'collude with others to manipulate the market

[15] SETC, *Opinions on Self-Disciplinary Prices Adopted by Some Industries*, 17 August 1998.

[16] The following list of Chinese legislation 'with competition relevance' prior to the enactment of the Anti-Monopoly Law is given by Dabbah, n 6, above, at 346–7: 'Law on Chinese-Foreign Equity Joint Ventures 1979; Provisional Regulation Concerning the Development and Protection of Socialist Competition Mechanism 1980 [this was the first attempt in China to introduce provisions relating to competition; art 3 states that 'in economic activities, with the exception of products exclusively managed by state-designated departments and organisations, monopolisation or the sole proprietary management of other products is not allowed']; Patent Law 1984; Law on Foreign-capital Enterprises 1986; Postal Law 1986; Law on Chinese-Foreign Contractual Joint Ventures 1988; Railway Law 1990; Anti-Unfair Competition Law 1993; Consumer Protection Law 1993; Company Law 1993; Foreign Trade Law 1994; Insurance Law 1995; Commercial Bank Law 1995; Civil Aviation Law 1995; Electric Power Law 1995; Highway Law 1997; Price Law 1997; Securities Law 1998; Interim Provisions on State-owned Enterprises' Utilising of Foreign Investment for Reorganising 1998; Provisions on Administrative Punishment against Price Violation Activities 1999; Law on Invitation and Submission of Bids 1999; Regulation on Telecommunication Industry 2000; Countervailing Regulation 2001; State Council Provision on Prohibiting Regional Blockade in Market Economic Activities 2001; Anti-dumping Regulation 2001; Regulations on the Administration of Financial Institutions with Foreign Investment 2001; Regulation on the Administration of Insurance Companies with Foreign Investment 2001; Law on Promoting Small and Medium Sized Enterprises 2002; Government Procurement Law 2002; Circular on Issues Related to Transferring State-owned Shares and Institutional Shares of Listed Companies to Foreign Investors 2002; Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors 2003; Interim Measures on Preventing the Activities of Price Monopoly 2003; Interim Measures for the Management of the Service Price of Commercial Banks 2003; Circular on Key Points of Filing Procedures in Listed Companies Transferring State-owned Shares to Foreign Investors and Foreign Invested Enterprises 2004; Provisions on the Establishment of Investment Companies by Foreign Investors 2004; Supplementary Provisions to the Provisions on the Establishment of Investment Companies by Foreign Investors 2004; Interim Measures Governing National Hi-Tech Industry Development Projects 2006; Measures on the Takeover of Listed Companies 2006. Dabbah notes both that this is 'a fragmented framework with a high number of laws and regulations being used', and that, perhaps more importantly, 'the framework is interwoven with uncertainty, inconsistency and unenforceability'.

[17] Article 3 of the Price Law states that:

> The State implements and is gradually perfecting a mechanism whereby prices are mainly determined by the market, while subject to economic adjustment and control at the macro level. The setting of prices shall conform to the laws of value. The prices of the great majority of merchandise and services shall be market-adjusted prices, whereas the prices of a very

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price, thus harming the lawful rights and interests of other business operators or consumers'. Article 40 provides that anyone in breach of article 14 may be required to pay damages, or have any illegal gains confiscated, and may be fined up to five times the sum of the illegal gains. A law of 1999 makes it illegal to engage in collusive tendering practices.[18] However, the most significant such law is the 1993 Law Against Unfair Competition.[19] This law contains measures which are targeted at combating monopoly practices, but also contains measures relating to consumer protection, and matters such as false trading and passing off. The range of conduct prohibited under the Law led a number of Chinese commentators to argue that such a legislative amalgam was inappropriate.[20] Wang Cunxue was not alone in arguing that this Law was incapable of dealing effectively with cartel practices, and that the patchwork of other relevant legislation, such as the Regulation of the Price of Manufacturing Material of 1987, was ineffective.

1-1.10 It is also clear that the monopoly provisions of the Law Against Unfair Competition have been little used in practice.[21] A number of examples are given in *Anti-Inappropriate Competition Law: Understanding, Application and Case Studies*[22] and *Anti-Inappropriate Competition Law Cases*.[23] In both of these works cases that would be classed as 'antitrust' cases within the western understanding of the word are interspersed with cases relating to unfair or inaccurate advertising, the defamation of the company bringing the case, the giving of discounts to encourage custom (by companies with no market power), and other

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small number of merchandise and services shall be subject to government-guided prices or government-fixed prices.

[18] The Bidding Law of the People's Republic of China.

[19] The Law of the People's Republic of China for Countering Unfair Competition is the usual translation given to the relevant legislation by Chinese government sources published in English.

[20] In the leading work dealing with the legislation there are, for example, sections headed 'bribery and kickback' and 'false and misleading publicity' (Jin, C and Luo, W, *Competition Law in China* (Buffalo NY: William S Hein & Co Inc, 2002). See also Gao, Y and Cao, D (eds), *Anti-Unfair Competition Law: Understanding, Application and Case Studies* (Beijing: Peoples Court Publishing House, 2nd edn, 1997). For a concise and accurate discussion of the pre-Anti-Monopoly Law regime see Li and Du, n 5, above.

[21] See, eg, Harris, n 5, above, at 175: '. . . as enacted and enforced, the [Law Against Unfair Competition] was essentially limited to the protection of trademarks and "passing off" offences, primarily because counterfeit goods were seen as the most pressing issue prompting repeated complaints from various countries, including the US. Efforts to include any "core" antitrust content in the statute were considered unnecessary and ultimately abandoned, at least in part because of disagreements over which agency or agencies would implement and enforce such laws.' See also Li and Du, n 5, above, at 188: 'Although the [Law Against Unfair Competition] contains provisions against monopolistic behaviour, it is primarily a law against unfair trading practices. The [Anti-Monopoly Law] is supposed to focus specifically on monopolistic practices and problems of market concentration. Therefore . . . there will be a clear distinction between laws against unfair trade practices and laws against monopoly in China.'

[22] Gao and Cao (eds), n 20, above.

[23] Huang, Q, Cao, Q, and Tu, T (eds), (Hunan People Publishing House, 1998).

similar matters. In the first work for example, only three of the reported cases would be classed as antitrust cases in the US, or as breaches of antitrust law in the EC. All of the reported cases however could be classed in Chinese law as breaches of the Law Against Unfair Competition, which may perhaps be better characterized as a law relating to consumer protection rather than a law about antitrust.

