법제교류 연구 16-18-②
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# A Comparative Study on Competition Law Enforcement in South Korea and China's Special Administrative Regions of Hong Kong and Macao

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# Abstract

## Ⅰ. Scope, Purpose and Methodology of Research

□ Review of legislative development of Korean competition law and the assessment of the same is provided as a guidance for the newer competition regimes such as Hong Kong and Macao where competition law was recently enacted or is still in the process of preparations for enactment.

□ Review and analysis of Hong Kong and Macao's competition laws are included.

□ Respond to the current policy needs of the small Asian jurisdictions such as Hong Kong and Macao to develop their own competition law regimes by analyzing the experiences of South Korea in competition law enforcement and by drawing policy recommendations.

## Ⅱ. Contents

□ Competition Laws of China's Special Administrative Regions of Hong Kong and Macao

○ Hong Kong Consumer Council published a report to recommend the adoption of a comprehensive competition law in 1996, and the

Competition Ordinance was adopted by the Hong Kong Legislative Council in 2012.

○ Examples of conducts that are excluded from the prohibited anti-competitive practices include conduct enhancing overall economic efficiency, compliance with legal requirements, services of general economic interests, etc.

○ One of the obvious peculiarities of the Hong Kong competition law regime is the absence of the cross-sector merger control.

○ Hong Kong and EU competition rules show similarities in substantive rules prohibiting anti-competitive conduct and abuse of dominant position with certain differences concerning the determination of dominance or "substantial degree of market power" in Hong Kong Competition Ordinance.

○ Unlike the EU and China, Hong Kong has opted for a judicial system of enforcement for the implementation of its competition law. This means that the Competition Commission does not have the power to impose fines. This power is vested with the courts (i.e. the Competition Tribunal).

○ Macao has not yet made any decisive steps towards adoption of a comprehensive competition legislation. Neither the 1992 Agreement for Trade and Cooperation with EU nor the 2003 Closer Economic Partnership with Mainland China impose any obligations on competition matters.

○ In Macao in the sectors that are not directly regulated by the government, the businesses are free to exercise their own commercial policies subject to the general rules related to economic activity such as company law, contract law, taxation, etc.

○ The Macao Commercial Code has a general clause and the non-exhaustive list of specific situations such as unfair competition acts that provides sufficient flexibility for enforcement; however, judicial enforcement of competition rules remains scarce.

○ Public consultation in Macaohas demonstrated substantial public support for adoption and enforcement of competition rules; it did not produce a clear vision of an enforcement framework such as establishment of a competition authority.

□ Competition Laws of South Korea

○ The shift in the economic policy from the government-driven to the market-oriented in the 1980's was symbolized by the enactment of the Monopoly Regulation and Fair Trade Act.

○ Multitudinous amendments of the MRFTA were made throughout the history, sometimes triggered by the market situation, sometimes by the government's policy, and other times as a preventive measures or a curing strategy to fix problematic activities in the market.

○ The government may seem too assertive in its intervention into the market in Korea's case through MRFTA; however, without fast and hard measures to intrude the already-built monopolistic and

abusive pricing system, the MRTFA would not have made any meaningful effect.

○ The purpose provision of the MRFTA enumerates four types of acts that needs to be regulated and/or prohibited; (1) the abuse of market-dominance position, (2) concentration of economic power, (3) undue collaborative acts, and (4) unfair business practices, and all three but the last one (UBP) mirror other leading competition law regimes.

○ Different types of measures were adopted into the provisions of the MRFTA that provides protection for the SMEs: (1) empowering SMEs in their competition against or transaction with large enterprises, (2) placing regulations applicable only to large enterprises and thereby protecting SMEs indirectly, (3) taking into consideration the harmful effects drawn upon SMEs when considering penalties for violations of the competition law.

○ The unfair trade practices, a/k/a fair competition provision, in Articles 23 and 29 MRFTA define the existence of unfair trade practices even without market dominance or anti-competitive agreement.

○ When the combined business is the largest in the sector, and when the combined enterprise's market share takes at least 25 % or more than the second largest undertaking's market share, the presumption of market dominance arises under Article 7 MRFTA.

○ The law provides a non-exhaustive list of abusive acts that any dominating enterprise must refrain from conducting, and the list covers numerous forms of abusive conduct.

○ In terms of the implementation and execution of the MRTFA, one of the most outstanding characters is that the KFTC has investigative and policy-making power, that it possesses substantial discretionary authority for enforcing the law when dealing with the complaints.

□ Comparison and Conclusion

○ In terms of maturity of the competition law regime Hong Kong, Macao, and South Korea are very distinct from each other.

○ All three jurisdictions have encountered similar problems on the way of incorporation of competition laws into their legal systems. In South Korea and Hong Kong the adoption of competition law has been a relatively long process with various groups opposing the adoption of competition law. Difference between the opposition in the South Korean on one hand and the Hong Kong/Macao on the other is that it came mainly from the large conglomerates in South Korea whereas the Hong Kong and Macao markets may not have such distinctive large players to form their unified voice.

## Ⅲ. Expected Effects

□ While both Hong Kong and Macao are currently in their early phases of the development and implementation of the

competition rules, there are several focus areas where they could learn from a more mature South Korean competition enforcement experience: (1) investigatory practices, (2) extra-territorial application of competition rules, (3) treatment of SMEs, (4) merger control.

□ Possible suggestions for changes on laws and policies for South Korea could also be drawn.

Key Words : Competition Law, Korean Fair Trade Commission, Hong Kong, Macao, South Korea

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# Ⅰ. Introduction

## A. Scope and Purpose of Research

The enforcement of competition rules is one of the most important state policies contributing to the functioning of competitive markets, strengthening the competitiveness of the national economies and according wider choice and lower prices to the consumers. If competition policy can be defined as "a set of policies and laws which ensure that competition in the market place is not restricted in such a way as to reduce economic welfare",[1] then it would be reasonable to assume that different markets (i.e. markets with differing competitive conditions might require different kinds laws and policies), which would effectively protect and promote competition within such markets. Furthermore, if one would define the competition law as "applying a body of legal rules and standards to deal with market imperfections and restore desirable competitive conditions in the market"[2] one should also consider that differing market realities might require defferent sets of rules and standards that are capable of mitigating the existing anti-competitive problems.

The current transnational landscape of competition law regimes can be best described by the terms "universal proliferation" and "global convergence".[3]

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1) M. Motta, *Competition Policy, Theory and Practice* (Cambridge University Press, 2004), p. 30.

2) M. Dabbah, "Measuring a System of Competition Law: A Preliminary View" (2000) 21 *European Competition Law Review* 369.

3) See e.g. D. Gerber, "Asia and global competition law convergence" in M. Dowdle, J. Gillespie, I. Maher *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* (Cambridge, 2013) pp. 36-52; L.T. Orlanski, "Searching for the Basis of International Convergence in Competition Law and Policy" *Global Antitrust Review* 4 (2011) 7-47.

As mentioned by the UNCTAD in 2007, a total of 113 countries and regional groupings have adopted or were in the process of adopting competition legislation.[4] By 2009 the number of national competition authorities (NCAs) joining the International Competition Network has reached 104 NCAs from 92 jurisdictions.[5] As a result, the universal proliferation of competition law regimes became a largely uncontested trend. Against this background, there are only few jurisdictions[6] that have not made comprehensive competition legislation a part of their national legal system. In this regard the Macao SAR represents a rare example of a developed market economy without a competition law regime.[7] While Mainland China[8] and most recently Hong Kong SAR[9] have made their policy

4) UNCTAD Guidebook on competition systems (Geneva, 2007), available at http://unctad.org/en/Docs/ditcclp20072_en.pdf.

5) International Competition Network, Factsheet and key messages, p. 1, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf.

6) For example, according to 2013 data, five ASEAN countries have not yet implemented a comprehensive competition law: Brunei, Cambodia, Lao PDR, Myanmar, and Philippines. See C. Lee and Y. Fukunaga, "ASEAN Regional Cooperation on Competition Policy" *Journal of Asian Economics* 35 (2014): 77-91.

7) As reported by the Global Competition Forum on 13 May 2010, available at http://www.globalcompetitionforum.org/asia.htm#Macau.

8) Anti-Monopoly Law of the People's Republic of China was adopted by the Standing Committee of the 10th National People's Congress on 30 August 2007 and is effective as of 1 August 2008. See generally A. Emch and D. Stallibrass, *China's Anti-Monopoly Law: The First Five Years* (Kluwer, 2014); D. Wei, "Antitrust in China: An Overview of Recent Implementation of Anti-Monopoly Law" *European Business Organization Law Review* 14(1): 119-139 (2013).

9) Competition Ordinance (Cap. 619) of 14 June 2012. See generally T. Cheng, "Ready for Action: Looking Ahead to the Implementation of Hong Kong's Competition Ordinance" *Journal of European Competition Law & Practice* 5(2): 88-94 (2014); Sharon Henrick, Joshua Cole, The Hong Kong's Competition Commission gives some advice to companies preparing for implementation of the Competition Ordinance, 14 June 2014, e-Competitions Bulletin June 2014, Art. N° 73552; Nick Taylor, Peter J. Wang, Sébastien J. Evrard, Emily S.Y. Lam, Donald Hess, The Hong Kong Legislative Council finally passes a comprehensive competition law, 22 June 2012, e-Competitions Bulletin June 2012, Art.

choice in favor of comprehensive competition legislation, Macao SAR continues to rely on economic regulation and self-correcting market forces. The majority of the younger competition regimes, including Asian ones, have followed the lead of the more experienced competition jurisdictions, such as European Union (EU) and the United States (US), in designing their national competition rules and building the institutional and procedural enforcement frameworks.[10] Although the "transplantation" of foreign competition rules into the domestic legal order has numerous benefits, it has been argued that a differentiated approach taking into account different market structures of the "follower" countries is to be recommended.[11] The experiences of the "new" EU Member States and non-EU countries with "copy-pasting" of the EU competition rules have provoked strong criticisms concerning the functionality of this approach.[12] The assessments of the competition law enforcement practices in the "new" EU Member States demonstrated the need for more research to be carried out on the application of competition rules in small transition economies.[13] Although the transposition of EU competition rules in these countries has

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N° 49929; Marc Waha, Julienne Chang, The Hong Kong Legislative Council introduces a cross-sector competition law regime, 14 June 2012, e-Competitions Bulletin June 2012, Art. N° 48223.

10) See e.g. J. Padilla and M. Gal, "The Follower Phenomenon: Implications for the Design of Monopolization Rules in a Global Economy".*Antitrust Law Journal*, Vol. 76, No. 3, (2010).

11) See E. Fox and M. Gal, "Drafting Competition Law for Developing Jurisdictions: Learning from Experience" in *Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar, 2014).

12) See e.g. R. Karova and M. Botta, "Five Years Enforcement of the Competition Law in the Republic of Macedonia – Time for an Assessment" *Mediterranean Competition Bulletin* No. 2 (November 2010).

13) See A. Svetlicinii and M. Botta, "Article 102 TFEU as a Tool for Market Regulation: "Excessive Enforcement" Against "Excessive Prices" in the New EU Member States and Candidate Countries" 8(3) *European Competition Journal* (2012), 473 – 496.

numerous benefits, it has been argued that a differentiated approach taking into account different market structures is to be recommended.[14)]

South Korea has accumulated substantial experience[15)] in the enforcement of its competition law since its adoption in the 1980 as the Monopoly Regulations and Fair Trade Act (MRFTA) and supplemented by sector-specific legislation.[16)] In the development and reforming of its competition legislation the South Korean legislators and enforcers have faced similar challenges as those encountered by the emerging competition law regimes in China and its SARs, Hong Kong and Macao: state regulation of economic activities, market dominance of the state-owned enterprises and privately owned conglomerates, lack of competition culture and acceptance of the anti-competitive behavior in business transactions, lack of experience and lack of capacity of the competition authorities, challenges related to the investigation and prosecution of anti-competitive behavior based on indirect and economic evidence, etc. This experience is particularly relevant for the emerging competition law regimes in Hong Kong and Macao, where the drafting and enforcement of competition rules currently appears at a very early stages of their development.

The proposed comparative study will review the South Korea's experiences in the enactment and enforcement of competition (antitrust) rules. The proposed study will produce a timely assessment of the South Korean

14) See D. Geradin and D. Henry, "Competition Law in the new Member States: Where do we come from? Where do we go?" in Modernisation and Enlargement: Two Major Challenges for EC Competition Law (Intersentia, 2005).

15) See Y. Jung and S.W. Chang, "Korea's Competition Law and Policies in Perspective Symposium on Competition Law and Policy in Developing Countries" 26(3) *Northwestern Journal of International Law & Business* (2006), 687-728

16) See Y. Jung and S.W. Chang, "Korea's Competition Law and Policies in Perspective Symposium on Competition Law and Policy in Developing Countries" 26(3) *Northwestern Journal of International Law & Business* (2006), 687-728

competition enforcement framework and provide valuable lessons for further development of competition law regimes in Hong Kong and Macao. While in Hong Kong the Competition Commission has just commenced the effective enforcement of the Competition Ordinance, in Macao the government and the legislators are still working on the draft competition legislation. Thus, both jurisdictions are currently in need of a timely guidance and directions concerning further development of their legislative (in case of Macao) and enforcement (in case of Hong Kong) frameworks.

## B. Methodology and Significance of Research

The aim of the proposed research is to produce a comparative study on the competition law regimes in South Korea, Hong Kong and Macao with particular focus on the following research questions, which are directly relevant for the development of the competition law regimes in the China's SARs: (1) comparative analysis of the substantive competition rules and basic concepts such as anti-competitive conduct (agreements, concerted practices, abuse of dominant position, etc.); (2) comparative analysis of the institutional frameworks (structure and powers of the competition authorities: Korea Fair Trade Commission and Hong Kong Competition Commission); (3) comparative analysis of the procedural framework for competition enforcement: administrative, civil and criminal; (4) overview of the South Korean competition law enforcement practice in order to identify challenges and opportunities for other emerging competition law regimes.

The proposed research is aimed to respond to the current policy needs of the small Asian jurisdictions, such as Hong Kong and Macao, to

develop their own competition law regimes and to contribute to the filling of the existing gap in the legal literature that largely overlooks the potential lessons in competition law enforcement that the Asian jurisdictions can learn from each other focusing instead on the antitrust experience of the EU and the US. Hence, it will analyze the experiences of South Korea in competition law enforcement and will attempt to draw policy recommendations for small Asian jurisdictions, such as Hongs Kong and Macao, which can be also relevant for the members of the ASEAN with the young and emerging competition law regimes, which would fit their economic and regulatory needs for protection of market competition and economic development. The scholarly significance of the project is at least three-fold: (1) the project takes an original approach towards experience sharing in the field of competition law, which is currently predominant in the legal literature and international policy discourse; (2) the project will be based on the comparative study of the legislation and enforcement practices of South Korea, Hong Kong and Macao, which will allow to identify and explain challenges and opportunities for competition law enforcement in these jurisdictions; (3) the proposed research will formulate policy recommendations that can be pursued by the emerging competition law regimes in Asia that decided to employ competition law and policy for protection of market competition and market regulation of their national economies.

This research was conducted as part of the comparative research series performed by scholars of member institutions of Asia Legal Information Network (ALIN), where Korea Legislation Research Institute (KLRI) serves as the secretariat. In this research, Jiyeon Choi of KLRI took the lead on Chapter Ⅲ on Korean Law while Alexandr Svetlicinii of the

University of Macau, Faculty of Law, provided Chapter Ⅱ on Law of China SARs. Introduction in Chapter Ⅰ, Comparison and Conclusion in Chapter Ⅳ were jointly prepared by both scholars.

# Ⅱ. Competition Laws of China's SARs

## A. Legislative History of Competition Laws and Regulations of China's SARs

### 1. Hong Kong's Legal Framework

The Hong Kong SAR has been praised as the world's freest economy with little government intervention in business operation.[17] Under the Laissez-faire approach the government seldom, if ever, attempted to fine-tune the level of macroeconomic activities and has continuously sought to keep intervention into the market system at a minimum.[18] This, however, does not mean that Hong Kong markets have not been affected by anti-competitive practices of the private actors. From the times of British administration of Hong Kong, monopolies existed in various economic sectors such as telecommunications, airlines, banking, insurance, legal services, etc.[19] Even prior to the resumption of the Chinese sovereignty over Hong Kong various actors have raised their concerns over the absence of the cross-sector competition rules: "Hong Kong is proud of its free and competitive markets. But a more sophisticated and prosperous community has become increasingly unwilling to accept unfair and discriminatory business practices. The public has already begun

17) Williams Mark, "Hong Kong: myths, perceptions and reality", *Competition Policy and Law in China, Hong Kong and Taiwan*, (Cambridge: Cambridge University Press, 2005) 223.

