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The evolution of competition law in East Asia

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2 The evolution of competition law in East Asia

Ping Lin

INTRODUCTION

Competition laws promote economic efficiency and social welfare by prohibiting restrictive business practices and creating a level playing field for firms. More than eighty countries now have competition laws (Pitofsky 1998). The Philippines was the first East Asian country to introduce a competition law, under American rule in 1925. Japan's Antimonopoly Law was passed in 1947, again under US occupation. It was not until the 1980s and 1990s that most other regional countries enacted competition laws. This chapter surveys the current state of competition policy in three East Asian economies – Japan, China and Hong Kong. It looks at the effectiveness of these policies and how well they are being enforced, and examines the lessons that can be learnt from the experiences of these countries.

The effective deterrence of competition law violations requires that the expected cost of violating the law be no lower than the illegal gain. The probability that a violator will be caught will depend on the effectiveness of the enforcement system, but will always be less than 1. This suggests that the penalty should exceed the illegal profit, thereby justifying a punitive (or multiple damages) system.

Japan made significant amendments to its 1947 Antimonopoly Law in the 1990s and is on the way to establishing a modern antitrust system. Although enforcement has improved, the administrative surcharge, which is the major mechanism for imposing sanctions, is still not consistent with the basic principle of deterrence. Like many other Asian countries, China and Hong Kong are in the early stages of developing an effective competition policy. China's 1993 Unfair Competition Law is enforced primarily by local administrative agencies, which are ineffective in combating violations by protected local interests. Hong Kong's laws are seemingly simpler, but its sectoral approach prevents enforcers from appearing impartial and independent.

Competition policy has not had a great deal of domestic support in many East Asian countries. Japan's antimonopoly law was imposed by the Allied Occupation after World War II, and it was pressure from the United States that

drove the amendments of the 1990s. External factors played a similar role in the passage of competition laws in Taiwan and Indonesia. In many East Asian countries, competition policy will lose out if there is a conflict with other policy objectives. Governments frequently intervene to promote certain industries or firms (e.g., state-owned enterprises). It is difficult to establish a culture for fair competition in such an environment.

The experience of other countries demonstrates the importance of an independent enforcement agency. In East Asia this is easier said than done. In Japan, for instance, the conflict between the Japan Fair Trade Commission (JFTC), which administers competition policy, and the Ministry of International Trade and Industry (MITI), which implements industrial policy, has impeded the enforcement of competition law (Sanekata and Wilks 1996). The most challenging task for East Asian countries is to establish independent agencies that are able to enforce competition laws.

EVALUATING THE EFFECTIVENESS OF COMPETITION LAW

Competition law is defined as a set of rules that govern the way that businesses interact with each other in the marketplace. The Model Law on Competition put forward by the United Nations Conference on Trade and Development (UNCTAD) outlines the aim of competition policy:

To control or eliminate restrictive agreements or arrangements among enterprises, or merger and acquisitions or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development. (UNCTAD 2000)

The Pacific Economic Cooperation Council (PECC) has published a set of non-binding principles for guiding the development of a competition-driven framework for APEC's economies. These principles declare that:

the ultimate goal of this competition framework is to promote the process of competition, as opposed to the welfare of individual competitors, in order to achieve greater overall economic efficiency and an increased average standard of living in domestic economies and the APEC region as a whole. (PECC 1999: 6)

In some countries, including Japan and China, competition laws also meet consumer protection objectives.

According to the Model Law on Competition, competition law covers three main areas: restrictive agreements or arrangements, the abuse of market power, and mergers and acquisitions. Unfair methods of competition are also prohibited in some countries, including the United States, Japan and China. Table 2.1 summarises the state of competition policy in East Asia.

Competition laws vary in terms of their coverage and content, reflecting differing social, political, cultural and legal contexts. Enforcement procedures

Table 2.1 Competition laws in selected East Asian countries

<i>Country</i>	<i>Title of law</i>	<i>Date of enactment</i>
China	Law of the People's Republic of China for Countering Unfair Competition (Unfair Competition Law) Price Law	1993 1998
Hong Kong	Competition policy statement/sector-based competition provisions	1998
India	Monopolies and Restrictive Trade Practices Act	1969
Indonesia	Law on the Prohibition of Monopolistic Practices and Unfair Business Competition	1999
Japan	Act concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (Antimonopoly Act)	1947
Philippines	Antimonopoly Law	1925
Republic of Korea	Monopoly Regulation and Fair Trade Act	1980
Taiwan	Fair Trade Law	1991
Thailand	Price-Fixing and Antimonopoly Act (renamed Trade Competition Act in 1999)	1979

also vary. To evaluate the effectiveness of competition law, it is useful to adopt a framework developed in the law and economics literature that has contributed significantly to the understanding of the economic incentives behind violations of competition laws (e.g., Posner 1977; Becker 1968).

Most laws rely on sanctions and penalties to prevent violations. The expected cost of violating the law is determined by the penalty imposed on those who are caught and by the probability that a violation will be uncovered and successively prosecuted: that is, the expected cost of violating the law = P (the probability of being caught) \times L , will be specified in the national competition law. Different penalties can be imposed, the remedies can be criminal as well as civil, the size of the fine varies, and some countries allow multiple damages or punish repeated offenders more severely.¹ In the United States, for example, violations of the Sherman Act can result in a fine of up to US\$350,000, imprisonment for up to three years, or both.

The probability of detecting a violation, P , depends on the administrative and legal power of the enforcement agency, the procedures it uses, the size of its budget, and the qualifications and experience of law enforcement agents. It also depends on the degree of independence the enforcement agency has to launch investigations and make decisions. Another factor affecting P is whether private cases can be brought before the court and how willing individuals and companies are to pursue such cases. In the United States, the 1914 Clayton Act allows anyone who has been injured by an antitrust violation to sue in a federal court and pursue treble damages plus the cost of the lawsuit.²

Another important factor concerns the burden of proof in a competition case. In the United States, the legality of a firm's conduct can be assessed under either the *per se* rule or the rule of reason, which are quite different principles. Clearly anticompetitive activities such as price fixing and certain types of vertical restrictions come under the *per se* rule and cannot be defended on other grounds (e.g., efficiency reasons). Illegality is not as easily defined under the rule of reason, which applies to horizontal mergers and monopolies, as the activity is assessed according to the effect on the marketplace. The distinction between the two rules lies principally in the burden of evidence each imposes on the parties to the litigation. Under the *per se* rule, the plaintiff need only demonstrate that the defendant engaged in proscribed conduct, whereas under the rule of reason, a further argument must be made that the conduct hurt the plaintiff or society.³

The effectiveness of enforcement also depends on the extent to which the enforcement agency is able to act without being constrained or unduly influenced by political forces that might have conflicting objectives. In the United States, for example, the Department of Justice was the only agency to enforce the Sherman Act until 1914, when the Federal Trade Commission Act stipulated that responsibility should be shared with the Federal Trade Commission. This was an attempt by Congress to reduce the influence of the president over the enforcement of laws. To cite another example, the conflict between Japan's Ministry of International Trade and Industry, now the Ministry of Economy, Trade and Industry (METI), and the Japan Fair Trade Commission has often been blamed for the weak enforcement of antimonopoly law in Japan up until the 1980s.