1-1.11 Many within China advocated the adoption of a new antitrust law, although some of the arguments made in favour of the adoption of a new law were somewhat sweeping.[24] In 1993 preparations began more seriously on a new law, and a working group was set up to draft this. The group comprised officials from the State Administration for Industry and Commerce ('SAIC'), and the SETC. A significant number of parties from outside China commented on the work undertaken, and advocated for particular approaches, and particularly for China to conform to recognizable international standards in any new law.[25] Wu states that:

> The principal drafters had the following goals for the [Anti-Monopoly Law]. The Chinese anti-monopoly legislation should meet the objectives of establishing a unified, open, competitive, orderly, and modern market system in China and of perfecting the socialist market economy system. It should not only be based on the Chinese situation, but it should also borrow from the practical experiences and results of foreign anti-monopoly laws. The law should meet the specific requirements of

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[24] For example, Fa Zhen of the Chinese Committee of Economy and Trade argued that there were four reasons to adopt a new anti-monopoly law: (1) the objective demand of accelerating the construction of the socialist market economy; (2) developing the socialist law system; (3) deepening the reform of enterprise and stimulating government to change its functions; (4) integrating Chinese approach with international practice and laws (Zhen, F, 'An economic constitution; a discussion of some ideas and problems in legislating a Chinese anti-monopoly law' (1998) 4 *Intertrade* 4).

[25] The process of drafting of the Anti-Monopoly Law is comprehensively discussed by Harris, n 5, above. A particularly good examination of the background is given by Williams, n 6, above. See also Huang, Y, 'Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law' (2008) 75 *Antitrust Law Journal* 117 whose analysis is prefaced with the following warning (at 118):

> . . . China which has a culture thousands of years old, with an ideology that is extremely conservative and even feudalistic, is a country undergoing a painful transition from command economy to market orientation. Under these circumstances, it is essential to examine the answers to these questions: What is the backstory to the creation of China's [Anti-Monopoly Law]? What is the driving force behind China's [Anti-Monopoly Law]? What were the controversies that held up the legislative process, and to what extent were they resolved?
>
> These questions may well puzzle the antitrust practitioners and policy makers outside of China, and even more puzzling are the answers that their Chinese counterparts give. To comprehend the answers to these questions, Western scholars have to stand in the shoes of the Chinese and possess a deep understanding about the political and economical reality of the country's past and present, as well as specific characteristics of the Chinese marketplace. Only against this backdrop can those antitrust scholars in the West comprehend the driving forces in the legislative process, the mission of the Chinese [Anti-Monopoly Law], and the major challenges facing this legislation.

> China, promote the orderly development of the socialist market economy, and comply with common international practices and regulations.[26]

1-1.12 The majority of those advocating change appeared to accept that a law could be drafted which took China's special circumstances into account. It was widely recognized that the prevalence of SOEs was a problem, but commentators were quick to point out that other economies which do successfully operate an antitrust law regime also contain within them SOEs, although not to the extent that is the case in China. In the event the approach to be taken to SOEs was one of the most hotly debated issues surrounding the enactment of the new law. The issue has been only partially resolved: Article 2 of the law appears to suggest that it does apply to SOEs and administrative monopolies,[27] stating simply that the law 'is applicable to monopolistic conduct in economic activities within [China]', making no reference to a general exclusion for SOEs. However, art 7, discussed in Chapter 2–3, makes further provision in respect of 'industries controlled by the state-owned economy' providing that the State 'regulates and controls their business operations and the prices of their commodities and services so as to safeguard the interests of consumers and promote technical progress'.[28] It is reasonable to anticipate that the role played by SOEs will diminish over time as private enterprise grows within China, although given the continued importance of the SOEs to the State this is likely to be a slow process.

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[26] Wu, Z, 'Perspectives on the Chinese Anti-Monopoly Law' (2008) 75 *Antitrust Law Journal* 73 at 78.

[27] 'Administrative monopoly refers to monopolistic activities initiated by government agencies at all levels by abusing their administrative powers, both legal and extra legal, to promote, manipulate, impede or prevent economic activities. Administrative monopoly includes a wide variety of activities such as legal monopoly and explicitly prohibited ultra vires measures. To a great extent administrative monopoly is a special legacy of socialist countries such as China, a relic of a centrally planned economy. Administrative monopoly manifests itself in various ways, ie as regional monopoly, industry monopoly and compulsory trading' (Li and Du, n 5, above, at 199). Li and Du also note that 'the use of competition law to control administrative monopoly has so far turned out to be a total failure' (ibid at 204). See also Fox, n 7, above.

[28] It has been argued, in reference to an earlier draft of the law, that: 'Dealing with the problem of administrative monopolies is one of the major goals of China's proposed antitrust law. Given China's current structure, administrative monopolies are seen as posing a far more significant problem to China's burgeoning market economy than monopolies created by private enterprises' (Owen, BM, Sun, S, and Zheng, W, 'Antitrust in China: The Problem of Incentive Compatibility' (2005) 1 *Journal of Competition Law and Economics* 123 at 131). For a good discussion of the issue of the problems raised by China's publicly owned utilities see Wen, X, 'Market Dominance by China's Public Utility Enterprises' (2008) 75 *Antitrust Law Journal* 151. At 169:

> . . . it appears to be highly unlikely that the promulgation of the law itself will solve the problem of privileged market status abuse completely. . . . part of the reason for [public utility monopolies] in China is due . . . to the creation of an administrative monopoly by the government. . . . without a separation between the government and the [utilities] it is hard to see how the antitrust law enforcement agencies could enforce the new [Anti-Monopoly Law] independently. It is simply not practical for the government to sue itself—or for that matter for private litigants to sue the government.

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1-1.13 The Anti-Monopoly Law went through a substantial number of drafts before finally being enacted in the form discussed in this book. Reference is made to earlier drafts here only when this is considered necessary to highlight features of the law as enacted. There is a substantial literature dealing with the drafting process, and a large range of comment on the various drafts. It is clear from the text of the Anti-Monopoly Law that while no single regime has served as a unique model for the Chinese law the EC regime has been more influential on the drafting of the legislation than that of the US.[29]

1-1.14 The fact that the Anti-Monopoly Law is in many places imprecise, and contains lacunae, has been noted above. It has, however, been stated that the Law 'only articulates the broad principles that will guide antitrust enforcement in China'[30] and that further guidance will provide the necessary detail.