18) Chen Edward K.Y, Lin Ping, "Competition Policy under Laissez-Faireism－Market Power and its Treatment in Hong Kong", *Review of Industrial Organization,* (21)2002(2) 145－166.

19) Cheng Leonard K, Wu Chang-Qi, "Competition and Competition policy", Pacific Economic Review, (5)2000(2), 285.

to voice alarm at the use of market power by suppliers in areas of special importance to the ordinary family's wellbeing."[20]

For a long time the adoption of anti-monopoly regulations was not considered since it would require government's interference in the business operations, which could distort the free market regime. This approach has continued until 1996 when Hong Kong Consumer Council[21] published a report to recommend the adoption of a comprehensive competition law.[22] This event marked the beginning of the Hong Kong's road towards establishment of its competition law regime.[23] This road has been followed until 2012, which has been marked by the adoption of the Competition Ordinance by the Hong Kong Legislative Council.[24]

The adoption of the Competition Ordinance has been preceded by a lengthy public debate on the necessity and shape of the eventual competition law regime. The discussion has focused among others on the following issues: (1) the need for a competition law; (2) the need for a comprehensive cross-sector competition law; (3) which jurisdiction should serve as a reference for Hong Kong; (4) how to design the institutional framework for enforcement of competition rules; (5) factors that should shape competition legislation and its enforcement; (6) objectives of the competition law; (7) private enforcement of competition rules; (8) concerns of the SMEs; (9) immunity from prosecution and leniency program, etc.

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20) Hong Kong Legislative Council, Official Record of Proceedings, 7 October 1992, 16. Available at: http://www.legco.gov.hk/yr92-93/english/lc_sitg/hansard/h921007.pdf.

21) Hong Kong Consumer Council, https://www.consumer.org.hk/ws_en/.

22) Consumer Council, Competition Policy: The Key to Hong Kong's Future Economic Success, November 1996, available at: https://www.consumer.org.hk/web/CompetitionStudyReports/1996-11_Competition_policy.pdf.

23) See Geraldine Johns-Putra, Miranda Noble, "Hong Kong", *Competition Law in Asia Pacific: A Practical Guide,* (2015) 167-233.

24) Hong Kong SAR Legislative Council, http://www.legco.gov.hk/index.html

As mentioned before, for a long time, the government of Hong Kong has adopted a non-intervention policy towards market regulation and has taken the stance that a free economy must also be a competitive one. Nevertheless, while the external market segment is undoubtedly competitive, the domestic market for goods and services is less so. In fact, many sectors of the domestic market were dominated by private monopolists (electricity, gas), duopolies (ports, supermarkets), oligopolies (petroleum), and cartels (stock- broking, bank interest rates, professional services, travel agents, school textbook publishing, etc.).[25)]

In 1996, the Consumer Council published a report, which focused on the absence of competition policy and advocated the adoption of a general competition legislation.[26)] Initially the government opposed this proposal because it believed that the all-embracing competition legislation will increase the cost of doing business and thus will reduce the competitiveness of Hong Kong enterprises (especially SMEs). It was also feared that competition legislation would create uncertainty for business operations and compromise free and open trade approach. The government has initially favored a less intrusive alternative for promotion of competition: promulgating self-regulatory codes of conduct, monitoring business practices in various economic sectors, and considering sector-specific legislative amendments to address the anti-competitive problems.[27)] This sector-specific

25) Williams Mark, "Competition Policy: One Theory, Three Systems", China Perspectives (Online), (2004) 51 2-16, available at: http://chinaperspectives.revues.org/789.

26) Consumer Council, Competition Policy: The Key to Hong Kong's Future Economic Success, November 1996, available at: https://www.consumer.org.hk/web/CompetitionStudy Reports/1996-11_Competition_policy.pdf.

27) Trade & Industry Bureau, *Consumer Council, Competition Policy: The Key to Hong Kong's Future Economic Success*, November 1996, available at: https://www.consumer.org.hk/web/CompetitionStudy Reports/1996-11_Competition_policy.pdf.

approach to anti-competitive problems was implemented in the telecommunications and broadcasting sectors, which were subject to competition rules prior to the adoption of the Competition Ordinance. The sector-specific regulation of competition has been criticized for inconsistences in scope and wording of analogous competition rules and substandard investigatory procedures employed by the relevant sector regulators.[28)]

Since Hong Kong is a newcomer in the world of competition law regimes, the discussion on the necessity and shape of the competition legislation was always carried out with references to other jurisdictions. Being a former British colony, the competition culture in Hong Kong must be influenced to some extent by the United Kingdom.[29)] Competition legislation of Hong Kong has borrowed a lot from the global leaders in this field: the US and the EU. However, because of the nature of Hong Kong's open and outward oriented economy and relatively small domestic market, the Competition Ordinance has been adopted with a different focus and extraterritorial reach.[30)] Hong Kong has many similarities with Singapore in terms of economic status being developed economies with historical influence from the UK. As a result, the experience of Singapore in the adoption and implementation of its competition legislation could be a good reference for Hong Kong.[31)]

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28) Hickin John, O'Brien Gerry, "Hong Kong's Competition Law Landscape – Present and Future", *Asia Law*, March 2008 6.

29) See Wu Richard W.S, Leung Grace L.K, "Competition Regulation in the Hong Kong Telecommunications", *Telecommunications Policy,* (2008)32 652-661.

30) Zhao Xiao-jing, Cheung Sai-On, Guo Yi-shan, "Hong Kong's First Competition Law influence on construction contracting", *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction,* (2014) 6(2) 8.

31) See Williams Mark, "Lion City and the Fragrant Harbor: The Political Economy of Competition Policy in Singapore and Hong Kong Compared", *The Antitrust Bulletin,* (2009)54(3) 517-578.

The judicial enforcement model in Hong Kong resembles most closely the Australian system but the private enforcement is likely to be less active than in Australia given that the Competition Ordinance does not permit stand-alone actions (but only follow-on actions) or class actions. Furthermore, the market power standard of the Competition Ordinance is "substantial degree of market power" unlike the "dominant position" under Article 102 TFEU and resembles the respective standard under the Australian and New Zealand competition laws.[32] The inter-jurisdictional experience sharing should be also available in the Greater China region, where Taiwan has the oldest comprehensive competition law,[33] while Macao has not yet made any decisive steps towards adoption of a comprehensive competition legislation.[34] The enforcement and policy lessons can be also drawn from Japan's experience, which has a long standing record in implementation of the competition legislation.[35]

Similar with other East Asia countries, Hong Kong experienced various impediments on the way towards development of its competition policy, which include lack of internal interest, conflicts with other national policies, and the influence of state-supported enterprises.[36] The consumer protection agenda, external pressures, the political landscape, and the size of the economy have also shaped how and why the competition policy

32) Kwok Kelvin Hiu-Fai, "The New Hong Kong Competition Law: Anomalies and Challenges", *World Competition Law and Economics Review,* (2014)37(4) 545.

33) See Williams Mark, *Competition Policy and Law in China, Hong Kong and Taiwan,* (Cambridge: Cambridge University Press, 2005).

34) See Svetlicinii Alexandr, "The Limits for the Global Proliferation of Competition Law: The Case of Macao SAR", *European Scientific Journal,* (2014)2, 31-39.

35) See Lin Ping, "Competition Policy in East Asia - The Cases of Japan People's Republic of China, and Hong Kong", Working Paper Series No.13, Centre for Asian Pacific Studies, Lingnan University, November 2002.

36) *Id.,* at 36.

debate in Hong Kong evolved the way it did.[37] The Hong Kong's Consumer Council played an instrumental role in pushing the competition policy agenda and gathering public support behind the idea of adopting a comprehensive competition legislation. The size of the economy also occupied an important role in the competition policy debate. Because the internal market of Hong Kong is relatively small, a free market without any competition policy to supervise it, would inevitably create a risk of oligopolistic collusions or monopolistic dominance.

## 2. Macao's Legal Framework

The Macanese legal system belongs to Romano-Germanic legal family with common features being codification of legislation and emphasis on public enforcement of economic regulations.[38] Under "one country, two systems" principle embedded in the China's Constitution[39] and implemented in the Macao Basic Law,[40] the Macao SAR enjoys a high degree of autonomy in the exercise of executive, legislative and judicial powers.[41]

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37) See Ho Suk-Ching, Chan Chi-Fai, "In Search of a Competition Policy in a Competitive Economy: The Case of Hong Kong", *The Journal of Consumer Affairs,* (2003)37(1) 68-85.

38) See generally P. Nunes Correia, "The Juridical System of Macau: A Comparative Law Perspective" in Manuel Trigo (ed.) *Report on Macau Law* (LexisNexis, 2014), pp. 1-14; P. Nunes Correia, "The Macanese Legal System: A Comparative Law Perspective" in Tong Io Cheng and Salvatore Mancuso (eds.) *New Frontiers of Comparative Law* (LexisNexis, 2013), pp. 133-140. See also J.C. Oliveira, J. R. Leao, P. Cardinal, P.P. Vidal, "An Outline of the Macau Legal System" 23 *Hong Kong L.J.* 358 (1993).

39) The Constitution of the People's Republic of China, adopted at the 5th Session of the 5th National People's Congress and promulgated for implementation by the Announcement of the National People's Congress on 4 December 1982, Article 31, English translation is available at http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm.

40) The Basic Law of the Macao Special Administrative Region of the People's Republic of China, adopted by the 8th National People's Congress at its 1st Session on 31 March 1993, unofficial English translation is available at http://bo.io.gov.mo/bo/i/1999/leibasica/index_uk.asp.

The preservation of the capitalist system in Macao has been guaranteed by the Macao Basic Law for fifty years following the resumption of exercise of sovereignty by China in 1999.[42] The Macao Basic Law instructs the government to "pursue the policy of free trade and safeguard the free movement of goods, intangible assets and capital".[43] The Macao SAR shall also "protect the free operation of industrial and commercial enterprises and make its own policies on the development of industry and commerce" as well as "improve the economic development and provide legal guarantees for promoting the development of industry and commerce and for encouraging investments, technological progress and development of new industries and new markets".[44] Notably, the word "competition" is nowhere to be found in the Macao Basic Law, which effectively leaves the choice of methods for the achievement of the above mentioned objectives to the discretion of Macao SAR Government.

The most recent WTO trade policy review for Macao concluded that "there has not been overarching competition legislation in Macao" as "the authorities consider that current provisions, which are scattered around various laws and sector-specific regulations and rules, have provided adequate

41) Macao Basic Law, Article 2. See also Y. Ghai, "The Basic Law of the Special Administrative Region of Macau: Some Reflections" 49 *Int'l & Comp. L.Q.* 183 (2000); W. Tao, "Rule of Law in SAR Macao Since Its Return to China" 5 *China Legal Dev. Y.B.* 119 (2011); G. Liu, "National Laws Applicable to the Macau Special Administrative Region" in Manuel Trigo (ed.) *Report on Macau Law* (LexisNexis, 2014), pp. 27-44.

42) See Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the question of Macao, http://bo.io.gov.mo/bo/i/88/23/dc/en/. See also Macao Basic Law, Article 5. See also L. Wang, "Macao's Return: Issues and Concerns" 22 *Loy. L.A. Int'l & Comp. L. Rev.* 175 (1999); F. Delgado, "Some Aspects Concerning the International Legal Status of Macao SAR" in Manuel Trigo (ed.) *Report on Macau Law* (LexisNexis, 2014), pp. 75-85.

43) Macao Basic Law, Article 111.

44) *Id.,* Article 114.

protection given that the territory is small and most businesses are small and medium enterprises".[45] Thus, unlike in the case of other countries,[46] Macao's WTO membership did not lead to the market liberalization or gradual replacement of economic regulation by competition rules.

The EU-Macao relations have been evolving under the 1992 Agreement for Trade and Cooperation,[47] which provided for cooperation in the field of trade and other areas such as industrial cooperation, investment, science and technology, information, communication, culture, environment, social development, tourism, etc. Unlike more recent trade agreements of the EU, the EU-Macao Agreement does not provide for any obligations or cooperation concerning competition matters.

The economic relations between Macao and Mainland China have been evolving under the framework of 2003 Closer Economic Partnership Arrangement (CEPA).[48] The CEPA is primarily aimed at liberalization of

45) Trade Policy Review of Macao, China, WT/TPR/S/281, WTO Secretariat, 25 March 2013, p. 8.

46) For example, it was argued that in case of Vietnam, the country's accession to the WTO accelerated transformation of the national economy and opening up to foreign direct investment (FDI), which in turn required the implementation of competition law and policy. See D. Fruitman, Vietnam Chapter in M. Williams (ed.) The Political Economy of Competition Law in Asia (Edward Elgar, 2013), p. 128.

47) Agreement for trade and cooperation between the European Economic Community and Macao, OJL404.31.12.1992, p.27

48) Mainland and Macao Closer Economic Partnership Arrangement, signed on 17.10.2003, entry into force 01.01.2004, available at http://www.economia.gov.mo/public/docs/CEPA_CEPA_I/index/en/efulltext.pdf. See also J. Hu, "Closer Integration, Controversial Rules: Issues Arising from the CEPA Between Mainland China, Hong Kong, and Macao" 18 *Pace Int'l L. Rev.* 389 (2006); A. Emch, "Services Regionalism in the WTO: China's Trade Agreements with Hong Kong and Macao in the Light of Article V(6) GATS" *Legal Issues of Economic Integration* No. 4 (2006); C-H Wu, "A New Landscape in the WTO: Economic Integration Among China, Taiwan, Hong Kong, and Macao" in C. Hermann and J.P. Terhechte (eds.) *European Yearbook of International Economic Law* (2012) 241-270.

trade in goods, trade in services, promotion of trade and investment facilitation.[49] While the Mainland has already granted concessions on market access in 18 service sectors[50] to Macao service suppliers, Macao's liberalization of trade in services for the Mainland providers are yet to be agreed.[51] The agreement specifically provides for cooperation in the field of banking, securities and insurance in order to "support Mainland financial institutions in establishing business in Macao" and to "support Mainland banks in developing network and business activities in Macao through acquisition".[52] Although the effective penetration of the Macao's services markets by the Mainland service suppliers is a current matter, the CEPA does not provide any obligations or commitments concerning competition.

## B. Analysis of Competition Laws and Regulations of China's SARs

### 1. Hong Kong's Laws and Regulations

The prohibition of the restrictive agreements, known as "anti-competitive agreements" in the EU is labelled "First Conduct Rule" in the Hong Kong Competition Ordinance. In order to provide a better understanding

49) CEPA, Article 1.

50) Legal, accounting, architectural, medical and dental, real estate, advertising, management consulting, convention and exhibition, value-added telecommunications, audio-visual, construction and related engineering, distribution, insurance, banking, securities, tourism, transport, logistics. See also A. Emch, Services Regionalism in the WTO: China's Trade Agreements with Hong Kong and Macao in the Light of Article V(6) GATS (12 July 2010), available at http://ssrn.com/abstract=978843.

51) CEPA, Annex 4 Specific Commitments on Liberalization of Trade in Services, available at http://www.economia.gov.mo/public/docs/CEPA_CEPA_I/index/en/eannex4.pdf.

52) CEPA, Article 13.

of the First Conduct Rule, the following chart contains the respective provisions of the Section 6 of the Competition Ordinance and Article 101 of the Treaty of the Functioning of the European Union ("TFEU").[53]

| **HK Competition Ordinance, Section 6** | **TFEU, Article 101** |
|---|---|
| (1) An **undertaking** must not－<br>(a) make or give effect to an agreement;<br>(b) engage in a **concerted practice**; or<br>(c) as a member of an association of undertakings, make or give effect to a **decision of the association**, if the **object or effect** of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong. | 1. The following shall be prohibited as incompatible with the internal market: all agreements between **undertakings, decisions by associations** of undertakings and concerted practices which may affect trade between Member States and which have as their **object or effect** the prevention, restriction or distortion of competition within the internal market, and in particular those which:<br>(a) directly or indirectly fix purchase or selling prices or any other trading conditions;<br>(b) limit or control production, markets, technical development, or investment;<br>© share markets or sources of supply;<br>(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;<br>(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. |

53) Consolidated version of the Treaty on the Functioning of the European Union, OJC325.26.10.2012, p.47-390

The comparison between HK and EU competition rules prohibiting anti-competitive agreements demonstrates a substantial degree of similarity between two sets of rules as far as the types of anti-competitive conduct. Both HK and EU provisions refer to: (1) agreements;[54] (2) concerted practices;[55] and (3) decisions of the associations of undertakings.[56] Both HK and EU provisions also stipulate that the anti-competitive practices should have as their object or effect the restriction, prevention, or distortion of competition. The Commission explains in its Guideline on First Conduct Rule that object and effect are alternative criteria.[57] The Competition Ordinance permits the ascertaining of the anti-competitive object of an agreement by inference.[58]

While Article 101(1) TFEU includes a non-exhaustive list of anti-competitive practices, the Competition Ordinance leaves the definition of particular

54) The term agreement is defined in the Section 2(1) of the Competition Ordinance and includes "any agreement, arrangement, understanding, promise or undertaking, whether express or implied, written or oral, and whether or not enforceable or intended to be enforceable by legal proceedings".