Given that corporate crimes are motivated by the desire for pecuniary gain, and that the probability of getting caught is less than complete, it is clear that the expected penalty must be greater than the illegal gains in order to deter crimes. Simply taking away the illegal profits gained will not deter future antitrust violations. The drafters of the US antitrust laws were aware of this simple principle, and instituted treble damages, where plaintiffs can be awarded three times the actual damages (plus legal fees).⁴ China's Unfair Competition Law and Consumer Protection Law also allow multiple damages.

The differing experiences of Japan, China and Hong Kong are discussed below.

COMPETITION POLICY IN JAPAN

Powerful, family-owned industrial conglomerates dominated the Japanese economy up until the end of World War II, when the Allied Occupation forces undertook to break up Japanese industry in order to prevent the re-emergence of militarism. One of the key reforms was the introduction of a competition law.

The Antimonopoly Act

At the centre of Japanese competition policy is the 1947 Act concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade, known as the Antimonopoly Act. The declared objective of the Act, which was modelled on US antitrust statutes, is 'to promote free and fair competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and people's real income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general' (section 1). Table 2.2 lists the main provisions of the Antimonopoly Act.

Table 2.2 Main provisions of Japan's Antimonopoly Act

<i>Section of the Act</i>	<i>Provision</i>
Section 3	Prohibits 'unreasonable restraints of trade' (cartels)
Section 6	Prohibits international cooperation that results in unfair trade practices or unreasonable restraints on competition
Section 7(2)	Imposes surcharges on price cartels
Sections 8(1)–(3)	Prohibits collusion and conspiracy in trade associations
Section 8(4)	Prohibits the creation of 'monopolistic situations' in highly concentrated markets
Section 9	Limits cross-shareholdings and holding companies (revised in 1996)
Section 13	Limits interlocking directorates and the dispatch of directors to other companies
Section 15	Sets market concentration limits on mergers and acquisitions
Section 18(2)	Requires implicit collusion and parallel price increases be notified to the JFTC
Section 19	Prohibits 'unfair trade practices'; stipulates that these activities are to be further specified in 'JFTC Designations'
Sections 21–23	Defines exemptions for monopolies under intellectual property right laws, special cooperatives and natural monopolies (section 21 abolished in 2000)
Section 24	Defines exemptions for recession and rationalisation cartels (revised in 1999)

The Antimonopoly Act has three main pillars. First, it prohibits unreasonable restraints of trade; that is, collusive activities that restrain trade. Second, it prohibits the creation of monopolies through mergers, cross-shareholdings and interlocking directorships. The third pillar of the Act prohibits unfair business practices, including behaviour that closes competitors out of markets or rules that discriminate against other firms. Six practices are highlighted as particularly unfair business practices:⁵

- 1) unfairly discriminating against other firms;
- 2) dealing at unfair prices;
- 3) unfairly inducing or coercing customers away from a competitor;
- 4) dealing with another party on restrictive terms;
- 5) using bargaining power unreasonably when dealing with another party;
and
- 6) unfairly interfering with competitors in their transactions with third parties
or interfering in the internal affairs of a competitor.

The Japan Fair Trade Commission (JFTC) was created under the Act to implement competition law and was positioned as an extra-ministerial body of the Ministry of Public Management, Home Affairs, Posts and Telecommunications (the commission is now under the Cabinet Office). Although the JFTC is modelled on the US Federal Trade Commission, its commissioners are not independent, but are appointed by the prime minister from the ranks of retired bureaucrats. The key post of chairman is usually filled by the Ministry of Finance.⁶ The four other posts are shared out among leading ministries: one from MITI, one from the Ministry of Justice, and two from the Ministry of Finance, the Ministry of Foreign Affairs or the JFTC itself. This opens up the possibility of conflicts of interest, as the commissioners might consider the interests of their parent ministries. It is widely believed that the relaxed application of antimonopoly law in the banking and securities sectors reflects the dominance of the Finance Ministry over the JFTC. Having said this, the commissioners are appointed for five-year, renewable terms and therefore enjoy substantial immunity from short-term political pressures. In addition, no more than three commissioners can be from the same political party. Independent administrative agencies of this kind were unknown before the creation of the JFTC.⁷

The JFTC can address anticompetitive business activities in four ways: through preventive consultations, informal measures such as cautions and warnings, formal recommendations and complaints, and criminal proceedings.⁸ Although an investigation can be initiated by the JFTC, most investigations are held in response to a report from the public (Schaede 2000: 113). Of the 1,007 cases examined by the JFTC between 1947 and 1996, 78 per cent resulted in recommendations, and most of these were immediately accepted by the respondents (Schaede 2000: 117).

As originally enacted the Antimonopoly Act was quite stringent. The provision on monopolies in the original law (article 8) prohibits any 'undue imbalance in business powers'. An enterprise that has a market share exceeding a certain threshold may automatically be considered to exhibit undue business power. In contrast, US law has a greater focus on conduct, and companies that occupy a large market share do not necessarily violate the law.⁹ The Antimonopoly Act prohibited the ownership of shares in a competitor and stipulated that mergers had to be approved by the JFTC.

The Antimonopoly Act has been amended several times, most substantially in 1953, 1977 and in the 1990s. The 1953 amendments relaxed some of the original restrictions, while later revisions generally strengthened the Act.

The first major revision in 1953 ended the prohibition of cartels and authorised two types of cartels – depression cartels and rationalisation cartels – both of which were subject to the approval of the JFTC. Depression cartels were temporary arrangements designed to alleviate economic hardship caused by a disequilibrium in supply and demand. Rationalisation cartels were deemed necessary 'for effecting an advancement of technology, an improvement in the quality of goods, a reduction in costs, an increase in efficiency or any other rationalisation of enterprises' (Kaserman and Mayo 1995: 403).

The 1953 amendments deleted article 8 of the Antimonopoly Act (the article was reinstated in a different form in 1977), made mergers and acquisitions unlawful only when they substantially restrain competition, and allowed an exemption for resale price maintenance of goods that fall under the category of intellectual property.¹⁰

One aspect of the Antimonopoly Act was strengthened by the 1953 amendments, namely the control of unfair trade practices. The original prohibition of 'unfair methods of competition' was widened to include 'unfair business practices' that lessen competition, including practices such as tying arrangements, exclusive dealing, price discrimination, resale price maintenance by enterprises that are not competitors (e.g., manufacturers and their suppliers or manufacturers and retailers). The aim was to control abuses of power by large enterprises able to place pressure on smaller firms (Matsushita 1993).