1-1.15 Some comment has been distinctly pessimistic as to the chances of a Chinese antitrust law operating effectively. The most substantial work on antitrust policy in China published in English is Williams' 2005 *Competition Policy and Law in China, Hong Kong and Taiwan*.[31] While Williams recognized that antitrust law 'might form a valuable component in the ongoing reformation of the Chinese economic system',[32] he argued forcefully that 'should a competition law be

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[29] Harris, n 5, above, points to a number of examples which demonstrate this throughout the text of the Anti-Monopoly Law. Dabbah, n 6, above, argues that the approach of seeming to choose *either* the US *or* the EC model was inappropriate, noting that '[t]here is a need to appreciate that the adoption and development of competition law and policy in a particular country is very much related to and depends on the culture and type of economy of that country as well as on various socio-economic and socio-political circumstances prevailing in such country' (at 354). A similar argument is made in Furse, M, 'Competition Law Choice in China' (2007) 30:2 *World Competition* 323.

[30] Deng, F and Leonard, GK, 'Incentives and China's New Antimonopoly Law' (2008) *Antitrust*, Spring, 73. See also Owen et al, n 28, above, at 141: 'It would be inappropriate to evaluate the proposed law as if it were, as it would be in the US, a set of instructions intended for the judiciary to interpret'. See *contra*, Wang, X, 'Highlight's of China's New Anti-Monopoly Law' (2008) 75 *Antitrust Law Journal* 133 at 144: '. . . in China, laws are more specific [than in the US] and are usually carried out to the letter. Thus what the law expressly states is fundamental.'

[31] Williams, n 6, above. Throughout his book Williams offers a severe critique of the willingness or ability of the Chinese Government to introduce and apply competition law given the current structure of the economy, the inherent weaknesses of the economy, the commitment to a socialist market economy (for example, 'intellectual gymnastics of a sophisticated kind are needed to reconcile socialism with market competition', at 125), and the lack of expertise in the judiciary and government in this area. See in particular, at 426:

> . . . can China administer a competition law? The answer to this must be no. China lacks sufficient competent personnel and its state institutions are notoriously susceptible to corruption of both the political and/or financial type. . . .
>
> . . . can China enforce a competition law? Again the answer is no. China does not have robust legal institutions and cannot ensure that administrative or legal decisions are faithfully carried into effect because of the structure of Chinese political society, local protectionism and a very weak legal system . . .
>
> Thus it is suggested that China cannot implement an effective pro-competition policy regime, even though one might be legislated.

[32] At 119.

enacted, grave doubt exists as to whether it can be implemented'.[33] Harris also raises concerns about the capacity of China to implement the new law effectively, while at the same time noting that 'China has approached the drafting of its Anti-Monopoly Law with remarkable openness and a willingness to hear and consider the views and experiences of Chinese experts as well as foreign antitrust agencies, academics, economists and practitioners'.[34] Nevertheless Harris points to concerns relating to the transparency of the judicial system, institutional capabilities, uncertainty in relation to the political control over the new Anti-Monopoly Law Enforcement Agency ('AMLEA') set up to administer the Law, and in some instances to the text of the legislation itself. There are indeed many lacunae in the legislation, and in particular a great number of terms, which may be important in practice, which are not defined.[35] While implementing regulations have been promised these have been slow to appear, such that at present there remains significant uncertainty as to how the Anti-Monopoly Law will be applied in practice.[36]

Antitrust Law in Hong Kong

1-1.16 The decision to adopt a general law of antitrust in Hong Kong was taken on 20 March 2007. That Hong Kong rejected calls for a general antitrust law prior to this was in part because the Government argued that the open nature of the economy rendered such a general policy unnecessary. This view was not universally shared.[37] In response to an APEC-OECD survey the Government indicated that:

> [Hong Kong] is fully committed to the promotion of free trade and competition. The fact that its traders and producers are exposed to acute international competition is a good illustration of [Hong Kong] as an open and free economy. The approach to promoting competition is grounded on the basic economic philosophy of

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[33] Ibid. See also Owen et al, n 28, above, at 123: '. . . our major difficulty with the new law is that, in the absence of a tradition of reliance on the rule of law, Chinese and foreign competitors will find it very difficult to rely on the antitrust statute or the actions of the courts in China as a basis for predicting the antitrust liability that might result from various business practices.'

[34] n 5, above, at 228.

[35] This is not just a feature of the Anti-Monopoly Law. A significant amount of Chinese legislation is drafted with imprecision. Dabbah, n 6, above, notes, for example, that both the Interim Measures Governing National Hi-Tech Industry Development Projects 2006 and the Law on Promoting Small and Medium Sized Enterprises 2002 contain 'a clear absence . . . of objective or workable criteria' (at 348).

[36] I am more optimistic than is Williams as to the likely success of China's new Anti-Monopoly Law. It is however likely that the learning process will be a difficult one—as it has been for antitrust authorities in the West. Williams notes, in relation to the experience in Taiwan, that: 'In any jurisdiction adopting a new competition law, with no previous experience of such legislation, it is to be expected that the enforcement learning curve will be a steep one and that almost inevitably errors will be made' (n 6, above, at 398).

[37] See for example the views of The Frontier and the Hong Kong Democratic Foundation as expressed in *Competition Policy in Hong Kong* (1993).

> minimum government intervention in market forces. In the case of [Hong Kong] which is a small and externally-oriented economy, this approach is regarded as the best means of enhancing competition and efficiency on the one hand and keeping costs and prices down on the other.[38]

Thus it had been noted that: '[u]nder Hong Kong's free trade policy, almost every good can be imported free of duties. The policy has made Hong Kong extremely competitive for goods and services that are traded in the global market.'[39] Instead of a general law in Hong Kong the Government had adopted a sector-specific approach to antitrust issues. For example, both the Telecommunications Ordinance and the Broadcasting Ordinance contain measures designed to frustrate anti-competitive practices.

1-1.17 More generally antitrust 'law' in Hong Kong operated, and at the time of writing continues to operate, on a system of persuasion without the support of sanctions. This futile system is utterly toothless and may be disregarded, such that the treatment of it here is cursory.