55) The concerted practice is defined by the Commission as "a form of cooperation, falling short of an agreement, where undertakings knowingly substitute practical cooperation for the risks of competition". Competition Commission, Guideline "The First Conduct Rule" (27 July 2016), para 2.27. The Commission also distinguishes the concerted practice from the parallel behaviour of the competitors in the conditions of the highly competitive market where the market players respond immediately to each other's pricing. See Guideline "The First Conduct Rule", para 2.31.

56) The examples of associations of undertakings include inter alia trade associations, cooperatives, professional associations or bodies, societies, associations without legal personality, associations of associations. See "The First Conduct Rule", para 2.34. The examples of a decision of such associations according to the Commission's Guidance include "the constitution of the association, rules of the association, resolutions, rulings, decisions, guidelines or recommendations of the association, whether made by the board, members, a committee or an employee of the association". See "The First Conduct Rule", para 2.35.

57) Guideline "The First Conduct Rule", para 3.2.

58) Competition Ordinance, Section 7(2).

types of First Conduct to the Commission. The Commission's First Conduct Rule Guideline discusses the following examples of anti-competitive conduct: price fixing, market sharing, output limitation, bid rigging, joint buying, exchange of information, group boycotts, activities of trade associations and industry bodies, vertical price restrictions, exclusive distribution and exclusive customer allocation, joint ventures, franchise arrangements, selective distribution, etc.[59)]

At the same time, the Competition Ordinance includes the examples of Serious Anti-Competitive Conduct, which includes the following: (a) fixing, maintaining, increasing or controlling the price for the supply of goods or services; (b) allocating sales, territories, customers or markets for the production or supply of goods or services; (c) fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services; (d) bid-rigging.[60)] While the above specification does not distinguish between horizontal and vertical agreements, the Commission stated in its First Conduct Rule Guideline that vertical agreements, as a general matter, are unlikely to be qualified as Serious Anti-Competitive Conduct.[61)] The qualification of certain conduct as Serious Anti-Competitive Conduct does

59) See Noah A. Brumfield, Mark Gidley, Yi Ying, The Hong Kong's Government publishes the final guidelines concerning competition law provisions, 27 July 2015, *e-Competitions Bulletin* July 2015, Art. N° 77164; Carolyn Bigg, Ian Wood, Hong Kong's Competition Authorities publish the final guidelines on how they propose to interpret, apply, investigate and enforce the new Competition Ordinance, 27 July 2015, *e-Competitions Bulletin* July 2015, Art. N° 77141; Sharon Henrick, Joshua Cole, The Hong Kong's Competition Commission gives some advice to companies preparing for implementation of the Competition Ordinance, 14 June 2014, *e-Competitions Bulletin* June 2014, Art. N° 73552.

60) Competition Ordinance, Section 2(1).

61) Guideline "The First Conduct Rule", para 5.5. At the same time, the Commission notes that certain vertical agreements such as resale price maintenance could be viewed as Serious Anti-Competitive Conduct under specific circumstances.

not affect its contravention to the First Conduct Rule. It only affects the range of procedural tools and remedies that the Commission may decide to employ in order to remedy the anti-competitive conduct in question. For instance, if an undertaking is involved in conduct that does not qualify as Serious Anti-Competitive Conduct under the First Conduct Rule, the Commission must first issue a warning notice to the undertaking concerned.[62] If the undertaking ceases the anti-competitive conduct during the period indicated in the warning notice, there will be no further actions on the part of the Commission. In case of the failure to comply with the warning notice the Commission can bring the infringement proceedings before the Competition Tribunal. Since the Commission can only bring the proceedings in respect to the conduct that takes place after the inception of the warning period, it has been argued that the deterrent effect will be insignificant given that fact that the warning period is unlikely to be longer than a few months.[63] In order to enhance the deterrent effect of its enforcement activity the Commission may consider to address such practices under the Second Conduct Rule, which can apply to various vertical restrictions.[64]

The Competition Ordinance contains a number of general exclusions from the First Conduct Rule: (a) agreements enhancing overall economic efficiency; (b) compliance with legal requirements; (c) services of general economic interest; (d) mergers; and (e) agreements of lesser significance.[65]

62) Competition Ordinance, Section 82.

63) Cheng Thomas K, "Ready for Action: Looking Ahead to the Implementation of Hong Kong's Competition Ordinance", *Journal of European Competition Law and Practice* (2014)5(2), at 93.

64) *Id.*

65) Competition Ordinance, Schedule 1.

Similarly to Article 101(3) TFEU, the Competition Ordinance provides for the exemption from the First Conduct Rules of otherwise prohibited agreement that: (a) contributes to (i) improving production or distribution; or (ii) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; (b) does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the objectives stated in paragraph (a); and (c) does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.[66] The Commission's First Conduct Rule Guideline requires from the undertaking relying on the efficiency exclusion to demonstrate the following: (a) the efficiencies, which must be objective in nature; (b) a direct causal link between the efficiencies and the agreement; (c) the likelihood and magnitude of each efficiency; (d) how each efficiency will be achieved; and (e) when the efficiencies will be achieved.[67] In order to qualify for an exemption based on the compliance with legal requirements the undertaking must demonstrate that "the relevant legal requirement must eliminate any margin of autonomy on the part of the undertakings concerned compelling them to enter into or engage in the agreement or conduct in question".[68] The "services of general economic interest" are understood by the Commission as "services that the public authorities believe should be provided to the public whether or not the private sector would supply the relevant services".[69] In order to qualify for the respective exemption, the undertaking

66) *Id.*, para 1.
67) Guideline "The First Conduct Rule", Annex Exclusions and Exemptions from the First Conduct Rule, para 2.7.
68) *Id.*, para 3.2.
69) *Id.*, para 4.7.

must demonstrate that application of the First Conduct Rule would obstruct the performance of the services of general economic interest. For example, it must show that the application of competition rules would require it to perform the entrusted tasks under economically unacceptable conditions.[70]

The prohibition of the unilateral anti-competitive conduct, known as "abuse of dominant position" in the EU is labelled as "abuse of substantial market power" or "Second Conduct Rule" under the Hong Kong Competition Ordinance. In order to provide a better understanding of the Second Conduct Rule, the following chart contains the respective provisions of the Section 21 of the Competition Ordinance and Article 102 TFEU.

| HK Competition Ordinance, Section 21 | TFEU, Article 102 |
|---|---|
| (1) **An undertaking** that has a **substantial degree of market power** in a market must not abuse that power by engaging in conduct that has as its **object or effect** the prevention, restriction or distortion of competition in Hong Kong.<br>For the purpose of subsection (1), conduct may, in particular, constitute such an abuse if it involves—<br>(a) **predatory behaviour** towards competitors; or<br>(b) **limiting production, markets or technical development to the prejudice of consumers.** | (1) Any abuse by **one or more undertakings of a dominant position** within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.<br>(2) Such abuse may, in particular, consist in:<br>(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;<br>(b) **limiting production, markets or technical development to the prejudice of consumers;** |

70) *Id.,* para 4.10.

| HK Competition Ordinance, Section 21 | TFEU, Article 102 |
|---|---|
| | © applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;<br>(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. |

The comparison between the Hong Kong and EU provisions on unilateral anti-competitive conduct demonstrates that the Hong Kong prohibition is directed against undertakings with "substantial degree of market power" while the EU terminology uses an expression "dominant position". It has been argued that this deviation from the EU model has been a conscious choice of the Hong Kong SAR Government to adopt a lower market power threshold for the application of the Second Conduct Rule given the oligopolistic structure of the Hong Kong local markets.[71] The Commission's Guideline on the Second Conduct Rule explains that an undertaking with "substantial degree of market power" may be able to: (a) reduce the quality of its products below competitive levels for a sustained period without offering any compensatory reduction in price; (b) reduce the range or variety of its products below competitive levels for a sustained period; (c) lower customer service standards below competitive levels for a sustained period; and /or (d) impair, relative to competitive

71) See Cheng (2014)5(2), at 93.

levels and for a sustained period, innovation or any other parameter of competition in the market.[72] The Competition Ordinance contains the following factors that can be taken into account when assessing market power of the undertakings for the purpose of the Second Conduct Rule: (a) the market share of the undertaking; (b) the undertaking's power to make pricing and other decisions; (c) any barriers to entry to competitors into the relevant market; and (d) any other relevant matters specified in the Commission's Guideline.[73] The Commission's Guideline admits the possibility of more than one undertakings having a substantial degree of market power in cases when the market is concentrated with only few large market participants.[74] Still, unlike its EU counterpart, the Second Conduct Rule refers to a single undertaking, which may preclude a finding of the collective dominant position in oligopolistic markets.[75]

Similar to its EU equivalent, the Second Conduct Rule contains a non-exhaustive list of practices that are considered as abuse of substantial market power. While Article 102 TFEU contains four examples of such practices, the Second Conduct Rule mentions two: (a) predatory behaviour towards competitors; and (b) limiting production, markets or technical development to the prejudice of consumers. The Commission's Guideline

72) Competition Commission, Guideline "The Second Conduct Rule" (27 July 2015), para 1.7. See also Carolyn Bigg, Ian Wood, Hong Kong's Competition Authorities publish the final guidelines on how they propose to interpret, apply, investigate and enforce the new Competition Ordinance, 27 July 2015, *e-Competitions Bulletin* July 2015, Art. N° 77141.

73) Competition Ordinance, Section 21(3).

74) Guideline "The Second Conduct Rule", para 3.3.

75) See e.g. Heiko Haupt, "Collective dominance under Article 82 E.C. and E.C. merger control in the light of the Airtours judgment" *European Competition Law Review* 2002, 23(9), 434-444; Emiliano Marchisio, "Critical remarks on collective dominant position in EU and Italian antitrust law" *European Competition Law Review* 2013, 34(11), 559-569.

explains that predatory behaviour includes predatory pricing, "which occurs when an undertaking with a substantial degree of market power lowers its price below an appropriate measure of cost, deliberately incurring losses in the short run so as to eliminate or reduce the competitive effectiveness of one or more of its rivals or to prevent entry into the market by potential rivals".[76] The second example of an abuse covers anti-competitive tying and bundling, refusals to deal and exclusive dealing.[77] The Commission's Guideline contains the following non-exhaustive list of examples of types of conduct that may be considered as an abuse of substantial market power: (a) predatory pricing; (b) tying and bundling; (c) margin squeeze conduct; (d) refusals to deal; and (e) exclusive dealing.[78] In order to be considered as anti-competitive infringement the conduct in question should have as its object or effect the restriction of competition i.e. anti-competitive foreclosure. Some types of conduct may be found restrictive per se, for example in case of predatory pricing when "an undertaking with a substantial degree of market power sets prices below its average variable costs".[79] The express linkage of the Second Conduct Rule to the restriction of competition prompted some authors to argue that unlike its EU equivalent[80] the Second Conduct Rule prohibition will not apply to the purely exploitative abuses such as excessive pricing.[81] At the same time, other commentators argue that exploitative abuses such

76) Guideline "The Second Conduct Rule", para 1.12(a).

77) *Id.*, para 1.12(b)

78) *Id..,* para 5.1.

79) *Id..,* para 4.13.

80) See e.g. Alexandr Svetlicinii and Marco Botta, "Article 102 TFEU as a Tool of Market Regulation: 'Excessive Enforcement' Against 'Excessive Prices' in the New EU Member States and Candidate Countries", 8 *European Competition Journal* (2012), 473-496.

81) See Cheng (2014) JECLAP, at 93.

as output restrictions may lead to excessive prices, which could be covered by the Second Conduct Rule under "limiting production, markets or technical development to the prejudice of consumers".[82)]

Unlike the First Conduct Rule, the Second Conduct Rule does not provide for an efficiency defense. Nevertheless, the Commission "may consider whether the undertaking is able to demonstrate that the conduct concerned is indispensable and proportionate to the pursuit of some legitimate objective unconnected with the tendency of the conduct to harm competition".[83)] The exemptions from the Second Conduct Rule are stipulated in the Schedule I of the Competition Ordinance: (a) compliance with legal requirements; (b) services of general economic interest; (c) mergers; and (d) conduct of lesser significance. The Competition Ordinance does not require the undertakings concerned to apply for an individual exemption to the Commission. The undertakings can make the assessment of the exemptions themselves and raise it as a defense before the Commission or the Tribunal. If an undertaking seeks greater certainty, it can apply to the Commission for the decision under Section 26 of the Competition Ordinance. In order to qualify for an exemption based on the compliance with legal requirements the undertaking must demonstrate that "the relevant legal requirement must eliminate any margin of autonomy on the part of the undertakings concerned compelling them to enter into or engage in the agreement or conduct in question".[84)] The "services of general economic interest" are understood by the Commission as "services that the public authorities believe should be provided to the public

82) See Kwok (2014) World Competition, at 545.
83) Guideline "The Second Conduct Rule", para 4.4.
84) *Id.,* Annex, para 2.2.

whether or not the private sector would supply the relevant services".[85] In order to qualify for the respective exemption, the undertaking must demonstrate that application of the Second Conduct Rule would obstruct the performance of the services of general economic interest. For example, it must show that the application of competition rules would require it to perform the entrusted tasks under economically unacceptable conditions.[86]

One of the obvious peculiarities of the Hong Kong competition law regime is the absence of the cross-sector merger[87] The Competition Ordinance applies only to mergers in the telecommunications sector.[88] Some authors attribute the omission of the full-fledged merger control regime to the opposition of the pro-business members of the Legislative Council.[89]

## 2. Macao's Laws and Regulations

In the sectors that are not directly regulated by the government, the businesses are free to exercise their own commercial policies subject to the general rules related to economic activity such as company law, contract law, taxation, etc.[90] Competition between entrepreneurs is regulated in the Title X, Chapter Ⅰ of the Macao Commercial Code (ComC).[91]

85) *Id.,* Annex, para 3.7.

86) *Id.,* Annex, para 3.10.

87) See Yuan Cheng, Robert Gavin, Marc Peter Harvey, "Hong Kong Government makes amendments to the proposed Hong Kong Competition Bill", 25 October 2011, *e-Competitions Bulletin* October 2011, Art. N° 40990.

88) Competition Ordinance, Schedule 7.

89) See Kwok (2014) World Competition, at 549.

90) See generally J. Godinho, *Macau Business Law and Legal System* (LexisNexis, 2007); J. Fan and A.D. Pereira, *Macau Commercial and Economic Law* (The International Encyclopedia of Laws, Kluwer, 2007).

91) Commercial Code, approved by Decree-Law no. 40/99/M of 3 August 1999, Official

The central provision is Article 153 ComC, which provides that competition between entrepreneurs shall take place in a manner that does not harm the interests of the economy of Macao.[92] The same provision prohibits all agreements or practices that have the object or effect of preventing, falsifying or restricting competition.[93] The ensuing provisions regulate the validity of no-competition agreements between entrepreneurs. These shall respect the general prohibition of agreements harmful to the economy or those restricting competition and shall be in writing.[94] The no-competition agreements must be also limited to a certain zone or certain activity[95] and their validity shall not exceed five years.[96] Summarily, the above mentioned provisions create private remedies for the parties willing to contest the validity of no-competition agreements. In line with the rules of civil procedure, the party alleging the invalidity of an anti-competitive agreement will bear the burden of proof in relation to the anti-competitive object or effect of such agreement.

Title X, Chapter Ⅱ ComC identifies the acts of unfair competition, which are prohibited and can give rise to the private claims for damages. The general clause defines unfair competition as "any act of competition that objectively reveals itself to be in breach of the norms and honest usage of economic activity".[97] The general clause is followed by a list

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Bulletin of Macao SAR No. 31 of 3 August 1999. See also J. Godinho, *The Macau Commercial Code: An English Unofficial Translation* (12 September 2013), available at: http://ssrn.com/abstract=1545094.