The next changes to the Antimonopoly Act in 1977 considerably strengthened Japan's antimonopoly law. First, the JFTC was allowed to levy an administrative surcharge on cartels of up to 1.5 per cent of their total sales during the period in which the cartel operated. The surcharge system was introduced after the first oil crisis as a response to consumer complaints about the number of cartels being formed (Matsushita 1993). Second, the JFTC was able to compel structural changes to correct a monopolistic situation and control an undue imbalance of business power. Third, a price reporting system was introduced to deter tacit collusion by businesses raising prices simultaneously.

Japan's enforcement of its antimonopoly law has been poor, particularly prior to the 1980s. According to *The Economist*, 'the law itself has teeth in plenty;

the problem is that its designated watchdog has been trained not to bite' (*The Economist*, 16 September 1989).¹¹ The lack of enforcement of antimonopoly law is often cited as one of the key traits of the Japanese government during the postwar period (Porter et al. 2000, Chapter 2).

Industry policy played a crucial role in achieving Japan's economic miracle during the 1960s and 1970s, and was the prime reason for the government's lack of interest in enforcing the Antimonopoly Act. To enhance the competitiveness of Japanese firms in international markets and catch up with the more advanced economies, Japanese ministries, particularly the Ministry of International Trade and Industry, encouraged measures that contradicted the principle of fair competition. As noted by Caves and Uekusa (1976: 149):

The goals of the Ministry of International Trade and Industry have varied over time in weight and composition, but some have recurred regularly since the ministry's founding in 1949. One has been to promote the movement of resources to certain favoured industries ... Another goal has been to promote larger operations in certain industries – larger plants because of an abiding faith in economies of scale, and larger firms in the belief that ... Japanese firms should be as large as their American competitors in order to compete with them effectively. This goal has led at times to considerable enthusiasm for mergers and restriction of new entry into industries of interest to MITI.

The pursuit of industrial policy has affected both the content and enforcement of Japan's antimonopoly law. The introduction of depression and rationalisation cartels was a prime tool of industrial policy during the 1960s and 1970s.¹² According to Porter et al. (2000, Chapter 2), as many as 1,379 cartels were allowed between 1953 and 1994.¹³ The extension of provisions governing 'unfair methods of competition' to cover 'unfair business practices' in the 1953 amendment was to a large extent intended to protect small suppliers (Matsushita 1993).

According to some scholars, 'the Japanese government takes a more pragmatic approach to antitrust enforcement, one that makes allowance for national goals such as industrial catch-up' (Okimoto 1989: 13). However, it is fair to say that the government has given more weight to industrial policy than to competition policy. Although the JFTC and MITI have negotiated over conflicts between the two policies, 'there are not many examples that can be cited in which the JFTC has ordered MITI to make major changes in industrial policy in order to conform to antitrust statutes' (Okimoto 1989: 14).

Recent changes to Japan's antitrust system

Japan's antitrust system has undergone substantial changes since the early 1990s, with the Antimonopoly Act being further strengthened and the power of the JFTC being greatly enhanced. The changes were driven by two factors: trade

disputes between Japan and the United States, and the drive for economic reform through deregulation and increased competition in domestic markets.

In trade negotiations during the mid-1980s, the US government started to raise allegations of anticompetitive practices by Japanese firms and trade associations. The Structural Impediments Initiatives talks in 1989 resulted in several Japanese commitments on competition law and policy, including (Yamada 1997):

- increasing the number of JFTC investigators and boosting the commission's budget;
- having the JFTC take formal action against price-fixing cartels and bid rigging;
- having the JFTC increase transparency by disclosing detailed information on its cases;
- increasing the fines for violations; and
- having the JFTC publish a set of guidelines on prohibited distribution and trade practices.

In 1995 the Japanese government embarked on a comprehensive restructuring of the economy with the aim of ending the worst recession since World War II. Deregulation has been taking place in important sectors such as telecommunications, energy, transportation and financial services to boost domestic competitiveness.

In June 1990 the JFTC announced it would pursue criminal charges against cartels, bid rigging, boycotts and other serious violations likely to have a widespread influence on consumers. It would also come down hard on repeat offenders and firms or industries that did not abide by measures to eliminate violations. The penalty that could be imposed on individuals participating in an illegal cartel or a monopoly was set at up to three years in prison or a fine of up to 5 million yen.¹⁴

In 1991 the surcharge on cartels was quadrupled to 6 per cent for industries other than wholesale and retail businesses. In addition, the government has cut the range of cartels allowable under the Antimonopoly Act and other laws.¹⁵ As a result, the number of cartels fell from a peak of 1,079 cases at the end of March 1966 to 15 cases under four laws at the end of April 2000.

In 2001 a system was introduced to allow those who have been injured by unfair trade practices to file a lawsuit seeking injunctive relief. This was a substantial improvement over the civil remedies allowed by the Antimonopoly Act.

Another recent development has been the decline in administrative guidance of firms' investment decisions that was so prevalent in government–business relations in Japan. Administrative guidance has been used by various ministries to accomplish policy objectives. Under the 1995 Deregulation Promotion Plan,

ministries must consult with the JFTC in advance of issuing administrative guidance. In 1994 the JFTC made public its Antimonopoly Act Guidelines on Administrative Guidance, which identified instances where guidance could lead to anticompetitive activities.

During the 1990s, when many other ministries were being rationalised, the JFTC expanded in size. By 2000 the JFTC had a staff of 564, up from 484 in 1992.¹⁶ Table 2.3 reviews the types of cases that the JFTC dealt with between 1995 and 2000, showing that its primary focus has been on bid rigging.

An evaluation of Japan's competition policy

Japan's competition law has been in place for over half a century. Prior to the 1990s, competition policy was subordinate to industrial policy. Cartels and administrative guidance contradicted the principles of competition policy. Since the early 1990s, Japan's antimonopoly law has been significantly strengthened and enforcement has improved. The law now has more clout and on the whole is as comprehensive as competition law in any other country. The JFTC is now more powerful, independent, visible and active.

However, there is an important aspect of the law that needs further revision. As mentioned earlier, the primary mechanism for imposing sanctions under the Antimonopoly Act is the surcharge system. Enterprises found to have engaged in major restraints of trade such as cartels and bid riggings are fined a fixed rate of 6 per cent of sales revenues for three years. The surcharge system was never intended to be punitive: 'it is regarded as a confiscation of excessive profits rather than as a fine' (Sanekata and Wilks 1996: 115). According to JFTC Commissioner Shogo Itoda, the surcharge system 'aims at forcing violators to fork out undue profit from cartels or bid riggings, and achieving social justice based on the crime-does-not-pay idea' (Itoda 2000).