1-1.18 In December 1997 the Government created the Competition Policy Advisory Group ('COMPAG') under the chairmanship of the Financial Secretary, which is responsible for the supervision of competition policy in Hong Kong, and to which competition-related complaints are to be referred. In May 1998 COMPAG published the *Statement on Competition Policy*, which serves as the overarching framework in this area for Hong Kong. Paragraph 4 of the Statement is in the following terms:

> *Pro-competition Principles*
>
> All government entities, and public- and private-sector bodies are encouraged to adhere to the following pro-competition principles for the purpose of enhancing economic efficiency and free trade—
> (a) maximizing reliance on, and minimizing interference with, market mechanism;
> (b) maintaining a level-playing field;

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[38] APEC-OECD Integrated Checklist on Regulatory Reform: Addressing Regulatory, Competition Policy, and Market Openness Policy Issues—Hong Kong, China, 2006/SOM3/EC/015, 23. The Government also stated that: 'When a business practice limits market accessibility or market contestability and impairs economic efficiency or free trade, to the detriment of the overall interest of [Hong Kong], the Government will take appropriate remedial action' (ibid). In fact the ability of the Government to take 'appropriate remedial action' was somewhat limited. Cartels could, for example, operate quite lawfully and will be able to do so until the introduction of the new law. The former Governor of Hong Kong, Chris Patten, had announced his intention to bring forward competition law in 1992, but this was abandoned (see generally Chen, AHY, 'Competition Law and Hong Kong' (1993) 23(3) *Hong Kong Law Journal* 412).

[39] Cheng, LK and Wu, C, *Competition Policy and the Regulation of Business* (Hong Kong: City of Hong Kong University Press, 1998) 225. This is one of a series of useful, although slightly dated, works published in the Hong Kong Economic Policy Studies Series. Other titles are: Lam, P-L, *Competition in Energy* (1997); Lam, P-L and Chan, Y-C, *Privatizing Water and Sewage Services* (1997); and Fung, KC, *Trade and Investment, Mainland China, Hong Kong and Taiwan* (1997).

(c) minimizing uncertainty and fostering confidence in system fairness and predictability by—
 (i) consistent application of policies;
 (ii) transparent and accountable operations; and
 (iii) adherence to equitable and non-discriminatory standards and practices.

It will be noted that this policy is directed towards all bodies, both public and private, and therefore extends to private enterprise.

1-1.19 Specific examples of practices 'which may warrant further examination' are given as price fixing, bid rigging and market allocation or sales and production quotas, joint boycotts and unfair or discriminatory standards. Some examples of abusive conduct are predatory behaviour, setting retail price minimums, and tying. The approach taken, and the implementation of the policy, are set out in paras 8–13. As far as the private sector is concerned the goal set out at para 10(d) is that of 'encouraging the private sector to embrace competition and its stated objective of enhancing economic efficiency and free trade'. This is further supported in paras 12–13, wherein:

> The Government calls upon all businesses to cease existing, and refrain from introducing, restrictive practices that impair economic efficiency or free trade on a voluntary basis. Where justified, the Government will take administrative or legal steps as appropriate to remove such practices as necessary.
>
> Alleged restrictive practices in the public and private sectors may be referred to the concerned policy bureau or government department for consideration. Separately, the COMPAG Secretariat will keep track of all referrals and bring these to the attention of COMPAG should there be substantial policy or systemic implications.

Alongside the Statement COMPAG published in 2003 *Guidelines to maintain a competitive environment and define and tackle anti-competitive practices.* These add little of substance to the Statement. COMPAG has dealt with a number of complaints, details of which may be found in its annual reports, but its effect has been negligible.

There has been international criticism of the approach taken by the Hong Kong Government to antitrust policy. The Secretariat of the WTO, for example, reporting in 2002, noted that a

> lack of coherent measures to address anti-competitive practices in all but a few sectors could constitute an obstacle to greater competition . . . The efficiency of Hong Kong, China's 'sector-specific' approach to competition, as a substitute for a comprehensive competition policy is open to question.[40]

[40] WTO Secretariat, *Trade Policy Review: Hong Kong, China*, WT/TPR/S/109, at III(1)(4).

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1-1.20 Some commentators, notably Williams,[41] have also been highly critical of the policy. Williams labelled Hong Kong's earlier refusal to introduce a general law of antitrust as 'very perplexing', and 'intellectually dishonest'.[42] More strongly he argued that:

> The concentration of economic and effective political power in the hands of a small economic, oligarchic elite that benefits from collusive economic practices and would suffer from a competitive market, is the real reason for the government's overt and illogical hostility to regulation, in the public interest, in this field.[43]

1-1.21 It has been argued elsewhere that:

> The Hong Kong economy suffers from a dichotomy. The external sector of the economy—its exporting firms—operates in the highly competitive global environment; the firms are among the world's leaders. On the strength of its external sector, Hong Kong rightly earns high rankings in surveys of external competitiveness . . . However, in Hong Kong's internal sector the picture is very different. Many of Hong Kong's internal markets are not very contestable. Through a variety of mechanisms such as governmental franchises, arrangements to fix prices, and outright collusion many markets are uncompetitive. Examples include electricity supply, domestic water heating and cooking fuel, supermarkets, petrol supply and shipping services.[44]

1-1.22 In June 2005 a Competition Policy Review Committee ('CPRC') was established by COMPAG 'to review the effectiveness of Hong Kong's competition policy and to report to COMPAG on its findings'.[45] A wide ranging consultation exercise was conducted, at the end of which the CPRC recommended that new legislation should be introduced, which should apply to all, but that it should '*not* target market structures, nor seek to regulate "natural" monopolies or mergers and

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[41] n 6, above. See generally Chapters 6 and 7. See also Williams, M, 'Cartels and Collusion: Failing Competition Policy in Hong Kong' (2005) 28:3 *World Competition* 313.

[42] n 6, above, at 225.

[43] Ibid. This led Williams to the conclusion 'that unless Hong Kong institutes constitutional reforms to commit to introducing a "functioning democracy", comprehensive competition law will be most unlikely to reach the statute book, save for a Damascene conversion of the vested interest groups that hold effective political power to an active role for government in competition regulation' (at 428); and at 427 '. . . the possibility of comprehensive competition legislation is remote'. The reasons underlying the 'Damascene conversion' of the Hong Kong legislature remain unclear, but the fact is that it appears that in 2009 or 2010 Hong Kong will operate a comprehensive system of antitrust law. Williams does not doubt Hong Kong's ability to implement and operate such a system effectively.

[44] n 37, above (Executive summary). For examples of cartelization see Williams, n 41, above, at 320.