92) Commercial Code, Article 153(1).

93) *Id.*, Article 153(2).

94) *Id.*, Article 154(1).

95) *Id.*, Article 154(2).

96) *Id.*, Article 154(3).

97) *Id.*, Article 158.

of specific acts prohibited as unfair competition. Two of them are noteworthy as they concern practices that are often banned under the classic antitrust rules. One of them is exploitation of dependence defined as "undue exploitation by an entrepreneur of a situation of dependence, with economic repercussions, in which entrepreneurs who are his clients or suppliers may find themselves, and who do not have an equivalent alternative for the exercise of their activity".[98] It appears that the finding of the exploitation of dependence does not require the existence of dominant position.[99] At the same time the absence of "an equivalent alternative for the exercise of their activity" might imply that the undertaking concerned is in a possession of substantial market power or in control of an "essential facility".[100] The ComC also prohibits predatory pricing qualifying the sale at a loss as an act of unfair competition: "sales effected below the cost or acquisition price are considered unfair, if they are part of a strategy directed at the elimination of a competitor or a group of competitors from the market."[101] The respective provision of the ComC also does not require the showing of dominance, which might imply that even the undertakings without market power cannot engage in sales at a

98) *Id.*, Article 168.

99) The abuse of economic dependence echoes a similar concept embedded in the German Act against the Restraints on Competition, which protects SMEs being economically dependent on larger companies with relative market power. See *Gesetz gegen*, version of 26 June 2013 (BGBl. I 1750), Section 20(1). See also M. Dreher and J. Koerner, Germany National Report in P. Këllezi, B. Kilpatrick, P. Kobel (eds.) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (Springer, 2014), p. 134.

100) See generally A. Stratakis, "Comparative analysis of the US and EU approach and enforcement of the essential facilities doctrine" *European Competition Law Review* 27(8): 434-442 (2006).

101) Commercial Code, Article 169.

loss with the purpose of eliminating competitors. The Macao's approach to defining the acts of unfair competition is thus a mixed one: there is a general clause and the non-exhaustive list of specific situations which are labeled as unfair competition acts. It has been argued that this enables certain flexibility and allows catching various emerging acts and practices.[102] The survey of the judicial practice of the Macao's courts in enforcing competition provisions of the ComC remains scarce and mainly restricted to the acts of unfair competition such as imitation of trademarks.[103]

Gaming is undeniable the most important economic sector in Macao generating substantial revenue for the region's public budget.[104] The Gaming Law contains several competition-related provisions that stipulate prohibition of the anti-competitive agreements and practices, certain forms of abuse of dominant position and control of economic concentrations. Thus, the law prohibits agreements and concerted practices, among the concession holders or companies belonging to the respective groups, which may prevent, restrict or distort competition among the concession holders.[105] The abuse by one or more concession holders of their dominant position on the market or in a substantial part thereof, which may prevent, restrict or distort competition among sub/concessionaires is likewise

102) See A. Teixeira Garcia, "Unfair Commercial Practices and Cyber Consumer Protection" in Tong Io Cheng and Salvatore Mancuso (eds.) *New Frontiers of Comparative Law* (LexisNexis, 2013), p. 197.

103) See e.g. Judgment of the Court of Second Instance No. 13/2004 dated 26.02.2004, Judgment of the Court of Second Instance No. 844/2011 dated 07.02.2013, available at http://www.court.gov.mo/. See also A. Teixeira Garcia, "Brief Note About Intellectual Property in Macau" in Manuel Trigo (ed.) *Report on Macau Law* (LexisNexis, 2014), pp. 601-616.

104) See e.g. Y. Zhang and F. Kwan, "Macao's Gaming-led Prosperity and Prospects for Economic Diversification" *China – An International Journal* (2009) 7(2): 288-319.

105) Law No. 16/2001, Article 21(3).

prohibited.[106] It should be noted, however, that due to the limited scope of application of the Gaming Law, even though the gaming concessionaires compete on a wide range of markets including hotel accommodation, catering, entertainment, etc., the above mentioned competition rules only apply to their gaming activities i.e. operation of games of chance. It was also noted that the above provisions do not contain any exemptions similar to Article 101(3) TFEU and also do not require showing of anti-competitive effects making the intention or object of such agreements or practices the key evidence of their illegality.[107]

In telecommunications sector, the protection of competition could be overshadowed by other objectives such as public interests (providing free-to-air TV channels to the Macao residents), protection of small and medium enterprises (master antenna service providers stayed in business) and public policy (settlement of business disputes through negotiations and reconciliation rather than regulatory measures and sanctions). Thus, although certain telecommunications activities have been liberalized and the number of market players is on the steady rise, it is unlikely to expect that the Bureau of Telecommunications Regulation will make use of its current competition enforcement powers instead of the regulatory and conciliatory actions it has been undertaking in the past.

The Financial System Law contains a broad prohibition of anti-competitive acts that have as their object or potential effect the distortion of competition or altering the normal functioning of the markets: anti-competitive agreements and practices, acquisition of dominance and impliedly abuse of dominant

106) *Id.,* Article 21(4).

107) See C. Wang, "Comentário sobre a Lei da Concorrência nos Jogos de Macau", *Administração* No. 87, Vol. XXIII, 2010-1, p. 158.

position as a form of unilateral anti-competitive act.[108] The prohibition of anti-competitive agreements does not apply to the contracts that have as their object: (1) participation in the issue and placement of securities or other similar instruments; (2) the granting of credit to an undertaking or a group of undertakings by a group of institutions which have joined together specifically for this purpose; (3) other contracts or agreements allowed by law.[109] Any merger, division or transformation of credit institutions must receive a prior approval of the Chief Executive, upon receiving an opinion of the Monetary Authority of Macao ("AMCM"), which may exempt the transaction from certain legal requirements applicable to companies in general or may subject it to certain additional requirements or specific conditions.[110] The AMCM is empowered to conduct the infringement proceedings and impose fines ranging between MOP 10.000 and 5 million.[111] There is no evidence that the AMCM has ever found an anti-competitive infringement under the Financial System Law or has used its sanctioning powers in that regard. While the AMCM has considered the competition effects when evaluating the notified concentrations, no merger has been blocked or conditionally approved due to the competition concerns.

The insurance services in Macao are provided under the framework of the Insurance Companies Law[112] implemented by the AMCM, which

108) Decree-Law No. 32/93/M, Article 112(1).

109) *Id.*, Article 112(2).

110) *Id.*, Article 113.

111) *Id.*, Article 128(1). When the economic benefits of the offender derived from the committed infringement exceed MOP 2,5 million, the amount of the fine may be increased to the value of twice the benefits. Id., Article 128(3).

112) *Id.*, Article 128(1). When the economic benefits of the offender derived from the

operates the licensing of the insurance service providers. According to the AMCM data for 2016 there were 23 licensed insurance companies, of which 11 were authorized to transact life insurance.[113] Among the 23 licensed insurers, 8 are locally incorporated while 15 are branches of overseas companies representing from Mainland China, Portugal, Australia, Canada, Bermuda and Hong Kong SAR. As a trend, life insurance business continuously accounted for a large portion of the insurance services market, representing 73% of the whole insurance market.[114] Life insurance market is a highly concentrated one, with two leading providers jointly holding 63% of the life insurance market. The Insurance Companies Law does not contain any competition provisions, which leaves the AMCM with the possibility to evaluate competition effects of the market entry *ex ante* during the licensing procedure. Among the factors that AMCM should take into account when appraising the request for authorization is "compatibility between the development prospects of the insurer and the maintenance of healthy competition in the insurance market".[115] As a result, the determination of the "healthy competition" is left to the discretion of the AMCM and can contain both promotion of competition and prevention of aggressive competition.

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committed infringement exceed MOP 2,5 million, the amount of the fine may be increased to the value of twice the benefits. *Id*., Article 128(3).

113) See AMCM, Insurers Authorized to Operate in Macao, available at http://www.amcm.gov.mo/en/insurance-sector/authorised-insurers.

114) See AMCM, Reports in Insurance Sector, http://www.amcm.gov.mo/en/insurance-sector/statistics.

115) Decree-Law No. 27/97/M, Article 19(2)(e).

# C. Institutional Framework of Competition Laws of China's SARs

## 1. Hong Kong's Institutional Framework for Enforcement

An important issue addressed during the lengthy competition policy debate in Hong Kong was the shape and structure of the institutional framework for competition law enforcement. This issue involved several questions: should the enforcement powers be vested with a single authority that would investigate and adjudicate competition infringements or should the investigative and adjudicative functions belong to different institutions? What type of powers should be attributed to the enforcement authorities? Should the existing sector regulators that also have a competition protection role continue to play such a role in parallel with a cross-sector competition authority?

The Hong Kong General Chamber of Commerce supported the idea of having a single authority, which would be more cost-effective and straightforward regulatory structure. At the same time, the majority of the actors participating in the public consultations preferred to separate the enforcement and adjudication powers in a fair and transparent manner[116] that would be consistent with Hong Kong's common law tradition.[117] Most respondents agreed that the Competition Commission should be

116) EDLB, Report on Public Consultation on the Way Forward for Hong Kong's Competition Policy, March 2007, 12. Available at: http://www.cedb.gov.hk/citb/doc/en/publication/submissions/ConsultationReport-eng.pdf.

117) CEDB, Detailed Proposals for a competition law - A Public Consultation Paper, May 2008, 9. Available at: http://www.gov.hk/en/residents/government/publication/consultation/docs/2008/competition_law.pdf.

independent from the Government and should have a "two-tier" structure, with a board and a separate executive arm. Some respondents made specific suggestions with regard to the composition of the board.[118] Others expressed their concerns about the need to protect confidential information collected by the competition authority that should only be disclosed with the agreement of the relevant company.[119] As for the division of tasks between the existing specific-sector regulatory authorities and the future cross-sector competition authority, some of the respondents suggested to migrate the competition enforcement powers from the sector regulators to the competition authority.[120]

The Competition Ordinance has accepted almost all of the above mentioned opinions. It established the Competition Commission and the Competition Tribunal to provide for an internal balance of powers. In order to coordinate the concurrent jurisdiction between the Competition Commission and the Communications Authority, the Ordinance stipulates: "[t]he Communications Authority may perform the functions of the Commission under this Ordinance, in so far as they relate to the conduct of undertakings that are －(a) licensees under the Telecommunications Ordinance (Cap 106) or the Broadcasting Ordinance (Cap 562); (b) persons who, although not such licensees, are persons whose activities require them to be licensed under the Telecommunications Ordinance (Cap 106) or the Broadcasting Ordinance (Cap 562); or (c) persons who have been exempted from the Telecommunications Ordinance (Cap 106)

118) *Id*., 3.

119) EDLB, Report on Public Consultation on the Way Forward for Hong Kong's Competition Policy, March 2007, 13.

120) *Id.*, 14.

or from specified provisions of that Ordinance under section 39 of that Ordinance."[121]

The Competition Commission currently consists of 15 members appointed by the Chief Exectuive for a period of three years.[122] The Commission has established three working committees: the Enforcement Committee, the Finance and Administration Committee and the Staff Committee. The Enforcement Committee carries out the investigatory actions and brings the cases before the Competition Tribunal. The Finance and Administration Committee develops guidelines on financial and administrative matters, including financial management control, accounting procedures and general administration management. The Staff Committee develops guidelines on human resources management, including staff recruitment and staff management. The exectuive branch of the Commission is headed by the Chief Exectuive Officer, Senior Executive Director, three exectuive directors (Operations, General Counsel, Corporate Services & Public Affairs), and the Chief Economist.

The public debate on competition policy also addressed the scope of the future Competition Ordinance. The Hong Kong Consumer Council believed that the competition law should not regulate natural monopolies but include an oversight over mergers and acquisitions that may have anti-competitive effects. Other respondents maintained that market structures should not be subject to regulatory control because mergers and acquisitions are an important way for enterprises to achieve economies of scale through expanding their scale of operation. In their view, a merger control regime

121) Competition Ordinance, Section 159(1).

122) The list of commissioners is available at https://www.compcomm.hk/english/about/comm/members.html.

would add a layer of complexity, delay, uncertainty and costs to the transactions, which is especially harmful to the small economies.[123] The Competition Policy Review Committee has proposed that competition law should cover seven specific types of such conduct: (1) price-fixing, (2) bid-rigging, (3) market allocation, (4) sales and production quotas, (5) joint boycotts, (6) unfair or discriminatory standards, and (7) abuse of dominant position.[124] It was argued that at the early stage of competition regulation it would be sufficient to focus on the above seven conducts and later the competition authority could produce guidelines that would make up for other type of anti-competitive conduct.[125]

Another question in determining whether a particular conduct constitutes an infringement of the competition law is whether the "object" and/or "effect" of the conduct in question should be taken into account. Some participants of the public consultation considered that the legislation should regulate the conduct itself, without distinguishing between its "object" or "effect" because it would be difficult to prove the "object" while some conduct arising from natural monopolies or market dominance would produce anti-competitive "effect" even under fair competition.[126] Numerous participants suggested that various types of market conduct that are ostensibly anti-competitive could benefit consumers or the wider economy, and should be regarded as infringements only if the said conduct has the purpose or effect of preventing, restricting or distorting competition.[127]

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123) EDLB, Report on Public Consultation on the Way Forward for Hong Kong's Competition Policy, March 2007, 8

124) CPRC, Report on the Review of Hong Kong's Competition Policy, June 2006, 4.

125) *Supra* note 103, at 7.

126) Opinion of Hong Kong Christian Service, *Id.*, 10.

127) *Id.*

The issue of private litigation and representative litigation has been raised in the 2008 public consultation. There was general support for the law that would allow "follow-on" private litigation. Nevertheless, the attitudes toward stand-alone litigation and representative litigation were less convergent. Whilst some participants believed that stand-alone litigation could complement public enforcement of the competition law,[128] others feared that this might lead to excessive litigation.[129] The possibility of allowing representative litigation also met some objections from the participations. Although such actions could help consumers and SMEs with limited resources to seek redress when faced with anti-competitive conduct,[130] the merits of representative actions were contested, especially since it is an unfamiliar concept for Hong Kong law, and, at least at the initial stage of competition law enforcement, it should have been omitted.[131] As a result, the Competition Ordinance allows only private follow-on actions that may be commenced once the infringement has been established in public enforcement. Applicants in follow-on actions may seek orders for damages and the broad range of relief that is set out in Schedule 3 to the Competition Ordinance. That is to say, the stand-alone litigation is not permitted in Hong Kong. As for the representative litigation, the Ordinance has no rules on the subject. However, the Rules of the High Court allow representative proceedings by multiple litigants who share the same interests.[132]

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128) CEDB, Detailed Proposals for a competition law - A Public Consultation Paper, May 2008, 15.

129) *Id*., 16.

130) Opinion of Cathay Pacific, *Id*., 26.

131) *Id.*

132) O. 15, r. 12, Rules of the High Court, CAP 4A, available at: http://www.legislation.gov.hk /eng/home.htm

During the public consultation period, numerous SMEs and their representative associations feared that the competition law may make the business environment more complex and increase their operation costs. Moreover, it was argued that under the new legislation, the larger companies can threaten SMEs with litigation, thereby forcing them to comply with the unreasonable business conditions. There were numerous suggestions on how to protect the SMEs such as: *de minimis* exemptions, exemptions for vertical agreements, power of the Competition Tribunal to strike out vexatious claims, the appointment of the Commission members with SME experience and availability of representative action. Most of these proposals were well received.[133] Most participants agreed with the proposal that an agreement should be exempted from the prohibition if it yields economic benefit that outweighs the potential anti-competitive harm, although some suggested that the meaning of "economic benefit" should be more clearly defined.[134] Several participants argued that the Commission should have the power to issue block exemptions in respect of certain categories of agreements that are likely to meet the exemption criteria, with some adding that the law should provide for an open and transparent procedure for issuing such exemptions.[135]

Another important procedural tool aimed at facilitating the discovery of the clandestine anti-competitive agreements and concerted practices is the leniency policy authorized by Section 80 of the Competition Ordinance. Following a public consultation on this matter, the Commission has finalized

133) CEDB, Detailed Proposals for a competition law - A Public Consultation Paper, May 2008, 27.
134) *Id.,* 7.
135) *Id.*

and published its Leniency Policy in November 2015.[136] The Leniency Policy provides that the first undertaking to notify the Commission about the existence of the conduct that violates the First Conduct Rule will be granted immunity from pecuniary penalities. To that effect the successful leniency application and the Commission shall conclude a leniency agreement whreby the latter is obliged not to bring the claim for pecuniary penalities before the Competition Tribunal.[137] The leniency agreement requires the leniency applicant to confirm that "it has not coerced other parties to engage in cartel conduct".[138] Some practitioners argued that "coercion" should be clearly defined in order to avoid the situation when the actions of an undertaking with significant market share may be automatically interpreted as coersive and make it ineligible for leniency.[139] It should be also noted that the leniency policy will not shield the successful applicant from the private follow-on suits for damages lodged by the private parties after the completion of the Commission's investigation and finding of the infringement of the First Conduct Rule.[140] The potential liability for civil damages may play an important role in the undertaking's decision whether to seek leniency.[141]

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136) Competition Commission, Leniency Policy for Undertakings Engaged in Cartel Conduct (November 2015), https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Leniency_Policy_Eng.pdf

137) *Id.,* p. 9.