Before the 1991 amendment, the fine had been 1.5 per cent of the long-term average profit across sectors, which was 3 per cent, because of an assumption that only half of an offending firm's profit would have come from

Table 2.3 Court cases brought by the JFTC, 1995–2000

<i>Type of violation</i>	<i>1995</i>	<i>1996</i>	<i>1997</i>	<i>1998</i>	<i>1999</i>	<i>2000</i>
Private monopolies	0	1	1	3	0	1
Bid rigging	14	15	13	15	22	9
Price cartels	5	7	4	3	3	2
Unfair trade practices	4	2	9	5	5	5
Other	2	8	0	1	2	1
Total	25	33	27	27	32	18

Source: JFTC Annual Reports, 1995–2000.

illegal cartel activities. The rate was raised to 6 per cent in 1991, following the finding that the actual profit was around 15–20 per cent of sales.¹⁷

The economic framework outlined earlier in this chapter illustrates that the fine is still too low to deter violations of the law. Given that the probability of detecting a violation, P , is less than 1, the fine should be greater (by a factor of $1/P$) than the surplus profits accruing from illegal cartels. Anything less makes breaking the law profitable even when firms are caught. A move to a punitive system through an increase in the fine would make Japan's competition policy more consistent with this principle. If the profit rate of a cartel is in the range of 15–20 per cent against an average 3 per cent normal profit, then the fine should be at least 12 per cent.¹⁸

Much can be learned from the Japanese experience, for instance by looking at why enforcement has been ineffective. Before the 1990s the main problem was that the JFTC had little power, which meant that competition policy was placed behind national priorities such as industry policy. Today two main factors inhibit the power of the JFTC and the Antimonopoly Act (Schaede 2000). The first is a lack of public awareness of antitrust principles and of what the Antimonopoly Act permits or prohibits, which means there is little impetus for stricter enforcement. Second, in stark contrast to the United States, where the possibility of large private damages is a major deterrent to antitrust violations, private antitrust lawsuits are extremely rare in Japan. A total of 31,745 private antitrust suits were brought in the United States between 1945 and 1988, but only 18 such suits were filed in Japan in that period (Schaede 2000, Chapter 5). The discrepancy can be explained by the high cost and low probability of success of bringing such a lawsuit in Japan.¹⁹ The effectiveness of Japan's competition policy would be enhanced if private parties had stronger incentives to report antitrust violations.²⁰ There are further lessons for East Asian countries from Japan's experience of building an independent enforcement agency.

COMPETITION POLICY IN CHINA

China did not have a competition policy until the early 1980s, when it started to move from central planning to a market economy. Under central planning there was no role for competition and therefore no need for competition policy.

The decision to permit the development of the private sector created the need for rules to govern competition between firms. Three main laws and regulations deal with competition issues: the 1980 Regulations on Development and Protection of Competition, the 1993 Unfair Competition Law and the 1998 Price Law. Other regulations exist at the sectoral and regional levels.

The State Council issued the Regulations on Development and Protection of Competition on 17 October 1980. The regulations stipulate that:

in economic activities, with the exception of products managed exclusively by state-designated departments and organisations, monopolisation or sole proprietary management of other products are not allowed.

The regulations are brief. Article 6 provides that:

Competition must be introduced by breaking down regional blockades and departmental barriers. No locality or department is allowed to block the market. No locality or department should impose any ban on the entry of goods made in other places. Localities should ensure that raw materials can be transferred out according to state plans and must not create any blockade. Departments in charge of industry, transport, finance and trade must revise any part or parts of their existing regulations and systems which impede competition so as to facilitate competition.

The Unfair Competition Law

The 1993 Unfair Competition Law was China's first competition law and was a significant step toward preventing anticompetitive practices and establishing a competition policy.²¹ It states that the aim of competition policy in China is to 'safeguard the healthy development of the socialist market economy, encourage and protect fair competition, stop acts of unfair competition and defend the lawful rights and interests of operators and consumers' (article 1).

A total of eleven business practices are outlawed. Article 9 prohibits false or misleading advertising. It also extends liability for false advertising to advertising agencies that are aware or should be aware of a seller's misrepresentation. Article 13 limits the use of prizes as a marketing strategy and states that the drawing of prizes must be conducted honestly and that prizes must not exceed 5,000 yuan (about US\$605). Article 8 prohibits the use of bribes, especially kickbacks to buyers, in money or materials. Article 14 outlaws the fabrication or spreading of false information intended to injure the reputation of a competitor.

Protection against trademark infringement is offered by article 5, which forbids the copying of trademarks and certificates of quality and origin, and also the use of similar brand identification, such as brand names, packaging or designs, that might confuse consumers. A fine of between 100 per cent and 300 per cent of the value of the illegal gains may be imposed. Criminal sanctions may be imposed under China's Trademark Law.

Article 10 protects trade secrets. Trade secrets refer to 'technical information and operational information not known to the public that is capable of bringing economic benefits to the owners of the rights, that has practical applicability and that the owners of the rights have taken measures to keep secret'. The law imposes a fine of between 10,000 yuan and 200,000 yuan on those who obtain such secrets illegally or who know or should know that trade secrets were obtained illegally but nevertheless distribute such knowledge to third parties.

The remaining five prohibited acts can be classified as antitrust provisions. Article 15 prohibits collusion in the tendering process (bid rigging).²² Violators can be fined between 10,000 yuan and 200,000 yuan, depending on the seriousness of the offence (article 27).

Article 11 forbids predatory pricing. It provides that an operator should not sell a product at a below-cost price for the purpose of driving out a competitor.²³ The following circumstances do not represent unfair competition: (1) selling fresh products; (2) disposing of overstocked products or products that are at or past their expiry dates; (3) seasonal reductions of prices; and (4) selling products at reduced prices to pay off debts, when lines of production change or when a business closes.

Article 12 provides that 'In selling a product, a business operator shall not make a tie-in sale against the wish of the buyer or attach other unreasonable conditions'. And article 6 states that 'Public utility enterprises or other business operators that have a legal monopolistic status shall not force others to buy the goods or services of their designated business operators in order to exclude other operators from competing fairly'. A violation of article 6 may attract a fine of between 50,000 yuan and 200,000 yuan, as well as the confiscation of between 100 per cent and 300 per cent of the illegally acquired revenues (article 23).

Article 7 prohibits government officials from coercing people into buying products from designated suppliers, as well as blockades of regional competition. The article states:

A local government and its subordinate departments shall not abuse their administrative power to force others to buy the goods of the operators designated by them so as to restrict the lawful business activities of other operators. A local government and its subordinate departments shall not abuse their administrative power to restrict the entry of goods from other parts of the country into the local market or the flow of local goods to markets in other parts of the country.

The Unfair Competition Law is enforced by the State Administration for Industry and Commerce (SAIC) and its branches at the provincial, city and county levels. All branches have investigative powers and can issue corrective instructions (including the suspension of business licences) and impose fines for violations of the law.²⁴ The law does not provide for criminal penalties except in cases of trademark infringements (article 21) and bribes (article 22). Even the extremely collusive behaviour of bid rigging does not trigger criminal penalties under the 1993 law, although it does under the Law of Public Tendering, which took effect in January 2000.