[45] CPRC, *Report on the Review of Hong Kong's Competition Policy*, June 2006, para 2. See, on the early stages of the reform process, Furse, M, 'Competition Law and Reform in Hong Kong' (2007) *European Competition Law Review* 401.

acquisitions'.[46] In November 2006, based in part on the CPRC proposals, a discussion document, *Promoting Competition—Maintaining our Economic Drive* ('*Promoting Competition*'), was published by the Economic Development and Labour Bureau ('EDLB'). Although the need to review the policy in Hong Kong was recognized in *Promoting Competition* there was no commitment expressed in the document to making substantial reform. Four benefits were identified in *Promoting Competition* as possibly flowing from the adoption of a general antitrust law: (1) current policy could be implemented more effectively by *inter alia* allowing for more effective sanctioning; (2) the institutional framework for antitrust policy would be strengthened; (3) the business environment would be improved and a level playing field promoted; (4) long-term relative competitiveness would be improved.

1-1.23 Comment in Hong Kong on the proposal to introduce antitrust law was widespread, with the balance in favour of the adoption of such a regime, although some responses were openly hostile, with particular fears expressed that the regime might criminalize certain conduct (but this was always going to be unlikely), or might open the floodgates to frivolous or vexatious litigation. The response to *Promoting Competition* was set out in the EDLB *Report on Public Consultation on the way forward for Hong Kong's Competition Policy* published in March 2007.[47] At paras 5–8 of Chapter 3 of the Report the EDLB set out 'the way forward', with work to take place on drafting the appropriate legislation, with it being envisaged that this would include:

(a) the definition of anti-competitive conduct to be covered and the introduction of an appropriate prohibition against such conduct;
(b) the establishment of a Competition Commission as the regulatory authority;
(c) a mechanism for exempting from the application of the law conduct that was considered to be in the wider economic or public interest;
(d) provisions related to confidentiality and a leniency programme; and
(e) the penalties that are applicable to a breach of the prohibition against anti-competitive conduct, refusal to cooperate with investigations, or unauthorized disclosure of confidential information.

A detailed proposal was put out to public consultation in May 2008. This is discussed in Chapter 3-1, below, which addresses the reform process as it stood at January 2009.

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[46] CPRC, n 45, above, para 5.
[47] The complete submissions made during the consultation process are posted on the EDLB website, at <http://www.edlb.gov.hk>.

Antitrust Law in Taiwan

1-1.24 Compared to China and Hong Kong Taiwan's antitrust law has assumed a functioning and effective maturity. Williams states that:

> Taiwan has achieved notable success in its progress towards operating a more efficient, flexible and responsive economy, to which end the competition law has been a not insignificant contributor. The commitment of politicians, the long-term public advocacy of competition policy and the effective implementation of the new law by the [TFTC] have been impressive.
>
> The results have not always been perfect but the system and those who operate it have shown themselves to be both reflective and responsive. The law has been amended to improve deficiencies and the bureaucracy has matured in its approach to enforcement.[48]

In common with the majority of regimes covered in this book Taiwan has undergone substantial changes to its economic organizing principles—it is now a mixed economy, and 'Taiwan's private sector is clearly at the centre stage of its economy'.[49] Under the regime of 'authoritarian capitalism' that operated in Taiwan through to the 1970s up to nearly 60 per cent of industrial production was accounted for by Government-owned enterprises. That figure fell dramatically by the 1980s and reflected a determination on the part of the Government to move to a more liberal, market-based economy, although the Government continued to maintain monopolies in many important sectors, including most of the utilities, steel production, and petroleum. Taiwan's antitrust law, now contained in the Fair Trade Act, was drafted originally in the early 1980s as part of a wider process of both market liberalization and a drive for increased international economic engagement.[50] It has been noted that antitrust law in Taiwan 'has been an important element of the program of economic reforms that moved the economy from centrally directed emphasis on manufacturing and exports to a market-driven emphasis on services and high technology'.[51] Like the law in China the process was

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[48] n 6, above, at 410–11. See also Liu, n 5, above, at 79: '. . . the pressure of globalization fostered general sentiments in favour of competition policy. The [TFTA] reinforced those sentiments, but its first ten years also demonstrate a checkered history of enforcement.' For an early overview of the development and operation of the regime see Lee, LLC, 'Taiwan's Antitrust Statutes: Proposals for a Regulatory Regime and Comparison of US and Taiwanese Antitrust Law' (1995–1996) 6 *Indiana International and Comparative Law Review* 583. For a more recent perspective see Wu, P and Thomas, C, 'Taiwan's Fair Trade Act: Achieving the "Right" Balance?' (2005–2006) 26 *Northwestern Journal of International Law and Business* 643.

[49] Liu, n 5, above, at 82.

[50] See Williams, n 6, above, at 366–411. See also Liu, n 5, above. In particular in 1984 it was announced by the recently-appointed Premier Yu that Taiwan would pursue a policy of 'internationalisation, liberalization and institutionalization' (see Liu, n 5, above, at 77).

[51] OECD, *Chinese Taipei—Peer Review of Competition Law and Policy 2006*, OECD (2006), 3.

somewhat lengthy, with five years spent drafting the legislation, and a further five years of deliberation. The Fair Trade Act was finally promulgated on 4 February 1991[52] (eleven years before Taiwan joined the WTO as a customs territory in 2002) and has since been amended on a number of occasions.[53] The Act extends to a wide range of conduct, encompassing areas falling within the purview of more mature antitrust regimes, such as those of the US and the EC,[54] but it also extends to unfair trade practices, including counterfeiting, false or misleading advertising, and deceptive practices that might affect the trading order.[55] Article 1 of the Fair Trade Act states that the law was enacted for the purposes of 'maintaining trading order, protecting consumers' interests, ensuring fair competition, and promoting economic stability and prosperity'.