138) Id., p. 9.

139) See Deirdre McEvoy, Jake Walter-Warner, The Hong Kong Competition Authority releases draft leniency guidelines, 23 September 2015, e-Competitions Bulletin September 2015, Art. N° 76721.

140) Leniency Policy for Undertakings Engaged in Cartel Conduct, p. 3.

141) See Adrian Emch, Henry Wheare, The Hong Kong Competition Commission publishes draft leniency policy, 23 September 2015, e-Competitions Bulletin September 2015, Art. N° 76097.

## 2. Macao's Institutional Framework for Enforcement

As of October, 2016, no competition law was enacted, nor does the enforcement institution exist. The Macao Consumer Council, which is a specialized government agency under the supervision of the Secretariat for Economy and Finance[142], is entrusted with the task of protecting and promoting the rights and interests of consumers. Currently it does not have enforcement powers vis-a-vis market competition among undertakings. The Consumer Council, which exists in its current form since 1995, consults the government agencies on consumer protection policies and engages in a variety of consumer advocacy activities. It can receive complaints of consumers, but, without any enforcement powers, it forwards such complaints to the competent government agencies. The Consumer Council is run by the General Committee and the Executive Committee. The General Committee consists of eleven members and chaired by the President elected from amongst its members. The Exectuive Committee consists of three members, which are appointed by the Chief Executiv e[143] taking into consideration the opinion of the General Committee.[144]

The Consumer Council has been entrusted by law to provide conciliation, mediation and arbitration services in respect of minor consumer claims.[145] In 1998 it has established the Consumer Arbitration Centre (CAC).[146] The

142) Office of the Secretary for Economy and Finance, https://www.gsef.gov.mo/.
143) Office of the Chief Exectuive, https://www.gce.gov.mo/.
144) For general facts on Consumer Council see http://www.consumer.gov.mo/AboutUS/Intro.aspx?lang=en
145) Law 4/95/M, Article 2.
146) *Centro de Arbitragem de Conflitos de Consumo de Macau,* http://www.consumer.gov.mo/CAC/Intro.aspx?lang=pt.

CAC is authorized to handle consumer disputes not exceeding the value of MOP 50,000.[147] The arbitration services are offered to the parties free of charge and the arbitration award can be enforced as a court judgment. The arbitration procedure is voluntary and requires the consent of both parties (consumer and undertaking). The CAC arbitration services are hardly relevant to the protection of market competition due to their narrow scope: consumer disputes should involve the supply of goods or services intended for private use, which excludes the disputes between undertakings. Furthermore, the CAC does not handle the disputes concering professional services provided by the representatives of liberal and technical professions as determined by law.[148]

## D. Current Status of Implementation and Enforcement of Competition Laws in China's SARs

### 1. Hong Kong's Enforcement Status

Unlike the EU and China, Hong Kong has opted for a judicial system of enforcement for the implementation of its competition law. This means that the Competition Commission does not have the power to impose fines. This power is vested with the courts (i.e. the Competition Tribunal). This solution is attributed to the case law of the Hong Kong Court of Final Appeal[149], which decided that if a punitive fine is imposed in an administrative proceeding, the defendants should be accorded with the procedural safeguards of a criminal standard.[150] Since the Competition

147) See the CAC Regulations at http://www.consumer.gov.mo/CAC/regulation.aspx?lang=pt.
148) See Dispatch of the Chief Exectuive 267/2003.
149) Hong Kong Court of Final Appeal, http://www.hkcfa.hk/.
150) *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170. See Thomas

Commission as an administrative authority cannot provide procedural safeguards of a criminal nature in its internal proceedings, the adoption of the administrative enforcement model has been effectively precluded. As a result, the Commission has to bring the case before the Competition Tribunal, which is authorized to impose fines in the amount not exceeding 10% of the annual turnover of the undertaking concerned for a maximum period of three years.[151] Although the infringement of the substantive provisions of the Competition Ordinance does not entail criminal prosecution, the obstruction of investigation by the Competition Commission and failure to comply with the Commission's request could result in criminal proceedings before the regular courts.[152]

The Commission has not yet issued any infringement or warning notices as of now. As a result, the enforcement activities of the Commission can be anticipated on the basis of its Enforcement Policy, where the Commission explain how it is going to prioritize the use of its operational resources in order to provide an enforcement response that is suitable and proportionate in the given circumstances.[153] As already demonstrated by its competition advocacy activities during the initial years of the operation the Commission believes that "its resources should be focused on encouraging compliance

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K. Cheng, "Ready for Action: Looking Ahead to the Implementation of Hong Kong's Competition Ordinance" (2014) 5(2) Journal of European Competition Law & Practice, 88-94, at 91

151) Competition Ordinance, Section 93. If the infringement has taken place over a period longer than three years, the fine will be calculated on the basis of the turnover of the undertaking concerned for the years when it was highest, second highest and third highest.

152) See e.g. Competition Ordinance, Sections 41 (failure to supply the requested documents), 42 (failure to appear before the Commission), 53 (destruction or falsification of documents), 54 (obstruction of the search under warrant), 55 (provision of false or misleading documents).

153) Competition Commission, Enforcement Policy (November 2015).

with the Ordinance in the Hong Kong economy as a whole, rather than focusing on specific sectors".[154] The Commission declared that its enforcement priority will extend over the cases that involve one or more of the following types of conduct: (a) cartel conduct; (b) other agreements contravening the First Conduct Rule causing significant harm to competition in Hong Kong; and (c) abuses of substantial market power involving exclusionary behavior by incumbents.[155] In relation to the cartel conduct, the Commission may prioritize taking actions not only undertakings directly involved in the cartel conduct, but also against associations of undertakings and/or officers, including directors of undertakings.[156]

In order to tailor its enforcement response to the above mentioned instances of the anti-competitive conduct the Commission is going to take into account the following "severity factors": (a) the conduct demonstrates a blatant disregard for the law; (b) the deliberateness of the conduct, including whether the person9 engaging or involved in the conduct took deliberate steps to avoid detection; (c) the conduct was engaged in by or under the direction of the senior management of an undertaking; (d) the person engaged or involved in the conduct has previously been: (1) advised by the Commission that the Commission has concerns about the conduct, given a reasonable opportunity to alter its conduct, but has not done so; (2) issued a warning notice or infringement notice, or has previously entered a commitment under the Ordinance regarding similar conduct; or (3) found by the Tribunal to have contravened the Ordinance.[157]

In the mid-2015 the Commission has initiated a competition advocacy

154) *Id.*., para 3.4.
155) *Id.*., para 3.5.
156) *Id.*., para 3.8.
157) *Id.*., para 3.12

project targeting trade and professional associations of Hong Kong in order to ensure that the latter are ready to comply with the Competition Ordinance. The Commission has distributed its information materials[158] to over 500 associations. The Commission has also reviewed the published practices of over 350 associations. As a result, it has identified twelve associations that practice price scales and other price restrictions.[159] The Commission's CEO has urged these associations to bring their practices in conformity with the Competition Ordinance: "As the Ordinance is now in full effect, the Commission will take necessary action to ensure compliance with the Ordinance. In particular, associations and their members who are engaged in cartel conduct, by giving effect to decisions of associations or otherwise, now risk enforcement action by the Commission."[160] The SMEs have been also targeted by the Commission in its competition advocacy. In November 2015 the Commission has published a practical toolkit for the SMEs on how to comply with the Competition Ordinance.[161] The importance of the SMEs has been underscored by the Commisison's CEO in the following way: "SMEs

158) Competition Commission, The Competition Ordinance & Trade Associations, https://www.compcomm.hk/en/media/press/files/CC_TA_Brochure_Eng.pdf.

159) The identified associations include: Hong Kong Container Tractor Owner Association, Hong Kong Real Estate Agencies General Association, Hong Kong Society of Notaries, The Association of Accredited Advertising Agencies of Hong Kong, The Hong Kong Federation of Insurers, The Hong Kong Institute of Surveyors, The Hong Kong Jewellers' & Goldsmiths' Association, The Hong Kong Jewellery & Jade Manufacturers Association, The Institution of Fire Engineers (Hong Kong Branch), The Kowloon Pearls, Precious Stones, Jade, Gold & Silver Ornament Merchants Association, The Law Society of Hong Kong, Travel Industry Council of Hong Kong.

160) Competition Commission, Competition Commission announces progress of its project on trade and professional associations (14 March 2016),

161) Competition Commission, How to comply with the Competition Ordinance: Practical Compliance Tools for Small and Medium-sized

constitute over 98% of Hong Kong's businesses and they have been a major focus of our advocacy and engagement plan. The toolkit published today is part of the Commission's ongoing programme to assist businesses to comply with the new law."[162]

Shortly after the Competition Ordinance has entered into force[163] the Commission has received an application[164] for the block exemption under Section 15 lodged by the Hong Kong Liner Shipping Association (HKLSA) in relation to the following liner shipping agreements: (1) voluntary discussion agreements (VDAs); (2) vessel sharing agreements (VSAs). VDAs provide for the exchange of commercial information between the shipping companies such as market data, trade flows, supply/demand dorecasts, etc. VDAs may also entail the development of the voluntary guidelines whereby the parties agree to follow certain rates, tariffs, charges, etc. VSAs are operational agreements that entaqil coordination or joint operation of vessel services and the exchange or charter of vessel space.[165] Upon the receipt of the HKLSA's application, the Commission has launched public consultation inviting the interested parties to share their experiences with VDAs and VSAs in business operations in Hong Kong, any specific issues or

162) Competition Commission, Competition Commisison Publishes Practical Compliance Toolkit for SMEs (2 November 2015), https://www.compcomm.hk/en/media/press/files/0151102_PressRel_Toolkit_Eng.pdf.

163) See Scott Hammond, "The Hong Kong Competition Commission issues a "Commencement Notice" for the introduction of a Competition Ordinance which is scheduled to come into force on December 14, 2015", 18 January 2013, *e-Competitions Bulletin* May 2016-III, Art. N° 79676.

164) Competition Commission, Notice of an application for a block exemption order in relation to certain liner shipping agreements (18 December 2015), https://www.compcomm.hk en/enforcement/registers/block_exemption/files/Notice_BEA_20151218_English.pdf.

165) HKLSA, Application for a block exemption order under Section 15 of the Competition Ordinance (17 December 2015), https://www.compcomm.hk/n/enforcement/registers/block exemption/files/Non_confidential_summary_HKLSA_BEA.pdf.

cocnerns, any efficiencies that may be generated by the said agreements, as well as general information on competition conditions in the liner shipping industry.[166] The consultation has been concluded on 24 March 2016 and the Commission is now considering information received in this context.[167]

## 2. Macao's Enforcement: Policy Considerations

The government's choice in balancing between economic efficiency and the market stability objectives is instrumental in understanding why Macao SAR does not have comprehensive competition legislation. In the 2015 policy address for economy and finance the Macao SAR Government pledged to maintain a stable economic and financial system, to facilitate economic diversification, to support SMEs, to ensure stable supply of goods and services, and to safeguard the employment of local residents.[168] According to the policy address, the above objectives shall be achieved through various state assistance and administrative measures. While economic diversification is proclaimed as one of the economic objectives for 2015, this objective is to be achieved through state support measures to the convention and exhibition sector, cultural and creative industries, traditional Chinese medicine and environmental protection industry.[169] Similarly, the promotion of

166) Competition Commission, Notice of Commission consultation regarding block exemption application in respect of certain liner shipping agreements (19 January 2016), https://www.compcomm.hk/en/enforcement/registers/block_exemption/files/Notice_of_Commission_consultation_re_liner_shipping_BEA_eng.pdf.

167) See Robert E. Connolly, The Hong Kong Competition Commission receives an application for a block exemption for liner shipping agreements (Hong Kong Liner Shipping Association), 17 December 2015, *e-Competitions Bulletin* December 2015, Art. N° 77718.

168) See Macao SAR Government, Major Policies on Various Areas for the Fiscal Year of 2015, available at http://www.policyaddress.gov.mo/.

SMEs is to be achieved through financial aid, support for Macao-branded products and services and providing relief to the enterprises facing human resources shortages.[170] The enhancement of social welfare is to be achieved through protection of labor rights of the Macao residents, stabilization of the supply of goods and services, inflation control, protection of consumer rights, etc.[171] In relation to the stable supply of goods and services for example, the Government has pledged to monitor the prices of basic food products (such as rice, oil, salt, sugar, cereals, etc.), to cooperate with the importers sharing information on supply quantities and prices, to combat stocking of products with the purpose of causing price hikes, etc.[172] The dissemination of prices among the consumers has been already implemented by Macao Consumer Council[173] in 2011 through the establishment of the Supermarket Price Information Platform, an online database containing the retail prices of around three hundred products from over ten supermarkets.[174]

The specified objectives clearly indicate that policy choice has been made in favor of market stability (i.e. stable supply and stable prices), preservation and promotion of the SMEs and support for the employment of local residents. The economic efficiency pursued by the competition rules appears to be sacrificed in favor of a number of social objectives,

169) Macao SAR Government, Policy Address for the Fiscal Year 2015, http://www.policyaddress.gov.mo/policy/download/en2015_summary1.pdf.

170) *Id.*

171) *Id.*

172) Macao SAR Government, Policy Address for the Fiscal Year 2015 – Area of economy and finance, available at http://www.policyaddress.gov.mo/policy/home.php?lang=pt.

173) Macao Consumer Council, http://www.consumer.gov.mo/

174) The database is available at http://www.consumer.gov.mo/commodity/supermarket.aspx?lang=en.

the cost of which will be covered from the substantial tax revenues generated by the gaming concessions. The Macao SAR government is determined to actively monitor and coordinate economic activities for the achievement of the specified social objectives and is not inclined to the adoption of competition legislation.

At the same time, the public opinion in Macao is increasingly gravitating towards introduction of the publicly enforceable competition rules. In the summer of 2014 the Legal Affairs Bureau,[175] the Civic Affairs Bureau,[176] and the Macao Consumer Council[177] have launched a joint public consultation on the revision of the consumer protection legislation.[178] The consultation document has proposed among others the prohibition of the abuse of dominant market position, which would be penalized in administrative manner by revocation or refusal to renew the license of the undertakings abusing their market dominance and/or in the form of pecuniary sanction imposed for the administrative offense. Notably, 67% of the respondents were in favour of introducing such prohibition.[179] The consultation document also proposed to prohibit price fixing practices, which would be sanctioned as an administrative offense. While it was noted that the prices for some products are determined on the world markets, the overwhelming majority of the respondents (77%) were in favor of adoption of such prohibition.[180] On the basis of the public

175) *Direcção dos Serviços de Assuntos de Justiça,* http://www.dsaj.gov.mo/.

176) *Instituto para os Assuntos Civicose Municipais,* https://www.iacm.gov.mo/.

177) *Conselho de Consumidores*, http://www.consumer.gov.mo/.

178) Relatório Final da Consulta Pública sobre a Revisão da Legislação relativa à Protecção dos Direitos e Interesses dos Consumidores (9 February 2015), http://www.dsaj.gov.mo/Content/pt/download/forms/RptConclusions_pt.pdf.

179) *Id.,* p. 7.