The Price Law

The main objective of the Price Law, enacted on 1 May 1998, is to curb price wars and predatory pricing in China's consumer goods markets. The law is enforced by the State Development and Reform Commission and local price administration agencies.

The law prohibits the following unfair pricing practices: price fixing (article 14), predatory pricing, discrimination against business operators, spreading

rumours of price hikes, attracting business through deceptive pricing, among others. The Unfair Competition Law addressed predatory pricing but did not define costs. The Price Law suggests that costs include production and operation costs. The provision regarding discrimination against particular business operators was designed to prevent monopolies from applying a price squeeze to drive out competitors. The Unfair Competition Law contains similar provisions regarding discrimination against particular business operations. Criminal penalties cannot be imposed under the Price Law, but it allows for fines of up to five times the illegal gains.

Regional and sectoral regulations

In addition to the national Unfair Competition Law, various provinces and major cities have also passed laws and regulations to counter unfair competition. For example, price fixing was first prohibited under regulations passed by Guangdong province. Beijing enacted its own Unfair Competition Law in 1994, shortly after the promulgation of the national law. By 2000 more than twenty provinces and cities had enacted their own unfair competition laws or regulations (Kong 2001: 15). Some sectoral regulations, for instance the 2000 Telecommunications Ordinance, have also incorporated competition provisions.

An evaluation of China's competition policy

China's competition policy regime has two major weaknesses: the lack of a comprehensive antimonopoly law and pervasive regional protectionism resisting the enforcement of competition law. Although the fines specified by the existing laws are fairly steep, deterrence is hampered by the weak enforcement system. China also needs to extend the coverage of laws and increase the probability that violations will be detected and punished. Another problem is that public awareness of competition laws is poor.

Table 2.4 describes the activities of the State Administration for Industry and Commerce in enforcing the Unfair Competition Law during 1995–97. Although the majority of cases dealt with infringements of trademarks or trade secrets, SAIC has also been combating antitrust violations and bid rigging. A large number of the antitrust cases were against public utilities. Most of the cases were dealt with through administrative measures, with only a small number turned over to the judicial system. This reflects the fact that competition law enforcement in China is primarily carried out through administrative channels.

In 1994 Chinese officials announced their intention to supplement the Unfair Competition Law with an antimonopoly law. Officials from SAIC and the State Economic and Trade Commission (SETC) drafted the Antimonopoly Law Outline. The outline has been revised several times since, often after suggestions from organisations such as the OECD, the World Bank, UNCTAD and APEC, as well as from countries that have antimonopoly laws (e.g., Germany, the United States, Japan, South Korea and Australia). The 1999 version of the outline, for example, covers the standard categories of business conduct (price discrimination, tying

Table 2.4 Competition cases concluded by China's State Administration for Industry and Commerce

<i>Type of case</i>	<i>1995</i>	<i>1996</i>	<i>1997</i>
Consumer protection/business dishonesty	711	2,160	2,441
Infringement of trademarks/trade secrets	4,361	8,856	9,296
Abuses of administrative power	22	38	13
Restrictions by public utilities	55	102	94
Predatory pricing	10	59	32
Tie-in sales	91	42	85
Bid rigging	16	23	37
Removing/concealing/destroying illegal assets	24	108	46
Other	n.a.	n.a.	2,847
Number of cases	5,290	11,388	14,891
Value of cases (million yuan)	419.1	738.2	843.9
Penalty (million yuan)	36.8	85.8	107.9
Cases transferred to judicial system	35	104	5

Note: n.a. means not available.

Source: State Administration for Industry and Commerce, China.

arrangements, exclusive dealing, predatory pricing, market division, collusion, abuse of market power, etc.) and structural changes such as mergers and acquisitions that might lessen competition.²⁵ The outline also briefly spells out how an enforcement agency should be established.

Perhaps unique to China is the inclusion of administrative monopolies in the proposed law. Four types of administrative monopolies are defined: forced transactions, regional monopolies, sectoral monopolies and compulsory associations that restrict competition. Among them, regional and sectoral monopolies are the most prevalent.

Regional monopolies exist under the protection of trade barriers erected by provinces and regions. Local protectionism blocks the entry of goods and services into the local market, or prevents raw materials or technology from being exported to other regions. Sectoral monopolies are large, integrated enterprise groups that also assume a regulatory role over a sector. The groups usually have ties with government ministries or departments and receive preferential treatment. As natural monopolies, public utilities also have characteristics typical of administrative monopolies. Operators in sectors such as water, power, gas, postal services, telecommunications, civil aviation and rail transport are sheltered from competition laws and government regulations.

The outline has not yet come into law. The long delay has mainly been because views differ on the introduction of an antimonopoly law.

One view is that the government should promote the formation of large enterprise groups and focus on developing economies of scale, so as to enhance

the international competitiveness of Chinese enterprises. The introduction of an antimonopoly law would work against these goals.²⁶

Another view supports the introduction of an antimonopoly law after firms have attained greater economies of scale. For the immediate future it is more important to oppose unfair competition such as cheating and vicious competition, rather than control industrial structure. An antimonopoly law can be introduced later.

To complement the Unfair Competition Law, China needs to develop an antimonopoly law that broadly controls monopolistic behaviour and restraints of trade that lessen competition. It may take some time before a consensus is reached about the best time to introduce an antimonopoly law. As China starts to fulfil its WTO commitments, and the dominance of the state-owned enterprises in the economy declines, attitudes toward antitrust laws will change. The ongoing deregulation of important industries such as telecommunications, transportation and public utilities will speed up the process of building an effective competition law.

Within the existing legal framework of competition law, perhaps the biggest problem is that the current enforcement mechanism cannot effectively deal with sectoral and regional monopolies. First, the leading agency dealing with market power, SAIC, is an agency at the ministerial level directly under the State Council. It is one of many government departments and does not have the authority to monitor the anticompetitive acts of other ministries in the way that Japan's FTC oversees administrative guidance. In fact, several new laws in recent years have weakened the enforcement power of SAIC. The 2000 Telecommunications Ordinance, for example, specifies that anticompetitive acts within the telecommunications industry should be investigated by the Ministry of Information Industry, a task that had previously been under SAIC's jurisdiction. Similarly, the agency now no longer has the authority to fight bid rigging. Under the 1999 Public Tendering Law, various (unspecified) government agencies now have this responsibility. These developments underscore the need to set up a truly independent enforcement agency that has the power to implement existing laws in a consistent and effective way.

Second, enforcement currently relies almost solely on local administrations for industry and commerce at the provincial, city and county levels. However, the prevalence of regional protectionism makes it difficult for law enforcers to carry out their duties. Motivated by economic and political interests, local governments often protect enterprises by putting up trade barriers, tilting the playing field in favour of local firms, or putting pressure on law enforcers investigating local firms. Since local governments appoint the heads of local Administrations for Industry and Commerce, it is difficult for them to enforce competition law independently and fairly. The existing enforcement system is not well suited for combating regional monopolies.