1-1.25 The primary body charged with administering the law is the Taiwan Fair Trade Commission ('TFTC'), which is responsible for 'drafting fair trade policy, laws, regulations, and investigating and handling various activities impeding competition, such as monopolies, mergers, concerted actions, and other restraints on competition or unfair trade practices on the part of enterprises'.[56] The TFTC is, under the terms of the Taiwan Fair Trade Act ('TFTA'), required to function independently of government, and although its Chairman is a member of the Cabinet, the TFTC operates with substantial independence. An OECD peer review process noted that its decisions are not subject to 'revision or reversal based on effects on other policy interests'.[57] Appeal procedures that are in place under the Administrative Appeal Law mean that the TFTC powers are subject to robust judicial control. The TFTC was created in 1992 and has, in its sixteen-year history, drafted amendments to the TFTA, the first of which, in 1993, significantly raised the penalties that were available to it in order to bring the enforcement of the TFTA more in line with that of the US and EC. The TFTC has also produced

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[52] In the words of Liu, n 5, above, at 79, the TFTA was enacted 'without much deliberation. In the frenzy for full political participation, what politician in his right mind would oppose legislation billed as being "fair"?' The OECD has noted that: 'Fair competition appears to be the dominant objective [in the TFTA]. The definition of competition implies that the law is more concerned about process and fairness than about welfare effects' (OECD, n 51, above, at 12).

[53] It should be noted that the TFTA was drafted while martial law was still in force, but that by the time it was enacted martial law had been lifted. This had an impact on institutional arrangements, such as the decision to give the enforcement body an independent status, rather than following the earlier proposal under which the TFTC would have been a part of the Ministry of Economic Affairs.

[54] The German influence on the legislation is also clear: '. . . the [TFTA] draft was the result of [a Ministry of Economic Affairs]-commissioned academic study by the German-worshipping Law Faculty of National Taiwan University' (Liu, n 5, above, at 87).

[55] Although the TFTC is active in its enforcement activity the majority of its case load continues to be taken up with cases brought in relation to deceptive and unfair marketing practices.

[56] Fair Trade Commission website, <http://www.ftc.gov.tw>.

[57] n 51, above, at 7.

guidelines based on its acquired experience in enforcing the legislation. These are referred to in the substantive chapters dealing with Taiwan's antitrust law in Part 4, below. The TFTC is relatively active in its enforcement activity, and in some years has made over 200 formal decisions, although many of these decisions are made after a relatively short procedure. There have also been ongoing advocacy efforts directed, in particular, at the local business community. The TFTC is also relatively active internationally, and Taiwan is an observer member of the OECD, and has been subject to peer review by the OECD, most recently in 2006.[58] Taiwan has entered into formal agreements with the Australian and New Zealand antitrust authorities, and with the French *Conseil de la Concurrence*, and has held bilateral consultation meetings with a number of other antitrust authorities. The TFTC created and maintains the Asia-Pacific Economic Cooperation ('APEC') Competition Policy and Law database, which remains an important source of information in relation to the antitrust regimes of the APEC members.

Antitrust Law in Korea

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1-1.26 The core antitrust legislation in Korea now is the Monopoly Regulation and Fair Trade Act ('MRFTA'), the short title of which (often encountered in the relevant materials) is the Fair Trade Act. The Act, which was passed in 1980, has a wide scope, extending to fair trade, antitrust, competition, consumer protection, and (de)regulation.[59] It has been noted that 'in general, Korean competition law resembles that of the European Union rather than that of the United States'.[60] Article 1 of the MRFTA provides that the purpose of the Act is to:

> . . . promote fair and free competition such that creative enterprising activities are fostered, to protect consumers, and to strive for the balanced development of the national economy by preventing the abuse of market dominance by enterprisers and excessive concentration of economic power and by regulating improper cartels and unfair business practices.

[58] See OECD, n 51, above. At the time of this review the following recommendations for change were made: implementation of a formal leniency programme; abandonment of special treatment of price fixing and other agreements among SMEs; raising of sanctions; merger notifications to be based on objective criteria, rather than on market share; rights of private claimants should be improved. The review also raised the risk 'that rules based on a cultural tradition of fairness might lead to interventions to correct differences in bargaining power, which could dampen competition rather than promote it' (ibid, Foreword).

[59] Anecdotal evidence suggests that there remain tensions between the operation of the antitrust law regime and the operation of regulatory regimes in Korea, with institutional conflicts occasionally manifesting themselves. For a good overview of the development of antitrust in Korea, and its practice up to 2005 see Jung, Y and Chang, SW, 'Korea's Competition Law and Policies in Perspective' (2005–2006) 26 *Northwestern Journal of International Law and Business* 687.

[60] Lee, MH, 'Recent Developments in the Treatment of Collusion by the Korean Courts' (2005) 4:2 *Journal of Korean Competition Law* 155 at 157.

Notwithstanding the wide range of activity that may be regulated under the terms of the MRFTA it is clear even from this first article that it incorporates a traditional antitrust approach, with particular attention paid to monopoly conduct, multilateral anti-competitive conduct, and mergers, all of which are dealt with in Part 5 below.

The MRFTA has been amended on many occasions since its enactment, most recently in February 2008.[61] The enforcement agency is the Korea Fair Trade Commission ('KFTC'), which was established in 1981 as an independent quasi-judicial organ, although it has been noted that 'the KFTC retains the character of an administrative organisation due to its important policy-making functions'.[62] The structure of the KFTC is dealt with more fully in Part 5-1 below. The KFTC maintains a website which incorporates substantial English-language information and materials. Unless otherwise indicated extracts from Korean antitrust legislation used throughout this book are taken directly from this website (<http://www.ftc.go.kr>). The MRFTA itself replaced earlier rudimentary legislation dealing with certain aspects of antitrust law. The first such law was the Price Stabilisation Act of 1973, and this was replaced by the Monopoly Regulation and Price Stability Act of 1975. This history of employing the law to control prices, which emerged out of the 1973 oil crisis, continued to haunt the early years of the operation of the MRFTA, and attracted criticism.

1-1.27 It is not possible to make sense of Korean antitrust policy without understanding the role of the '*chaebol*'—a distinctive industrial conglomerate entity—which collectively are very powerful and prominent in the Korean economy, and whose existence has been highly influential on the development of antitrust policy in Korea. At the end of the Second World War the Korean economy was exceptionally weak and had suffered from nearly 40 years of Japanese colonial rule. The economy was further damaged by the Korean War (1950–1953). In 1962 under the Park Chung Hee administration a five-year plan, the first of several such initiatives, was introduced, and 'a remarkable transformation of the economy took place'.[63] *Chaebols* were deliberately fostered by the Government in the early 1960s as part of the drive towards the development of a modern industrial economy that could compete globally. The result was the emergence of a number of entities with holdings in many different sectors, including heavy industry, chemicals,

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[61] The consolidated text of the MRFTA reproduced in Appendix 3 incorporates all amendments at present in force. Not all of the reforms made in 2008 have entered into force at the time of writing.