180) *Id.,* p. 7.

comments the working group has proposed to introduce the detailed rules on determination, supervision, monitoring and sanctioning the price fixing practices. The sanctions could be in the form of pecuniary penalties imposed for administrative offense as well as revocation or refusal to renew the license of the undertakings engaged in such practices.[181] In relation to "hoarding" practices that lead to the artificial scarcity, higher demand and higher prices of the "hoarded" goods, which currently constitutes an economic crime punishable by imprisonment of six months to three years, the consultation document proposed to clarify the term "essential goods". 80% of the respondents have supported this initiative; some of the resppndents proposed to entrust the Chief Executive with the competence to draw and periodically revise the list of the "essential goods".[182]

Although the above mentioned public consultation has demonstrated substantial public support for adoption and enforcement of competition rules, it did not produce a clear vision of an enforcement framework such as establishment of a competition authority. The consultation document has proposed to entrust the Macao Consumer Council with investigatory powers that would allow it to collect market information and investigate various market practices.[183] While 75% of the respondents favor such strengthening of the Consumer Council's investigatory and monitoring powers, the results of the public consultation do not suggest that the Consumer Council would be also entrusted with the decision-making and sanctioning powers in relation to the discovered anti-competitive conduct

181) *Id.,* p. 9.
182) *Id.,* p. 10.
183) *Id.,* p. 12.

of the undertakings. Since the Consumer Council has already accumulated a substantial experience in facilitating the voluntary resolution of consumer disputes thorugh its Consumer Arbitration Centre (CAC),[184] the public consultation has addressed the possibility of expanding the CAC's authority, developing the institution of consumer mediation, etc.[185] At the same time, the consultation document did not address the possibility of entrusting the Consumer Council with public enforcement of competition rules and did not specify which government authorities will carry out this task. Thus, although the results of the public consultation indicate the existence of a substantial public support for adoption of comprehensive competition rules, there is no clarity as to the institutional structures that are necessary for the efficient enforcement of such rules.

There could be a number of external factors such as membership in international organization, bilateral or multilateral trading relations with other countries, that could prompt the Macao SAR to adopt competition law; however, it seems that none of Macao's international engagements currently induces the government to adopt the competition legislation. The most recent WTO trade policy review for Macao concluded that "there has not been overarching competition legislation in Macao" as "the authorities consider that current provisions, which are scattered around various laws and sector-specific regulations and rules, have provided adequate protection given that the territory is small and most businesses are small and medium enterprises".[186] Thus, unlike in the

184) Macao SAR Government Consumer Council, Consumer Arbitration Centre, http://www.consumer.gov.mo/CAC/Intro.aspx?lang=en

185) *Relatório Final da Consulta Pública sobre a Revisão da Legislação relativa à Protecção dos Direitos e Interesses dos Consumidores* (9 February 2015), p. 19.

186) Trade Policy Review of Macao, China, WT/TPR/S/281, WTO Secretariat, 25 March 2013, p. 8.

case of other countries,[187] Macao's WTO membership did not lead to the market liberalization or gradual replacement of economic regulation by competition rules. Unlike more recent trade agreements of the EU,[188] the EU-Macao 1992 Agreement for Trade and Cooperation does not provide for any obligations or cooperation concerning competition matters. The Closer Economic Partnership Arrangement (CEPA) between Mainland China and Macao does not provide any obligations or commitments concerning competition.

187) For example, it was argued that in case of Vietnam, the country's accession to the WTO accelerated transformation of the national economy and opening up to foreign direct investment (FDI), which in turn required the implementation of competition law and policy. See D. Fruitman, Vietnam Chapter in M. Williams (ed.) *The Political Economy of Competition Law in Asia* (Edward Elgar, 2013), p. 128.

188) See for example Association Agreement between the European Union and the European Atomic Energy Community and their Member States and the Republic of Moldova, OJ L260, 30.8.2014, Article 335(1): "Each Party shall maintain in its respective territory comprehensive competition laws which effectively address anticompetitive agreements, concerted practices and anti-competitive unilateral conduct of undertakings with dominant market power and provide effective control of concentrations."

# Ⅲ. Competition Laws of South Korea

## A. Legislative History of Competition Laws and Regulation of South Korea

Law is a living organ that evolves, responding to events happening in the people's everyday lives. When government, legislators, scholars and practitioners alike try to interprete currently existing laws in understanding and regulating present circumstances but to no avail, a need to devise a new law to cover such phenomena is called, so gets a brand-new law created. The trend for the fair competition in the market was high during the 1960's and the Price Stabilization Act was the governing law that controlled and regulated activities in the market. Then the Three Powders Incident, the trigger of the start of the competition law in South Korea, happened.

### 1. The Triggering Event and Development of Discussion for Enactment

The Three Powders Incident happened in 1963[189] right after the beginning of the Economic Development Plan driven by the government in 1962. The large conglomerates participated in the Economic Development Plan formed monopoly in the market and manipulated the supply and price of the three powered products, namely cement, flour, and sugar. Their unjust enrichment through the manipulation of the market was only possible as they were the main players (in the same concept as the

189) Youngsu Shin, Legislative History of Monopoly Regulation and Fair Trade Act, 30 years of Fair Trade Commission, Fair Trade Commission, at 5

“dominant market player, as perceived in the law) for the Economic Development Plan by the government who together had formed cartel in the market.

The government assessed hefty fine[190] on those businesses and designated eight products, including the three powdered products at issue, as restricted products in the market to prevent further manipulation. Yet, it was apparent that imposing heavy fine and setting aside products prone to manipulation would not prevent further possibilities of distorted practice in the market. “A research on the legislation for securing fair competition” formed the legal basis for drafting the Fair Trade Act (1964), by the committee on the Fair Trade Act under the Economy and Strategy Department. This draft was the first-ever legislative attempt by the government on the regulation of monopoly in the market. Faced to radical opposition by the Federation of Korean Industries backed up by the reasoning that government should promote businesses’ profit maximization even through monopoly, instead of oppressing the same, as such business practice would eventually extend the market and improve the economy, the 1964 Fair Trade bill did not get passed.

Not discouraged easily by the furious opposition of the interest party, the government again introduced a Fair Trade bill two years later, in 1966, which named four facets of business practices to be prevented: anti-competitive agreements, mergers impeding competition, unfair business practices, and abuse of market dominance. Those four factors are identical to the objectives listed on the current MPFTA. Although courageously introduced to the floor by the government with strong will to regulate the market competition, again due to the opposition by the business

190) Total KRW 870,000,000 fine were imposed.

sector and to the lobbying of the same sector, the bill died at the end of the congressional session without getting passed.

As the bill died with the closing of the congressional session in June, 1967, the government reintroduced the same bill in August, 1967, with a provision on business association added. This bill was then withdrawn when the new Monopoly Regulation Bill was introduced in April, 1969 as the contents of the Monopoly Regulation Bill substantially mirrored the contents of the Fair Trade Bill that the Monopoly Regulation Bill was considered as the better-replacement of the Fair Trade Bill.

The Monopoly Regulation Bill was sparked by the Shinjin Auto-Motive Cooperation's smuggling issues that had basis in monopoly of the market. The change in the title of the law from the Fair Trade Bill to the Monopoly Regulation Bill evidenced the intent of the legislators to clarify what constituted monopoly and to reinforce prohibition of monopoly. The bill defined monopoly as having five enterprises or one business takes up 20% or more of a certain product that the President may list them on the presidential decrees. Having this quantitative approach in defining what constitutes monopoly was surely a new direction that the government took as previous issues were focused on the pricing rather than the structure of the market.[191] This bill, too, died down at the end of the congressional session, hitting the opposing argument by the business sector.

Another Fair Trade Bill was introduced again in 1971 in responding to the world-wide stagflation caused by the Vietnam War. This time it was quite hopeful to get the bill passed as the bill was supported by consumer organizations and SME associations. The nature of the 1971

191) Shin, *Supra* Note 170, at 9

bill was a combination of the Fair Trade Bill in 1967 and the Monopoly Regulation Bill in 1969, a rather comprehensive market regulation. If only there was no abrupt closing of the congressional session on October, 1972 for political reasons, this bill could have been passed and enacted.

Finally, the Law on Price Stabilization was enacted in 1973 in the government's effort to regulate pricing issues as the market price was highly unstable due to the oil shock from the end of 1971. This law was later amended to the Price Stabilization and Fair Trade Act, still placing heavy weight on pricing regulations rather than promoting fair trade, considering fair trade would indirectly effect stabilizing market prices of products. Although the first enacted law on Fair Trade, with focus on price stabilization, critics evaluate that it is far too remote to call this law as the origin of Korea's Competition Law.[192)]

The shift in the economic policy from the government-driven to the market-oriented in the 1980's was symbolized with the enactment of the Monopoly Regulation and Fair Trade Act. In the background and the objective of the enactment, the government stated

"Because the national economy has grown enough to drive its own way rather than leaving the government take the driver's seat for the effective operation, now the government intend to set out the principles of the fair trade in the market to assist private players to function efficiently."[193)]

192) Shin, *Supra* Note 170, at 13

193) Whitepaper of Monopoly Regulation and Fair Trade Act, Economy Strategy Department, 1984, pp.62-63.

## 2. Subsequent Amendments and Development of MRFTA[194)]

Multitudinous amendments on the MRFTA were made through the history, sometimes triggered by the market situation, sometimes by the government's policy drive, and other times as a preventative measures or a curing strategy to fix problematic activities in the market. Each amendment has multiple provisions that form the character of the amendment and the direction of the MRFTA at large, and below are the most important parts of each amendment among the changes made.

### (1) The 1st Amendment (1986) - Regulation on Large Conglomerate

The first amendment was designed to regulate economic power's concentration by the large conglomerate by setting up a prohibition provision to establish holdings company in Article 7-2.

### (2) The 2nd Amendment (1990) - Complete Overhaul

This amendment was the only complete overhaul of the MRFTA in history to arrange provisions and overall structure, and such change was driven by the change in the enforcement agency from the Ministry of Economic Strategy to the Fair Trade Commission. Definition provision was reformed, unfair business activities subject to regulation were specified, and fines may be imposed at larger scope; yet the most notable part in the amendment was the establishment of the Fair Trade Commission. It is widely known that the effectiveness of the enforcement of the law increased significantly and the caseload of the complaint skyrocketed

194) Shin, *Supra* Note 170, pp 22-39.

since 1990, and having this FTC would be pointed as the main reason for such active enforcement.

#### (3) The 4th Amendment (1992) - to Supplement Provisions for Effective Application

A couple of changes on expanding exceptions to the investment amount cap and revising regulations for the unfair concerted activities were made to effectuate and supplement the complete overhaul and amendment made in 1990.

#### (4) The 5th Amendment (1994) - Limit on the Total Amount of Contribution

The limit of the total amount of contribution was reduced from 40% to 25% of the net asset through this amendment in the effort to correct issues resulted from the concentration of the economic power. The drastic reduce on the limit of the total amount of contribution brought about opposing argument from the enterprises; yet the government considered that this reduce in the contribution amount was an achievable goal within the 3 year period provided, considering that the average total amount of contribution for companies belonged to large congamelates were 26.8%. Also, a couple of exceptions still were installed in the provision to ease the reduce-in-limit effect and also to promote SOC construction businesses.[195]

As for the enforcement side, a provision was inserted that no injunction or penalties may be imposed for violations that ceased 5 years or more ago.[196]

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195) Businesses performing construction work under the Act on Public-Private Partnerships on Infrastructure were exempt from this limit of total amount of contribution.

196) Current version of the law makes this period as 7 years. Sec. 49.

### (5) The 7th Amendment (1996) - Promote Competition to Strengthen National Competitiveness

Section 3 of the law, “Remedy, Etc. of Monopoly or Oligopoly in Market Structures” was provided through this amendment. This section of the law clearly provided legal basis for the government to interrupt the market and to restructure the system to promote competition, although when first introduced criticism and concerns that this provision may well be another empty propaganda or statement.

Another meaningful provision devised through this amendment was Section 7 that prohibited combination of enterprises that applied across the board, regardless of the size of the enterprises. As the combination of enterprises were prohibited for enterprises with certain asset level (above KRW 5,000,000,000 investment or KRW20,000,000,000 net asset) only, expanding this combination of enterprises to all enterprises built the current provision of the law on the issue.

### (6) The 13th Amendment (1998) - Coping with Financial Crisis

The financial crisis hit hard the market in South Korea at the end of 1997. In responding to the emergent situation arose out of the financial crisis, a couple of irrational provisions were devised and installed through this amendment. As the sections inserted or amended through this amendment were rather instant response to the crisis that they may have gone even to the opposite direction from what the law initially envisioned. For instance, the total amount of contribution limit was deleted, only to be brought back onto the law through later amendments.

### (7) The 16th Amendment (1999) - Methods to Strengthen Effectiveness of Regulation

Presumption of market dominating enterprises were allowed through different scenarios under Section 4 of the law.[197] By specifically setting the conditions for presumption of market-dominating enterprises, the effectiveness of the regulation on the same enterprises was pursued to be enhanced.

### (8) The 19th Amendment (1999) - Revert to Norm after Financial Crisis is Over

The emergency measures taken in response to the financial crisis were stricken, and the total amount of contribution limit was brought back into the law that was temporarily removed. Reverting back to the normal state from the financial crisis is understandable and maybe even praised for trying to keep the principle in place even when the economic situation has not been substantially improved or stabilized since the crisis; however, a policy change this drastic - removing the restriction and bring back the same regulation within 2 years period - poses concerns on the reliability of the law and should be avoided when possible.

### (9) The 20th Amendment (2001) - Empowering FTC's Investigative Authority

To promote restructuring of enterprises, with certain limitations not to impede upon the restrictions on the economic power concentration, provisions

197) When the marekt share of one enterprise is half of more, or the total market share of three or more enterprises is 75% or more (enterprises with less than 10% market share are excluded).

making it easier to establish or transition to holdings company were imposed.[198] Also, to effectuate investigative power of FTC, leniency program[199] was revised to provide more benefit for enterprises making voluntary reports and for anyone who cooperated with investigation. Another measure taken through this amendment was the extension of the rights of FTC to request information pertaining to financial transactions from enterprises for another 2 years. Allowing FTC to request such information was to prevent ay unfair insider-trade, and such extension was made in furtherance to the regulation on the illegal loaning.

#### (10) The 21st Amendment (2002) - Regulation on Economic Power's Concentration

Revisions on the total contribution limit was made to continue regulating excessive contribution to expand market dominance. Revisions on the total contribution limit was also crafted in a way to free up regulations to promote enterprise's competitive strength by allowing contributions for concentration on the core business.

#### (11) The 24th Amendment (2004) - MRFTA's Applicability to Overseas Acts

A provision about the MRFTA's applicability to foreign acts was added through this amendment. For the first time, the law may be applied to acts taken overseas when such act affects domestic market. This applicability of the law to the foreign acts have been recognized through caselaw in

198) Establishment of holding company were permitted through amendment in Feb. 1999, yet the application of such provision was not easy due to the requirements.

199) 22-2 Reduction, Exemption, Etc. on Voluntary Reporters.

the court decisions; yet this provision clarified and formalized such interpretation into the statute.

As for the investment for corporate restructuring, certain limits on the investments were imposed with exception for the technology collaboration with SMEs, for the strengthening of the international competitiveness of the industry and for the enhancement of the competitiveness of the enterprise.

### (12) The 27th Amendment (2005) - Economic Collaboration with North Korea

In furtherance of the economic collaboration between two Koreas, the limit on the investment were lifted for investment to the companies under the Inter-Korean Exchange and Cooperation Act.

### (13) The 29th Amendment (2007) - Loosening Regulation on Holdings Company

Regulations for holding companies were eased. Holding company's liabilities limit was loosened from 100% to 200%, possession rate of self-issued stock were decreased, total contribution limit increased from 25% to 40% of the company's net asset.

### (14) The 32nd Amendment (2007) - Procedural System Organization

Revamp of the unfair concerted acts were introduced through this amendment. A new type of unfair concerted act was added to the law[200], and a new section was added to prevent any unfair concerted act in the public sector bidding.[201]

200) 19(1)(8) Deciding successful bidder, successful auctioneer, bidding price, highest price or contract price, and other matters prescribed by Presidential Decree

201) 19-2.

### (15) The 34th Amendment (2007) - Total Investment Amount

This amendment was a very minimal amendment adding only a couple of provisions to the total contribution limit system.

### (16) The 37th Amendment (2009) - Deletion of Regulation on Total Contribution Limit

Removal of the total contribution limit was the biggest change made through the amendment. Also, the publication requirement[202] on the current status of the company was another important change that was in line with the restriction on the concentration of the economic power.

The legislative background and the developmental history through numerous amendment concisely portrays the relationship between the government and the law as to how the government sets out agenda and how the low responds, and also the relationship between the society and the law as to what happens in the domestic and overseas market and how the law evolves to fix or to catch-up such phenomenon. Especially the government's economic policy and the law's change in accordance with such agenda setting, followed by market response and further amendment, may provide valuable information for other countries in Asia where competition law is taking baby steps.