Finally, a distinctive feature of Chinese law is the inclusion of strict penalties. Fines under the Unfair Competition Law and the Price Law can be up to five

times the illegal gains for price fixing and three times the illegal gains for infringements of trademarks and refusals to follow instructions over other violations.²⁷ China has encouraged its citizens to report illegal acts. For example, the State Development and Reform Commission and the Ministry of Finance decided that individuals and groups reporting Price Law violations to the proper enforcement agency would receive a reward of 10 per cent of whatever fine is imposed. The reward can be higher for special cases but is generally no more than 2,000 yuan (*People's Daily*, 14 December 2001).

Although many in China are aware of the existence of competition laws, they are unsure what the laws prohibit. In one recent case in 2000, the managers of nine television manufacturing firms met to fix the prices of televisions.²⁸ They did not seem to be aware that this action would violate the 1998 Price Law. The meeting was held openly, with national media coverage, and the prices were announced to the public. The managers defended their action by saying that a collective decision was needed to end price wars in the industry. Officers from the State Development and Reform Commission had to state publicly that this was a breach of the Price Law.²⁹

COMPETITION POLICY IN HONG KONG³⁰

Hong Kong did not have a competition policy until 1998, when the government issued a policy statement based on a series of studies made by the Hong Kong Consumer Council (Consumer Council 1996).³¹ The objective of its competition policy is 'to enhance economic efficiency and the free flow of trade, thereby also benefiting consumer welfare'.³²

Instead of a competition law, the government has set up a sector-specific competition policy framework. Horizontal restraints of trade and abuses of market power that impair economic efficiency or free trade, or that are intended to distort the operation of the market, were included in the policy statement. For horizontal restraints, the following examples were given: price fixing; bid rigging, market allocation schemes, sales and production quotas; joint boycotts; and unfair or discriminatory standards among members of a trade or professional body that intend to prevent newcomers from entering or contesting the market. For abuses of market power, the following examples were listed: predatory pricing; setting price minimums for retail products or services for which there are no ready substitutes; and restricting the supply of products or services to the purchase of other products or services or to the acceptance of certain restrictions other than for the reasons of quality, safety, adequate service or other justifiable purposes.

The determination of whether a practice is restrictive 'must be made in the light of the actual situation. The intended purpose and the effects of the practice in question, and the relevant market or economic conditions, etc., must be all taken into account.'³³ Thus, the rule of reason, rather than the per se rule, would be followed even for practices involving price fixing and bid rigging, which are normally treated as per se illegal in most countries.³⁴

The government also followed a sectoral approach in its policy statement, the essence of which is to identify anticompetitive behaviour and encourage competition through administrative or legislative measures in each sector. Instead of establishing an overall law for the entire economy, the government has proposed setting different rules to govern competition in different sectors, with the administration of these rules to be carried out by sector-specific agencies. For example, the Telecommunications Ordinance and the Broadcasting Authority Ordinance specify the principles to be followed in promoting competition in the telecommunications industry and the broadcasting industry, respectively. In addition, detailed competition provisions were incorporated in the contracts between the government and each licence holder. The Telecommunications Authority and the Broadcasting Authority enforce these provisions and issue warnings or instructions if violations occur.

For less severe violations, the authority concerned might require a licensee to cease the action prohibited by the rules, but serious violations may attract a fine. Up until 2000 the maximum fine that the Telecommunications Authority could impose for violations of competition provisions or breaches of a licence was HK\$20,000 for the first offence (approximately US\$2,600), HK\$50,000 for the second offence and HK\$100,000 for any subsequent offences. These fines were raised to HK\$200,000, HK\$500,000 and HK\$1,000,000 in early 2000 when the Telecommunications Ordinance was amended. The Telecommunications Authority can request the court to impose a penalty not exceeding 10 per cent of the turnover of the licensee over the period of the breach, or HK\$10 million, whichever is higher. For the broadcasting industry, the penalty is an amount not exceeding 10 per cent of the licensee's turnover over the period of the breach, or HK\$2 million, whichever is higher. It is possible that the authorities may decide to suspend an operator's licence.

The Telecommunications (Competition Provisions) Appeal Board was established to hear appeals against the Telecommunications Authority's decisions. The appeal board's decisions are final. A board has not yet been set up for the broadcasting industry.

Table 2.5 lists the types of cases considered by the Telecommunications Authority during 1998–2001. Although over half of the cases related to advertising conduct, some important competition cases were considered over this period. Most cases were resolved without a fine, including a price-fixing case in January 2000 that involved all six mobile service providers.³⁵

An evaluation of Hong Kong's competition policy

Hong Kong's current competition policy framework is transparent. During the three years since the establishment of its competition policy, the government, particularly the Telecommunications Authority, has handled competition cases in an open, transparent and timely manner.³⁶ Although there have been some controversies, the government seems to be satisfied with the current approach to competition policy.

Table 2.5 Competition cases completed by the Hong Kong Telecommunications Authority

	1997-98	1999	2000	2001 (Sept.)	Total
Price fixing			1	0	1
Predatory pricing		1	1	0	2
Mergers/acquisitions	3	0	1	0	4
Unauthorised discounting		8	1	0	9
Breach of advertising code		22	13	5	40
Exclusive dealing		2	0	0	2
Undue discrimination/unfair					
Cross-subsidisation		3	0	0	3
Customer complaints		3	2	3	8
Operation without a licence		0	0	3	3
Other		6	0	0	6
Total	3	45	19	11	78

Source: Office of the Telecommunications Authority, Hong Kong.

Chen and Lin (2002) argue that there are two fundamental drawbacks with a sectoral approach.³⁷ First, a sectoral approach may hinder the efficient allocation of resources across the economy. In choosing where to invest, private agents not only follow price signals but also consider regulatory and institutional barriers. Under a sectoral approach, rules will be interpreted and enforced differently by different regulatory agencies. Varying institutional environments will therefore imply different rates of return on investment, and this will affect the decisions of private investors.

The second fundamental problem has to do with the dual roles performed by government regulatory agencies under a sectoral approach. On the one hand, as regulators of natural monopolies, they must fulfil their regulatory duties, such as issuing and administering business licences, and reviewing and monitoring standards and prices. On the other hand, they hear complaints and judge the behaviour of the firms they regulate. When the same agency has dual responsibilities, it is difficult for outsiders to believe that decisions can be made independently.

Such a conflict occurred in a recent telecommunications acquisition case dealt with by the Telecommunications Authority. In 1997 Hong Kong Telecom CSL Ltd was unsuccessful in obtaining a mobile service licence through a bidding process, but was allowed to acquire the successful bidder, Pacific Link. The Telecommunications Authority was criticised for having compromised the regulatory environment by allowing the loser of the bidding process to buy back a licence. The Authority had difficulty defending its position because it

was unable to convince critics that it had acted fairly in granting the licences and approving the acquisition. Similarly, it was not able to establish that its approval of the transaction was independent of its ongoing negotiations with Hong Kong Telecom (CSL's parent) on the termination of Hong Kong Telecom's exclusive licensing contract in the international calls market. Since the government had to compensate Hong Kong Telecom for early termination of its monopoly status, questions were raised as to whether the Telecommunications Authority's approval of the acquisition of Pacific Link was part of a compensation package for the early termination of the monopoly contract. Had an independent authority approved the acquisition and the Telecommunications Authority been responsible for making licence decisions only, this conflict would not have arisen.