[62] Kim, Y-H, 'A Guide to Korean Antitrust Law' (2002) 2 *Journal of Korean Law* 161 at 167.

[63] Lee, H-H, 'Korea's Competition Policy and Its Applications to Other Asian Economies', in Hoa, TV (ed), *Competition Policy and Global Competitiveness in Major Asian Economies* (Cheltenham: Edward Elgar, 2003) at 89. See generally Chung, Y-I, *South Korea in the Fast Lane: Economic Development and Capital Formation* (Oxford: Oxford University Press, 2008) Chapter 2.

manufacture, extending through to banking and retail distribution. While the government initiative was successful in transforming the nature of the Korean economy, it has been noted that the 'pattern of industrialisation led by *chaebols* accelerated the monopolistic and oligopolistic concentration of capital and economically profitable activities in the hands of a limited number of conglomerates'.[64] At the start of 2007 for example Samsung, the largest of the *chaebols*, which had in excess of 60 affiliated companies, with interests ranging from petrochemicals to hotels, accounted for nearly 25 per cent of the total of the Korean stock market value, and was responsible for approximately one-fifth of Korea's exports. Jenny pointed to the *chaebols'* damaging role in the Korean economy:

> The development of the *chaebols* went unchecked from the 1960s to at least the middle of the Eighties resulting in a high level of market concentration. The *chaebols* pursued a policy of diversification and over-expansion sometimes with little regard for profitability. With the support of successive governments they were able to get preferential loans to pursue their development. On the contrary, firms which did not belong to a *chaebol*, irrespective of their productivity or profitability had a difficult time getting loans to expand their business. As a result, the *chaebols* accumulated huge debts which made them particularly vulnerable to any slowdown in their export capacity. Well-known scandals revealed the cosy relationship between some *chaebols* and the political elite and the way in which political influence was used by them to secure new sources of financing, even for dubious projects.[65]

1-1.28 Although Korean antitrust law has clearly borrowed in parts from US antitrust law it is closer in spirit to the law of the EC, and there are a number of peculiarities in the system—particularly in relation to merger control—which are explained by the need to take into account the presence of the *chaebols* in the market, and in particular their ability to cross-subsidize activities from one sector to another. The question of the approach that should be taken towards the *chaebols* continues to influence the development of antitrust law in Korea. In February 2007 for example it was reported that although the Government intended to reduce the controls on cross-shareholdings the move was opposed by the Chairman of the KFTC who argued that 'the *chaebols* have become too powerful', and that the proposed move would further ease the position of the *chaebols*.[66]

1-1.29 The role of the *chaebol* has also led to greater steps to protect small and medium-sized enterprises ('SMEs') than may be the case in other jurisdictions. While the EC for example has on occasion pointed to the role of antitrust law in protecting and nurturing SMEs the US is generally silent on such a policy. In Korea SMEs account for in excess of 80 per cent of employment, notwithstanding the power of

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[64] Kim, n 62, above, at 168.

[65] Jenny, n 3, above, at 16.

[66] 'S Korea ties to clip wings of the chaebol', *Financial Times*, 4 February 2007. Provisions of the law which are aimed almost exclusively at curbing *chaebol* power are not dealt with in this book.

the *chaebols*, and a large part of the turnover of the SMEs flows from sub-contracting transactions. The KFTC is particularly concerned in this environment to ensure that 'fair cooperative relationships' are built between large companies and such enterprises. There is some influence of this policy in the MRFTA and in the application of Korean antitrust law, alongside wider protections in dedicated legislation, such as the Fair Subcontract Transactions Act.[67]

1-1.30 Antitrust policy in Korea has not been static since the enactment of the MRFTA, as is shown in part by the number of amendments to the MRFTA. In December 2003 for example the KFTC published a *Three-year Market Reform Roadmap* which set out a policy agenda of market reform, the ultimate aim of which was 'to increase efficiency in resource allocation'. This would be achieved by enhancing transparency and fairness in the market, which would 'facilitate the functioning of the market, leading to technological innovation through market competition and the emergence of new growth engines'.[68] Government regulation was to be reduced 'on a gradual basis'. The bulk of this reform programme was addressed to company and financial transactions law and regulation, but the KFTC also announced that it was to carry out a review of the antitrust laws, and that it would look in particular at improving the mergers review system, and facilitate private lawsuits for antitrust damage. The KFTC was also to propose legislative change to regulations which hindered market entry and competition under the umbrella heading of 'The Omnibus Cartel Repeal Act' an earlier version of which had effected change in approximately 20 regulations, including for example areas such as prohibiting previously legal fee-setting arrangements in the professions, including lawyers and tax accountants. At an early stage of the second version of this exercise some 174 anti-competitive regulations were identified as raising possible concern. Particular attention too was placed on the detection and deterrence of cartels, with the KFTC arguing in favour of an enhanced penalty system of up to ten per cent of turnover to align Korean penalties with those of the EC. This policy was subsequently supported, and the penalties permitted under the MRFTA have now been increased.

1-1.31 The antitrust law regime in Korea is active and a version of the effects doctrine is applied such that its reach may be extraterritorial. It is with some regularity that enforcement action undertaken by the KFTC is reported, and the powers of the KFTC should not be underestimated. In 2005, for example, the KFTC dealt with a staggering 707 cases violating the MRFTA (the majority of which—481—related to the provisions of the MRFTA dealing with unfair business practices),

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[67] No 3799, 31 December 1984; amended by Law No 7107, 20 January 2004.