Specifically, provisions in Korea's MRFTA such as economy concentration prohibition would provide legal basis for solving SOEs or large private businesses, not to mention conglomerate issues, with their social, economic, and political issues.[203]

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202) 11-4.

203) Hyeshin Cho, KLRI Competition Law Workshop Booklet (May 12, 2016) p.24

What is peculiar in Korea's MRFTA, as compared to the competition laws of the United States, is that the MRTFA started its way off as a price regulation law, and the conversion to MRFTA still has the regulation on pricing as the important component of the law. As the anti-trust laws in the US does not impose any restrictions on the pricing and instead leaving the issue up to the market, the government may seem too nosy in meddling into the market in Korea's case through MRFTA; however, this trait may be explained and even justified when consideration on the market environment of Korea was different than that of the US. When the MRTFA was introduced, the market economy has already taken its way to a substantial level of development while allowing monopoly and oligopoly taken up their share in the competition. Without fast and hard measure to intrude the already-built monopolistic and abusive pricing system, MRTFA would not have made any meaningful effect.

## B. Analysis of Competition Laws and Regulations of South Korea

### 1. Objective and Background of Legislation

With the hope of solving the imbalanced economic concentration by the so-called chaebol, the large conglomerates, a statement declaring economic democratization[204] was added to the Korean Constitution in 1980. Through the economic democratization provision of the Constitution, the State

204) Constitution of the Republic of Korea, Article 119, Provision 2: (2) The State may regulate and coordinate economic affairs in order to maintain the balanced growth and stability of the national economy, to ensure proper distribution of income, to prevent the domination of the market and the abuse of economic power and to democratize the economy through harmony among the economic agents.

is awarded the authority to intervene economic affairs when such intervention is for the balanced growth and the stability of the national economy, for the appropriate distribution of income, for the prevention of the market domination, and for the democratization of the economy. This economic democratization provision was innovative in its nature, considering the historical and political status of Korea back then, still having the shadow of the dictatorship and was under the government erected through military coup. This single and small provision added to the Constitution threw heavy impact to the legislation and government policy making from then on, inducing the enactment of the Korean Competition law. Following the amendment on the Constitution, the Monopoly Regulation and Fair Trade Act (MRFTA, a/k/a the Korean Competition Act) was enacted.

MRFTA proclaimed its purpose as

> *"to promote fair and free competition, to encourage thereby creative enterprising activities, to protect consumers and to strive for balanced development of the national economy, by preventing any abuse of market-dominating positions by enterprisers and any excessive concentration of economic power, and by regulating undue collaborative acts and unfair business practices."*[205)]

This purpose article clearly states that for the benefit of the fair competition for the protection of the consumer and the balanced development of the economy, the State will jump in and meddle by preventing market domination/economic concentration and by regulating unfair collaborative

205) MRFTA, Article 1.

acts and unfair business practices ("UBP"). The purpose statement on its face expresses its societal and economic goals.[206]

## 2. Structure and Character of MRFTA

It is important to note that the purpose provision of the MRFTA enumerates four types of acts that needs to be regulated and/or prohibited as (1) the abuse of market-dominating position, (2) concentration of economic power, (3) undue collaborative acts, and (4) unfair business practices, and all three but the last one (UBP) mirrors other leading competition regimes. The odd ball in this target list has its origin in the Japanese Anti-Monopoly Law.[207] Adding this UBP provision can almost be interpreted as placing a catch-all phrase, having another safety net over the other regulated activities to make sure that this law become implemented and utilized in the way it was aimed for. This evidences the dire desire of the legislators and the government to enact a law that effectively achieves its goals, and again, this careful setting was backed up by the economic democratization clause on the Constitution.

MRFTA has 71 provisions in the Act and 66 provisions in the Regulations. Through the Act and the Regulation, specific types of acts that are to be regulated and/or prohibited are explained, along with the procedures for the Fair Trade Commission to adjudicate and the damages, penalties, and exemptions. Among the many provisions under the MRFTA, four distinctive features may serve as the backbone and the key of the law; namely, the

206) Professor Yosop Choi stated during the workshop for Korean Competition Law Analysis held on May 12, 2016 that this combination of societal and economic goals as the purpose of the law resulted in a blend of ordoliberalism and neoliberalism.

207) Article 19 of Japanese Anti-Monopoly Law.

rule on abuse of market dominance on articles 3-2 and 4, the cartel enforcement on articles 19 and 26, the merger control on article 7, and the rules on unfair business practices on articles 23 and 29. Of course each and every provision in the law serve specific purpose in regulating competition in the market that it is hard to weigh some provisions heavily over others, still those four aspects of rules show the intent of the legislatures and the purpose of the law. These provisions will be discussed more in depth in the following chapters.

### 3. Related Laws

Having MRFTA as the primary law regulating competitive activities in market participation, South Korea has at least five more laws that are directly and/or rather discreetly related to MRFTA. They are Act on Fair Transactions in Large Franchise and Retail Business, Framework Act on Consumers, Product Liability Act, Act on Fair Labeling and Advertising, and the Fair Transactions in Agency Act.

## C. Institutional Framework of Competition Laws in South Korea

### 1. Overview of KFTC

When the MRFTA was first enacted in 1980, the Korean Fair Trade Commission was rather an advisory branch of the government, not an independent agency with adjudicatory right. Along with the gradual increase in the importance of the fair competition, the need for securing the comission's indepedence as well as its adjudicatory right arose. In 1990

through amendment of the MRFTA, the independent standing of the organization and its adjudicatory power were granted.

The KFTC was composed of 3 standing committee members and 2 non-standing members initially, when the law was first enacted in 1980. Members of the committee were appointed by the president, based on the Economy and Strategy Minister's recommendation. Investigative officers conduct investigation and review of respondent's response, and the committee members vote on the disposition of the matter - 3 or more members' concurrence were required to form the official opinion of the committee, then the final disposition was rendered by the Minister of the Economy and Strategy Ministry. As such, no independence or adjudicatory power were imbedded on the committee.

The amendment in 1990 defined the KFTC as an independent adjudicatory body, concists of 7 members including 2 non-standing. Head and the Deputy members were appointed by the president, based on the Economy and Strategy Minister's recommendation, and other members were appointed by the Head. Although the law provided its adjudicative power, its independence was still limping as the commission was still housed under the Ministry of Economy and Strategy.

In the 1994 amendment, the law moved the structural positioning of the KFTC to the current Prime Minister's Office, specifically spelling out its independence as the reason for such restructuring. Later through the 1996 amendment, sub-committee meeting system was introduced.

In the legal structure, MRFTC has two presidential enforcement decrees under the act: The Enforcement Decree of the Monopoly Regulation and Fair Trade Act, which specifies rules and directions to implement the law into action, and The Enforcement Degree on the Hierarchical Structure of

the Korean Fair Trade Commission, which sets force the organic structure of the KFTC. Rules on who/which civil servant takes which position at KFTC for doing what kinds of duties are laid out on this enforcement decree and the subordinate ordinances under the decree.

### 2. Complaint Procedure

A complaint case with KFTC may start from identification or reporting of a violation, although most cases start with reporting in reality. Upon filing a complaint, the investigator at KFTC reviews such claim and conduct investigation. The investigator must prepare a report and submit it to the review meetings where committee members determine whether violations were committed and how the case must be resolved. When such disposition was delivered, if the respondent do not agree, s/he may request a reconsideration of the case, which the commission must reconsider and decide within 60 days. The respondent may file an appeal at Seoul High Court when s/he does not agree to such decision made through reconsideration.

## D. Current Status of Implementation and Enforcement of Competition Laws in South Korea

### 1. Consideration for SMEs

The purpose of the MRFTA, as explained previously, clearly places “promotion of fair and free competition” as the main goal to achieve through the law. Fair and free competition, when juxtaposed with the policy protecting SMEs, may seem in discord with each other[208] as the

former encourages free competition while the latter may seem to provide shield to some competitors (names, SMEs) that eventually leads to the disturbance oft he free competition where each and every competitor is treated equally. However, the scale and economic power of an enterprise does matter and affect on the influence it may make in the market in reality, treating all player in the market equally may not provide a level playingfield for the fair competition. In that sense, installing protective measures for the SMEs in the MRFTA only made sense as it would enable SMEs to have similar bargaining power in the market as their competitor large enterprises or conglomerates do.

Different types of measures were adopted into the provisions of MRFTA that provides protection for the SMEs: (1) empowering SMEs in their competition against or transaction with large enterprises, (2) placing regulations applicable only to large enterprises and thereby protecting SMEs indirectly, (3) taking into consideration of the harmful effect drawn upon SMEs when considering penalties for violations of the law.[209)]

Section 60 provides that the MRFTA does not apply to association for mutual support for small-scale enterprises. By carving out the group of small enterprises forming an association for mutual support from the regulations of the law, the law encourages small enterpreneurs to collaborate with each other and form solidarity that may gain more power to compete against large enterprises. In a similar vein, Section 19(2) carved out a scenario where a business activity was conducted with the purpose of

208) Jungku Park, Review on problems and suggestions for SME policies: focused on establishing SME policy that is competition-friendly, LEG Working Paper Series, 2010-10, at 36.

209) Hyeshin Cho, A study on the problems of Korean Competition Law for the Harmonization of Competition Policy and SEMs Policy, Competition Law Research, Vol.29 (2014) p. 475.

enhancing competitiveness of SMEs as provided by the presidential decree that was authorized by the KFTC from the prohibition of collaborated business rule. Those provisions that provides special exemption for SMEs that promotes collaboration and cooperation of SMEs are self-explanatory in the sense that SMEs would have more power to compete against large enterprises by promoting cooperative clusters SMEs. It does seem true at least in terms of the size or scale of the unit that is competing against large enterprises; however, criticisms arose to the evaluation of the effectiveness of those provisions in action. It is argued that competition brings about advancement of technology and economic justice, not cooperation or collaboration, that promoting collaboration may exacerbate monopolization of the market, that intervention by the government carries risks of overpowering and making it harder for new competitors to participate to the competition in the market.[210)]

Section 3-2 and Section 23 each specifies abuse of market dominant status and unfair business practices as violation of fair competition, respectively. These abuse of market dominant status and unfair business practices provisions only apply to large enterprises and places special regulation for them, thereby protect SMEs indirectly. Again, although regulating large entities for violations while leaving the SMEs free helps SMEs in having larger leeways to maneuver and certainly helps in their competing against large enterprises in theory, when interpreted by the court, the provision almost speaks in a different language. In Supreme Court 2002Du8626, Decision rendered on November 22, 2007, Re:

210) Kling/Thomas, Kartellrecht, Vahlen, 2007, S. 494; Rittner/Dreher, Europaisches und deutsches Wirtschaftrect – Eine systematische Darstellung, C.F. Muller Verlag, 2008, S. 393, at 584, recited Ohsung Kwon, Cooperation of SMEs and MRFTA, Kyunghee Law Review, Vol. 25, No. 1, 1990, pp 93-97.

Refusal of Supply of Posco Thermoplastic Coil, the court stated that mere disadvantage that a specific enterpriser suffered due to a refusal of transaction by a market-dominant enterprise was not sufficient to prove the unfairness, that a refusal of transaction based on the purpose to maintain and strengthen monopoly in the market along with objective evaluation that such refusal would result in monopoly is necessary to find unfairness in refusal of transaction by a market-dominant enterprise. Apparently, proving the SME's own disadvantage that it suffered due to the market-dominent enterprise's business conduct would be much easier and obvious than proving potentially harmful effect to other players in the market and the purpose of such business conduct. This may raise serious concerns as to the effectiveness of the provision in providing protection for SMEs as it was initially designed.

In the amendment of the law in 2013, Section 71(4) was added that provides that the Administer of the Small and Medium Business Administration, among others, may request the KFTC to file a complaint even when the KFTC determined that no case passes through the threshhold for violation of the law. Allowing the SME Administer to initiate a process to penalize enterprises that threw harmful effect on SMEs indicates its policy consideration that the disadvantage the SME suffers matter in determining penalties for violations.

## 2. Key Sections of MRFTA

### (1) Regulation on Market Dominance

What stands out from MRFTA of South Korea, among other detail-oriented and carefully crafted measures for protection of small players in

the market, is the provisions regulating market dominating positioning and their activities in Articles 3-2 and 4.

**Article 3-2 (Prohibition of Abuse of Market-Dominating Position)**

(1) No market-dominating enterpriser shall commit any act falling under any of the following subparagraphs (hereinafter referred to as "abusive acts"): <Amended by Act No. 5813, Feb. 5, 1999>

1. Determining, maintaining or changing unreasonably the price of commodities or services (hereinafter referred to as "price");
2. Unreasonably controlling the sale of commodities or provision of services;
3. Unreasonably interfering with the business activities of other enterprisers;
4. Unreasonably impeding the participation of new competitors;
5. Unfairly excluding competitive enterprisers, or doing considerable harm to the interests of consumers.

(2) Categories or standards for abusive acts may be determined by Presidential Decree. <Newly Inserted by Act No. 5235, Dec. 30, 1996; Act No. 5813, Feb. 5, 1999>

In Articles 3-2, the law provides a non-exhaustive list of abusive acts that any market-dominating enterpriser must refrain from conducting. As clearly provided, although in the form of a non-exhaustive list, the Article covers almost all abusive conduct that one may perform in a market, from price changing, controlling sales, interfering others' business activities and impeding upon newcomers, to unfair exlusion of competitor and harming consumers' interests. Also, the law provides room for standards determining the abusiveness to be determined by the Presidential Decree[211], building in flexibility into the law to reflect societal changes and currentness along with global and national status of economy.

211) As compared to Acts, decrees tend to have smoother and easier path for amendments, thus leaving those standards to be determined in the presidential decree could imply that the standards may get changed depending on circumstances

**Article 4 (Presumption of Market-Dominating Enterpriser)**
An enterpriser (excluding the enterpriser whose annual amount of sales or purchase in a particular business area is less than 4 billion won) whose market share in a particular business area falls under any of the following subparagraphs shall be presumed a market-dominating enterpriser referred to in subparagraph 7 of Article 2: <Amended by Act No. 8631, Aug. 3, 2007>

1. Market share of one enterpriser is 50/100 or more;
2. The total market share of less than three enterprisers is 75/100 or more: Provided, That those whose market share is less than 10/100 shall be excluded herefrom.

[This Article Wholly Amended by Act No. 5813, Feb. 5, 1999]

And then the law goes on in describing the presumption of market-dominating enterpriser, stating that the market-dominance is determined by the size of the enterprise in the market, calculated by the market share. Any one enterprise whose market share is more than a half, such enterpriser is presumed to be a market-dominating enterpriser under this act, thus the restrictions under Article 3-2 apply. Also if less than three enterprises take up more than 75% of the market share, such enterprises are preseumed to be dominating, with the exception of any one of the less than three enterprises whose market share is less than 10%, meaning that this market-dominant enterprises category catches big conglomerates and businesses with large enough scaled shares, but at the same time carefully crafted any unfortunate small businesses that happened to be one of the largest among the mom-and-pop stores. Enterprises fall under this category, with the exception, will be presumed to be dominating the market and are prohibited from conducting any of the abusive acts listed in the law, determined by the standards set by the Presidential Decree.

### (2) Control on Merger

Another point that MRFTA places heavy weight is its control on merger of enterprises in Article 7, because, obviously, merge may be a very effective tool in eliminating competition in the market by simply combining similar busineses, thus threatens the just competition that enrich healthiness of the market economy.

Among other activities, while enlisting the types of combination that this article aims to cover, the law also details cases where presumption arises upon merger that the combined company becomes a market dominant player. Such cases include when the combination meets the market dominance test under Aritlce 4, when the combined business is the largest in the sector, and when the combined enterprise's marketshare takes at least 25 % or more than the second largest undertaking's market share.

**Article 7 (Restriction on Combination of Enterprises)**

(1) No one shall, directly or through a person determined by Presidential Decree as having special interest (hereinafter referred to as "person with special interest"), practically suppress competition in a particular business area by conducting practices falling under any of the following subparagraphs (hereinafter referred to as "combination of enterprises"): Provided, That this shall not apply where a person, other than a company whose size of total assets or turnover (referring to the sum of total assets or turnover of affiliated companies) meets the size determined by Presidential Decree (hereinafter referred to as "large company"), performs an act falling under subparagraph 2: <Amended by Act No. 5235, Dec. 30, 1996; Act No. 5813, Feb. 5, 1999; Act No. 8631, Aug. 3, 2007>

1. The acquisition or ownership of stocks of other companies;
2. The concurrent holding of an executive's position in another company (hereinafter referred to as "concurrent holding of an executive's position")

by an executive or employee (referring to a person who continues to be engaged in the affairs of the company, but is not an executive; hereinafter the same shall apply);

3. A merger with other companies;

4. An acquisition by transfer, lease or acceptance by mandate of the whole or main part of a business of another company, or the acquisition by transfer of the whole or main part of fixed assets used for the business of another company (hereinafter referred to as "acquisition by transfer of business");

5. Participation in the establishment of a new company: Provided, That this shall not apply to any of the following cases:

(a) Where a person, other than persons with special interests (excluding those determined by Presidential Decree) does not participate in the establishment of a new company;

(b) Where a person participates in the establishment of a company by division under Article 530-2 (1) of the Commercial Act.