The criticisms of the Telecommunications Authority's actions are not specific to individual cases. Rather, they reflect the problems of a sectoral approach that stems from the presence of asymmetric information, and will likely also arise in other sectors.

Chen and Lin (2002) further argue that a comprehensive competition law enforced by an independent competition authority would overcome these two fundamental drawbacks and better promote competition in Hong Kong.

LESSONS FROM EAST ASIA

In many Asian countries, external pressure or even direct intervention from foreign countries triggered the introduction of competition policy. Japan's 1947 Antimonopoly Act was imposed by the Allied Occupation forces, and the extensive changes of the 1990s were a response to pressure from the United States. In Taiwan the threat of trade retaliation from the United States played a decisive role in the passage of the Fair Trade Law in 1991 after nearly a decade of deliberation and revisions (Liu and Chu 2002). Indonesia's new competition laws were a direct consequence of an International Monetary Fund program designed to prevent the economy from falling into a financial crisis like the one in 1998 (Pangestu et al. 2002). As the world economy becomes more integrated, countries will be forced by both external and internal forces to establish rules for fair competition. Although economic integration has helped promote competition policy,³⁸ domestic demand is a key prerequisite for establishing a truly effective antitrust system. What are the main obstacles for developing an effective competition policy in Asian countries? What lessons can be drawn from the cases reviewed here for other countries in the region?

In East Asia competition policy is sometimes in conflict with other policy objectives. Asian economies have a long history of heavy government intervention through state enterprises or through administrative guidance of the flow of resources into selected industries. In Japan in the 1970s and 1980s, in the newly industrialised economies seeking to catch up with the industrialised world, as well as in other economies in the region, the state has played a crucial role in guiding development. The promotion of industrial policy has influenced

industrial structures, increased concentration and market power, and helped create a culture of reliance on the government. It would be naive to expect to build an effective antitrust system in such an environment overnight.

Influences from government-supported enterprises may delay the introduction of competition policy or affect the scope and enforcement of such policy. This is illustrated by China's failure to enact an antimonopoly law. In Korea the state's desire to protect and promote the country's large conglomerates (*chaebols*) has meant that enforcement of the 1980 Monopoly Regulation and Fair Trade Act has focused on unfair practices rather than abuses of monopoly power (Shin 2002). It is reasonable to predict that there will be widespread resistance to the introduction of competition policy and to the development of a culture for fair competition in the region (Round 2002).

There has been a concern among developing countries that competition policy may adversely affect economic growth by imposing restrictions on the size of domestic industries and by depriving the government of its regulatory and discretionary power. Some hold the view that competition policy should be implemented only after economic growth is achieved through industrial policy.³⁹

Japan's success in creating a 'miracle economy' in the 1960s and 1970s might lend support to the argument that industrial policy should come before competition policy. However, the increasing integration of the world economy has made it extremely difficult, if not impossible, for a country to grow without inflows of foreign capital and technology, and without liberalising its domestic industries and opening up to trade with the rest of the world. Adopting competition policy will help attract foreign investment, as well as promote trade and competition in domestic markets. It seems clear that the only way to achieve economic growth and the efficient allocation of resources is to utilise the market system and competition process. Competition law is an indispensable element of a modern market system, as it sets the rules of the game to create a level playing field for competition.

The passing of competition law does not guarantee an effective competition regime. A qualified, independent enforcement agency is crucial for the rigorous and effective enforcement of competition policy, as the drafters of America's 1914 Federal Trade Commission Act were aware.

The principle of independence has been emphasised repeatedly in East Asia, but experiences in the region suggest that the action does not match the rhetoric. In Japan the composition of the JFTC has been described as an impediment to the enforcement of antimonopoly law (Sanekata and Wilks 1996: 124).

Thailand's experience also underscores the importance of institution building. The Thai Competition Commission is chaired by the Ministry of Commerce. In two cases against large companies in 2000, the commission's poor institutional design was blamed for its inability to find the defendants guilty of violating the 1999 Trade Competition Act (Poapongsakorn 2002).⁴⁰

Finally, acting independently is different from being seen to act independently. Hong Kong's experience with assigning dual roles to sectoral regulatory agencies indicates that problems with asymmetric information should be taken into account when designing the enforcement agency. This suggests that the principle of independence should be about building an enforcement agency that is willing, has the capacity, and can be seen to act independently.

CONCLUSION

This chapter has highlighted some common difficulties that many East Asian countries face in developing an effective competition policy. These include a lack of domestic support for competition policy, conflict with other national policies, particularly industry policy, the influence of state-supported companies, weak enforcement, and poor institutional design. Given the history of these countries, such obstacles are likely to continue to hinder the development of competition policy in the near future. However, Japan's achievements in strengthening antimonopoly rules in the 1990s suggest that competition policy can move at a much faster pace. As heavy government intervention becomes less popular and countries become more integrated with the world economy, they will find it in their best interests to set fair rules of the game for competition. This should not be surprising, as good competition laws are needed for the success of a market economy.

NOTES

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- 1 Non-pecuniary penalties are not considered here.
- 2 For an analysis of the trends in private and public antitrust cases in the United States, see Lin et al. (2000).
- 3 Different countries may adopt different rules regarding the same conduct. For example, price fixing is considered *per se* illegal in the United States, and any effort by cartel members to set prices jointly is sufficient to prove that they have violated the law. This is so even when the cartel members did not implement the agreement or the agreement had no adverse effect on consumers. In Japan, however, the Japan Fair Trade Commission has to further prove that the cartel members followed the agreed plan and that the conduct affected competition.
- 4 This system has been criticised for encouraging too many lawsuits.
- 5 These activities were outlined in JFTC Notification 11 of 1953 and JFTC Notification 15 of 1982.
- 6 In August 1996 Yasuchika Negoro became the first JFTC chair in thirty-three years to come from outside the Ministry of Finance (MOF) or the Bank of Japan. Since his appointment, the JFTC has introduced greater transparency into its rules and systems.
- 7 The JFTC also implements the Act against Unjustifiable Premiums and Misleading Representations and the Act against Delays in Payment of Subcontract Proceeds, etc., to Subcontractors. These are special laws complementing the Antimonopoly Act.