[68] KFTC, *The Three-Year Market Reform Roadmap*, December 2003, 2. See also KFTC, *Direction of Competition Policy in 2004*, part III.

imposing penalties in excess of Won259bn.[69] More recent activity includes: a probe into Hyundai Card following concerns that the credit card company had received unfair financial support from its parent, Hyundai Motor Group;[70] an investigation into seven of the country's largest supermarket chains to determine whether the retailers were unfairly using their purchasing power;[71] an investigation into possible collusion amongst eleven banks (including Citibank and Standard Chartered) in relation to fee-setting;[72] and an investigation into Hyundai Motor following allegations that the company exerted unlawful pressure on suppliers to impose territorial restrictions.[73] That such actions are more than paper exercises can readily be shown. In May 2006, for example, the three mobile telecommunications providers in the country were fined a combined Won1.78bn (US$1.8m) following a finding that they had colluded in price-setting. In 2005 the KFTC had imposed penalties totalling Won116bn on fixed-line telecommunications providers in relation to similar breaches. Commentators have identified a 'tougher' stance being taken by the KFTC towards anti-competitive activity of large Korean firms in recent cases. In 2007, the KFTC reported, penalties imposed in respect of breaches of the MRFTA amounted to some Won423bn (US$408m), of which cartel infringements accounted for Won307bn.[74]

Antitrust Law in Vietnam

1-1.32 The policy of *doi moi* entered into by Vietnam in 1986 committed the State to the development of a 'socialist oriented market economy',[75] and foreign direct investment was accepted in 1988. The development of a comprehensive antitrust law—something new to Vietnam—was seen as an integral tool for the achievement of this policy. Vietnam introduced an antitrust law in 2004 (the Vietnam Law on Competition ('VLOC')), which entered into force on 1 July 2005, and a number of relevant implementing laws are in place, although the application of these remains undeveloped. This law takes precedence over any other laws regarding

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[69] See KFTC, *Annual Report on Competition Policy Development in Korea*, September 2006, 10.
[70] *Financial Times*, 1 November 2006; KFTC Decision 2007-504, 24 October 2007.
[71] *Financial Times*, 31 October 2006.
[72] *Financial Times*, 2 June 2006; KFTC Decision 2005-129, 18 August 2005.
[73] KFTC Decision 2007-281, 18 May 2007.
[74] KFTC Newsletter, 4 July 2008. In respect of cartels punished in 2007 the KFTC imposed penalties against: a synthetic resin cartel (US$101.3m); a non-life insurance cartel (US$48.8m); a sugar making cartel (US$50.7m); and an oil refining cartel (US$50.7m).
[75] Article 16 of the Constitution of Vietnam of 1992 (as amended) states that:

> All economic sectors are important components of the socialist-oriented market economy. Organizations and individuals of all economic sectors may conduct production and business activities not prohibited by law, striving for long-term development, co-operation, equality and competition under law.

anti-competitive practices and applies to all business enterprises and professional and trade associations in Vietnam, including overseas enterprises and associations registered in Vietnam (see further Chapter 6-1, below). State administrative bodies, public utilities, and state monopolies are also subject to the law. Article 1 of the law states that it extends to 'competition-restricting acts' and 'unfair competition acts', and also sets out relevant procedures, although many of the provisions of the law are supplemented by decrees (discussed in further detail in Part 6). As will be discussed in Part 6, although the law is in parts based on the EC model it is also highly distinctive, differing in many places from the standards advocated by bodies such as the International Competition Network ('ICN'), and in practice may be difficult to apply due to the rigidity of the legal provisions. When it can be applied its application may not always be sensitive to competitive realities.

1-1.33 While China's antitrust law has been brought forward in part to facilitate relationships with the WTO, Vietnam was not yet a member of the WTO at the time its law was brought forward. The membership to which Vietnam aspired was granted in January 2007, when Vietnam became the 150th member of the WTO. It has been pointed out however that other international relationships may have played a role in the drafting of the law, and that under a bilateral trade agreement with the US Vietnam is 'committed to improving the quality of its laws and the consistency of its legislative framework'.[76] Although the Vietnamese economy remains characterized by low productivity and inefficiency there have nevertheless been some remarkable successes in the fostering of business. In 2000 there were some 42,000 businesses in Vietnam. By the end of 2007 this number had risen to over 183,000, with nearly 60,000 new businesses being registered in 2007 alone. This growth may be attributed in part to the Enterprise Law of 2005. A large number of SOEs have been equitized, but the State retains a large degree of equity ownership in many of these firms.[77] Throughout 2007 merger and acquisition activity was expanding rapidly in Vietnam. In 2006 there were 38 deals reported with a value of US$299m, whereas in 2007 some 113 deals with a value of US$1.753bn were reported by PricewaterhouseCoopers. In a majority of the larger deals the target was a Vietnamese company, and the acquirer purchased the entirety of the assets. Many purchasers were foreign firms, although there were some mergers in which Vietnamese firms purchased foreign firms.

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[76] McBratney, A, 'The Nine Lives of Vietnam's new Competition Law' (2004) *European Competition Law Review* 485. For a discussion of some of the complexities surrounding the law in Vietnam see generally Pham, A, 'The Development of Competition Law in Vietnam in the face of Economic Reforms and Global Integration' (2005–2006) 26 *Northwestern Journal of International Law and Business* 547.

[77] VCAD, *Report on Economic Concentration in Vietnam in 2008—Current situation and outlook* (2009) [draft, nyp].

1-1.34 There is an unfortunate element of political intervention in the antitrust law system in Vietnam. The primary enforcement agencies are a part of the Ministry of Industry and Trade; a number of key decisions can be taken only by the Minister, and some may only be taken by the Prime Minister. It has, however, been suggested that the Ministry 'is the only place where knowledge and expertise on competition issues is available'.[78] The relationship between the State and the competitive process is further clouded by the presence of a sizeable state-owned sector, with state-owned enterprises ('SOEs') being prevalent (although their performance has, historically, tended to be poor), and a number of important industries remain subject to state-controlled monopolization. A number of these SOEs are highly vertically integrated, and the market generally, in part because of its relatively small size, remains very concentrated, which appears to be a matter of some concern to the Vietnam Competition Administration Department ('VCAD'). Over 50 per cent of industry top-three firms remain state-owned at the end of 2008. Unlike the law in Korea, however (see above), there are no special provisions in the VLOC to deal with conglomerate structures which possess substantial market power, and which may have the ability to hinder entry. Further cultural difficulties exist in the operation of an antitrust regime. As discussed in Chapter 6-3, below, some provisions of the Law are very prescriptive, and it has been noted that there is in Vietnam a 'deep-rooted command and control system'[79] notwithstanding attempts to liberalize markets in accordance with the *doi moi* policy. Further, VCAD itself has recognized that as Vietnam 'is just moving toward a market-oriented economy, both the private sector and regulatory agencies are still inadequately aware of issues that may arise in connection with a modern market mechanism'.[80]

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[78] CUTS International, *A Guide to Competition Issues in Vietnam*, at 69.

[79] CUTS International, *Promoting Competition Policy & Law in Vietnam*, at 13. There are a number of legislative instruments which are highly interventionist, including in particular an Ordinance on Price (2002).

[80] See n 77, above, Part IV.