- 8 A warning is a written guidance and is stronger than a caution. There does not need to be a legal case for a warning, and no penalty will be imposed. If the JFTC finds evidence of a substantial violation of the Antimonopoly Act, it can issue a recommendation, which is usually accompanied by a cease-and-desist order. The respondent must notify the JFTC within a certain period (usually ten days) whether it accepts the recommendation. If the JFTC receives an acceptance, it will close the case by issuing a final recommendation. There will be no further investigation or criminal proceedings. If, however, the respondent denies the alleged conduct and refuses to accept the recommendation, the case becomes a complaint and a trial hearing will be held. If the respondent rejects the decision of the hearing, he or she can appeal to the Tokyo High Court and, if necessary, to the Supreme Court.
- 9 Japanese businesses were highly critical of article 8 as they saw economies of scale as the way to revitalise the postwar economy.
- 10 Resale price maintenance occurs when upstream firms set vertical restrictions on retail prices.
- 11 Shogo Itoda, Commissioner of the JFTC, rejected this claim, saying that 'the JFTC barks loudly and bites violators hard' (Itoda 2000).
- 12 According to Iyori and Uesugi (1983: 19), 'the major exemption laws were enacted until 1952. The Stabilisation of Specific Small and Medium Enterprise Temporary Measures Act, which authorised depression cartels for specific small enterprises, and the Export Trading Act, which permitted export cartels, were both enacted in that year. Since that time, many exemption laws intended to prevent excessive competition between small enterprises or to promote rationalisation were enacted, revised or strengthened almost every year ... Many exemption laws opened the door for approval of cartels not by the JFTC but under the guidance of the ministries in charge of the industries. They also provided for restrictions on the activities of non-members of cartels in order to strengthen cartel activities.'
- 13 The Japanese government has not approved a recession cartel since 1989, despite Japan being in recession for the entire 1990s.
- 14 The amendment of the Antimonopoly Act in May 2000 set the maximum penalty that could be imposed on companies at 500 million yen, up from the previous maximum of 100 million yen. However, there are no criminal penalties for unfair trade practices.
- 15 About thirty-five exemptions under twenty laws other than the Antimonopoly Act and the Exemption Act were abolished or modified under the 1997 Omnibus Act. The 1999 Omnibus Act put in place measures to repeal the depression cartels and rationalisation cartels under the Antimonopoly Act, abolish the Exemption Act, and limit the scope or establish JFTC procedures concerning six exemptions under four other laws. Another amendment to the Antimonopoly Act took effect in June 2000, repealing section 21 and thereby eliminating the antimonopoly exemption for the electricity, gas and rail sectors, as well as other sectors that could be characterised as natural monopolies.
- 16 In 1999 the Antitrust Division in the US Department of Justice had 819 staff, the US Federal Trade Commission had 964 staff, and the Competition Directorate General of the European Union had 486 staff (JFTC web site: <http://www2.jftc.go.jp/e-page/index.htm>).
- 17 The US Trade Representative expected an increase to at least 10 per cent (Sanekata and Wilks 1996).
- 18 Under the treble damages system, the fine would be 36 per cent.
- 19 When bringing cases under the Antimonopoly Act, the full burden of proof is on the plaintiff, who must provide evidence of a causal relationship between

the cartel and the injury suffered, and of the extent of damages incurred. Moreover, with no allowance for double, treble or punitive damages, the incentive for bringing a private lawsuit is low. Class action suits are now allowed in Japan, but plaintiffs cannot pool litigation costs. In addition the likelihood of winning a private antitrust case is small, as courts side with the defendant in most instances.

- 20 Iyori (1986) argues that cultural differences lead Asian people to settle cases privately rather than through the courts.
- 21 A version of the law in English can be found at <<http://www.apeccp.org.tw/doc/China.html>>.
- 22 The Unfair Competition Law does not prohibit price cartels (price fixing), which are per se illegal in almost all competition laws in other countries. The omission was corrected in the 1998 Price Law.
- 23 The law, however, does not give a definition of costs.
- 24 No new agency was created to enforce the 1993 Unfair Competition Law. SAIC is under the State Council and has a long tradition of protecting market order. Its other duties include administration of business licences, registration of trademarks and the enforcement of other laws such as the Trademark Law and the Advertisement Law.
- 25 For a brief description of the outline, see Chen (2000).
- 26 For more on administrative monopolies, see Wang (1998) and Yang (2002).
- 27 The laws, however, do not provide for criminal penalties.
- 28 The nine producers (Konka, Skyworth, TCL, Rova, Hisense, Xococo, Jinxing, Panda and Westlake) collectively had more than 80 per cent of the Chinese market. After several price wars, the manufacturers decided to fix television prices and agreed that televisions sold at lower prices would be considered poor quality. The alliance said that prices that were any lower would not allow manufacturers to recoup their production costs (*China Daily*, 25 June 2000 and 11 August 2000). The case has not yet been considered formally by the government.
- 29 In a similar case, the Chinese Automobile Industry Association stated in January 2000 that China's ten car manufacturers had decided not to fight a price war by lowering prices (*China Daily*, 3 August 2000).
- 30 This section is based on Chen and Lin (2002).
- 31 In October 1992 the Hong Kong Consumer Council launched a series of studies on market competition in sectors such as banking, retailing, gas supply, telecommunications, radio broadcasting and real estate. Low levels of competition were found in most sectors. The November 1996 report on competition policy in Hong Kong strongly recommended the adoption of a comprehensive competition law and the establishment of an independent competition authority (Consumer Council 1996).
- 32 See <<http://www.info.gov.hk/tib/roles/psoc.htm>>.
- 33 See <<http://www.info.gov.hk/tib/roles/psoc.htm>>.
- 34 According to the Secretary for Trade and Industry, Denise Yue Chung-ye, firms can achieve economies of scale and provide better service under many 'apparently collusive agreements' and it 'would not be proper to rule these out indiscriminately' (*South China Morning Post*, 4 November 1997).
- 35 This price cartel lasted for two weeks and the companies rescinded the simultaneous price increases after receiving warning letters from the Telecommunications Authority. In another incident, the dominant operator in the international calls market was fined HK\$50,000 for having repeatedly violated the terms of its contract that prohibited it from offering unauthorised discounts

- to its customers. This is probably the heaviest fine levied so far in a competition case in Hong Kong.
- 36 Since 1997 the Telecommunications Authority has handled over eighty-one competition cases. For details, see Chen and Lin (2002).
- 37 The Consumer Council pointed out that the sectoral approach is piecemeal and fails to provide consistent, comprehensive guidelines. It also stated that competition provisions in different sectors may be subject to different interpretations and carry different penalties, and that a sectoral approach may be prone to the capture of regulators by interest groups. The government, on the other hand, stated that it did not see the need to introduce a broad competition law and that a sectoral approach is less expensive, less intrusive and can take into account industry conditions and provide greater certainty to the business community.
- 38 For a detailed discussion of the link between trade policy and competition policy, see Wu and Chu (1998).
- 39 The promotion of economic development is one of the objectives of the UNCTAD Model Law.
- 40 One of the companies serviced cable televisions and the other was in beer manufacturing.

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