(2) The provisions of paragraph (1) shall not apply where the Fair Trade Commission deems that a combination of enterprises falls under any of the following subparagraphs. In such cases, the parties concerned shall assume the burden of proof as to whether it meets the requirements:<Amended by Act No. 5813, Feb. 5, 1999>

1. Where the effect of efficiency promotion attainable through the combination of enterprises is more than the negative effect produced by restricted competition;

2. Where such combination is made with an inviable company, falling under the requirements determined by Presidential Decree, such as the company whose total capital in a balance sheet is less than its paid-in capital for a reasonable period.

(3) Deleted. <by Act No. 8631, Aug. 3, 2007>

(4) In cases of a combination of enterprises falling under any of the following subparagraphs, it shall be presumed that competition is practically suppressed in a particular business area: <Newly Inserted by Act No. 5335, Dec. 30, 1996; Act No. 5813, Feb. 5, 1999; Act No. 8631, Aug. 3, 2007>

1. In cases where the aggregate of the market share of a company (referring to all the companies participating in the establishment of a company in cases of paragraph (1) 5; hereafter the same shall apply) taking part in the combination of enterprises (referring to the aggregate of market shares of the affiliated companies; hereafter the same shall apply in this Article) meets the qualifications of the following items:

(a) In cases where the aggregate of the market share of the company concerned satisfies the presumptive requirements for a market dominating enterprise;

(b) In cases where the aggregate of the market share of the company concerned is the largest in the business area concerned;

(c) In cases where the aggregate of the market share of the company concerned exceeds the market share of a company with the second largest market share (referring to a company with the largest market share besides the company concerned) by not less than 25/100 of the aggregate of the market share;

2. In cases where a large company, directly or through a person with a special interest, combines enterprises according to the following requirements:

(a) In cases of the combination of enterprises in a particular business area where small or medium enterprises under the Framework Act on Small and Medium Enterprises occupy not less than two-thirds of the whole market share;

(b) In cases of the combination of enterprises through which the combined company will have 5/100 or more of the market share.

(5) The Fair Trade Commission may determine and announce the standards for the combination of enterprises which practically suppresses competition in a particular business area under paragraph (1), and for the combination of enterprises to which paragraph (1) does not apply pursuant to paragraph (2). <Newly Inserted by Act No. 5235, Dec. 30, 1996; Act No. 5813, Feb. 5, 1999; Act No. 8631, Aug. 3, 2007>

But this article does not ban merger all the time - while generally prohibits mergers to protect balanced competition in the market, this

article also provides exceptions where mergers can still be allowed and not considered as anti-competitive. The good-old balancing test is adopted and when and only when the benefit of efficiency obtained through the merger outweighs the chilling effect of competition such merger is considered as an exception to this article, thus the prohibition not apply. Also, the law structured another convenient leeway in the way of the presidential decree, that a non-viable undertaking that satisfies the decree's requirements may also fall into the exception category.

(3) Rules on Cartel

Unfair Collaborative Acts are prohibited under Article 19(1) of MRFTA. The law specifically bans enterprisers from agreeing with other enterprisers by contract, agreement, resolution, or any other means, to jointly engage in any enumerated acts. The section provides a list of enumerated acts that may constitute unfair collaborated acts as 1. Fixing, maintaining or changing the price; 2. Determining terms and conditions for the transaction of goods or services, or for payment of prices thereof; 3. Restricting production, delivery, transportation, or transaction of goods or restricting transaction of services; 4. Limiting the area in which a transaction arises or the transaction counterpart; 5. Preventing or restricting the establishment or extension of facilities or the installation of equipment necessary for the production of goods or the rendering of services; 6. Restricting kinds and standards of goods or services when they are produced or traded; 7. Jointly carrying out, managing the main parts of business or establishing a company, etc. to jointly carry out and manage it; 8. Deciding successful bidder, successful auctioneer, bidding price, highest price or contract price, and other matters prescribed by Presidential Decree; 9. Practically restricting

competition in a particular business area by means of interfering or restricting the activities or contents of business by other enterprisers (including the enterpriser who has conducted the activity), which is other than the act referred to in subparagraphs 1 through 8. Exemption from this prohibition provisions are also built in under Article 19(2) of the same act, with a notification procedure should an enterpriser wishes to utilize the exemption provision. The exemption is available when the conditions on the Presidential Decree is met and also such exemption is authorized by the KFTC. The criteria for such exemption varies, including industrial rationalization, R&D, economic depression, reform of industrial structure, rationalization of trading condition, and enhancement of competitiveness of SMEs. What is notable in this exemption criteria is that if an otherwise unfair collaborative act may still be allowed if it is for the enhancement of competitiveness of SMEs, that the law specifically designed an advantage for SMEs, and this is what Hong Kong and Macao where SMEs cound vast majority of the market look for in enacting and implementing their competition laws.

The strictness of the provision on controlling the Unfair Collaborative Acts is shown on Article 19(5) where a violation is presumed in circumstances. For instance, the characteristic of the goods or services, the relevant market, the economic reason for the conduct, the consequences of the conduct, and the nature and frequency of contact between enterprises are all factors that may lead to a presumption of the existance of an agreement in violation of the law. Obviously it is not an easy job determining which acts met the criteria and constituted violation and which do not, and KFTC, being the party having the burden to prove such existence of cartel, often failed to prevail.[212)]

**Article 19 (Prohibition of Unfair Collaborative Acts)**

(1) No enterpriser shall agree with other enterprisers by contract, agreement, resolution, or any other means, to jointly engage in an act falling under any of the following subparagraphs, which unfairly restricts competition (hereinafter referred to as "unfair collaborative act") or allow any other enterpriser to perform such unfair collaborative act: <Amended by Act No. 4513, Dec. 8, 1992; Act No. 4790, Dec. 22, 1994; Act No. 5235, Dec. 30, 1996; Act No. 5813, Feb. 5, 1999; Act No. 7315, Dec. 31, 2004; Act No. 8631, Aug. 3, 2007>

1. Fixing, maintaining or changing the price;
2. Determining terms and conditions for the transaction of goods or services, or for payment of prices thereof;
3. Restricting production, delivery, transportation, or transaction of goods or restricting transaction of services;
4. Limiting the area in which a transaction arises or the transaction counterpart;
5. Preventing or restricting the establishment or extension of facilities or the installation of equipment necessary for the production of goods or the rendering of services;
6. Restricting kinds and standards of goods or services when they are produced or traded;
7. Jointly carrying out, managing the main parts of business or establishing a company, etc. to jointly carry out and manage it;
8. Deciding successful bidder, successful auctioneer, bidding price, highest price or contract price, and other matters prescribed by Presidential Decree;
9. Practically restricting competition in a particular business area by means of interfering or restricting the activities or contents of business by other enterprisers (including the enterpriser who has conducted the activity), which is other than the act referred to in subparagraphs 1 through 8.

212) Yosop Choi, Korean Competition Law, workshop held by KLRI on

(2) The provisions of paragraph (1) shall not apply, where unfair collaborative practices are authorized by the Fair Trade Commission as satisfying the requirements prescribed by Presidential Decree, and they are conducted for any of the following purposes: <Newly Inserted by Act No. 5235, Dec. 30, 1996>

1. Industry rationalization;
2. Research and technology development;
3. Overcoming of economic depression;
4. Industrial restructuring;
5. Rationalization of trade terms and conditions;
6. Improvement of competitiveness of small and medium enterprises.

(3) Necessary matters with respect to the standards, methods, and procedures of authorization under paragraph (2) and modification of authorized matters shall be determined by Presidential Decree. <Newly Inserted by Act No. 5235, Dec. 30, 1996; Act No. 5813, Feb. 5, 1999>

(4) Any contract, etc. stipulating unfair collaborative acts as referred to in paragraph (1) shall be null and void between enterprisers.

(5) Where two or more enterprisers conduct an act falling under any subparagraph of paragraph (1), it shall be assumed that the enterprisers have agreed to conduct an act in association falling under any subparagraph of paragraph (1) when it is highly probable to reckon that they did the act in association regarding the characteristic of the relevant transaction, goods or services, economic reasons and ripple effects of the relevant activity, frequency, mode, etc. of contact among enterprisers. <Amended by Act No. 8631, Aug. 3, 2007>

(6) The Fair Trade Commission may prescribe and announce the standards for examination of unfair collaborative acts. <Newly Inserted by Act No. 8631, Aug. 3, 2007>

MRFTA not only prohibits individual enterprises anti-competition conducts, but also bans anti-competitive activities by business association under

Article 26. Just like other provisions providing list of activities not to be performed, this section also sets out certain types of activities that should not be carried on by business associations: 1. Unfairly restricting competition through an act falling under any subparagraph of Article 19 (1); 2. Restricting the present or future number of enterprisers in any business area; 3. Unreasonably restricting the business contents or activities of member enterprisers (referring to an enterpriser who is a member of the enterprisers' organization; hereinafter the same shall apply); 4. Inducing or assisting an enterpriser to conduct unfair trade practices under each subparagraph of Article 23 (1), or to conduct practices of resale price maintenance under Article 29

**Article 26 (Prohibited Activities of Enterprisers' Organization)**

(1) No enterprisers' organization shall commit any of the following acts: <Amended by Act No. 5235, Dec. 30, 1996; Act No. 5813, Feb. 5, 1999>

1. Unfairly restricting competition through an act falling under any subparagraph of Article 19 (1);
2. Restricting the present or future number of enterprisers in any business area;
3. Unreasonably restricting the business contents or activities of member enterprisers (referring to an enterpriser who is a member of the enterprisers' organization; hereinafter the same shall apply);
4. Inducing or assisting an enterpriser to conduct unfair trade practices under each subparagraph of Article 23 (1), or to conduct practices of resale price maintenance under Article 29;
5. Deleted. <by Act No. 5814, Feb. 5, 1999>

(2) Article 19 (2) and (3) shall apply mutatis mutandis to cases as referred to in paragraph (1) 1. In such cases, “enterpriser” shall be construed as “enterprisers' organization”. <Amended by Act No. 5235, Dec. 30, 1996; Act No. 8631, Aug. 3, 2007>

(3) If it is necessary for preventing any act of violating paragraph (1), the Fair Trade Commission may establish and announce any guidelines to be observed by the enterprisers' organization.
(4) If the Fair Trade Commission intends to establish the guidelines as referred to in paragraph (3), it shall hear opinions from the heads of the related administrative agencies.

### (4) Efforts for Level Playingfield: Prohibiting Unfair Trade Practices

When the existence of unfair business conduct under the MRFTA is proven, without the requirement of showing market dominance or anti-competitive agreement, the MRFTA jumps in and places restraits in business activities in the market, vertically. Provisions related to this trait are under Article 23 and 28 of MRFTA. This is one of the most unique features of the Korean MRFTA that shows differences from the competition law provisions from the western advanced markets where market dominance or some sorts of violation of competition agreement must be proven for governement intervention.

**Article 23 (Prohibition of Unfair Trade Practices)**
(1) No enterpriser shall commit any act which falls under any of the following subparagraphs, and which is likely to impede fair trade (hereinafter referred to as “unfair trade practices”), or make an affiliated company or other enterprisers perform such act: <Amended by Act No. 5235, Dec. 30, 1996; Act No. 5813, Feb. 5, 1999; Act No. 8382, Apr. 13, 2007; Act No. 12095, Aug. 13, 2013>
1. Unfairly refusing any transaction, or discriminating against a certain transacting partner;
2. Unfairly excluding competitors;

3. Unfairly coercing or inducing customers of competitors to deal with oneself;
4. Trading with a certain transacting partner by unfairly taking advantage of his/her position in trade;
5. Trading under the terms and conditions which unfairly restrict business activities of a transacting party or disrupting business activities of another enterpriser;
6. Deleted; <by Act No. 5814, Feb. 5, 1999>
7. Assisting a person with special interest, or any other companies by conducting any of the following acts:
(a) Providing the person with special interest, or an other company with advanced payment, loans, human resources, immovable assets, securities, goods, services, right on intangible properties, etc. or conducting a transaction under substantially favorable terms;
(b) Transacting with the person with special interest, or another company that does not perform a practical role in the transaction, despite that transacting with another enterpriser is substantially favorable;
8. An act likely to impair fair trade, other than those listed in subparagraphs 1 through 7.

(2) No person with special interest or company may conduct an act of receiving the relevant assistance from another enterpriser despite the possibility of falling under paragraph (1) 7. <Newly Inserted by Act No. 12095, Aug. 13, 2013>

(3) The categories or standards for unfair trade practices shall be determined by Presidential Decree. <Amended by Act No. 5235, Dec. 30, 1996; Act No. 12095, Aug. 13, 2013>

(4) If it is necessary to prevent acts of violating paragraph (1), the Fair Trade Commission may make and announce the guidelines to be observed by enterprisers. <Amended by Act No. 12095, Aug. 13, 2013>

(5) In order to prevent an unreasonable inducement of customers, the enterprisers or an enterprisers' organization may voluntarily make a code (hereinafter referred to as "fair competition code"). <Amended by Act No. 5814, Feb. 5, 1999; Act No. 12095, Aug. 13, 2013>

(6) Enterprisers or an enterprisers' organization may request that the Fair Trade Commission to examine whether or not the fair competition code referred to in paragraph (5) is in violation of paragraph (1) 3 or 6. <Amended by Act No. 12095, Aug. 13, 2013>

Vertical restraints are listed on Article 23, providing basis for banning enterprises from engaging in any activities that may impede fair trade, or make an affiliated company or other enterprisers perform such act. Specific examples of prohibited conducts are provided under the provision, clarifying which activities fall under the unfair trade practices under the law: 1. Unfairly refusing any transaction, or discriminating against a certain transacting partner; 2. Unfairly excluding competitors; 3. Unfairly coercing or inducing customers of competitors to deal with oneself; 4. Trading with a certain transacting partner by unfairly taking advantage of his/her position in trade; 5. Trading under the terms and conditions which unfairly restrict business activities of a transacting party or disrupting business activities of another enterpriser; 6. Unfairly aiding someone with a vested interests

**Article 29 (Restrictions on Resale Price Maintenance)**

(1) No enterpriser shall engage in a resale price maintenance: Provided, That this shall not apply where there exist justifiable reasons in terms of the maximum price maintenance preventing the transactions of commodities or services in excess of specified prices. <Amended by Act No. 6371, Jan. 16, 2001>

(2) The provisions of paragraph (1) shall not apply to literary works prescribed by Presidential Decree, or to those commodities which meet all of the following conditions and have been pre-designated by the Fair Trade Commission as eligible for a resale price maintenance:

1. The uniformness in quality of the relevant commodity shall be easily identified;
2. The relevant commodity shall be used daily by ordinary customers;
3. Free competition shall exist with respect to the relevant commodity.

(3) Where an enterpriser desires to be so designated as provided for in paragraph (2), he/she shall apply to the Fair Trade Commission, as prescribed by Presidential Decree.

(4) The Fair Trade Commission shall make it public whenever it designates a commodity as being eligible for resale price maintenance under paragraph (2).

Resale price maintenance is prevented under Article 29(1) of MRFTA, except for where justifiable reasons for maximum price maintenance exists. Another exception for this vertical price fixing is stated under Article 29(2) as literary works or commodities meeting certain conditions and authorized by the KFTC.

Scholars pointed that the provisions on unfair trade practices (also known as unfair business practices, UBP) are almost identical to the Japanese rule in Article 19 of the Anti-Monopoly Law (AMA) that was modelled on Section 5 of the US Federal Trade Commission Act, that the UBP rules in Asia, as exemplified by Korea, Japan, and Taiwan, share the similar spirit of fair competition that originated in the US law.208 Along with the similarities, what stands out as the difference in Korea's case is the discretionary power vested on KFTC, so are the administrative burdens on the agency. To control and manage the load of complaints that KFTC investigates (almost all unfair trade practice cases that complaints are filed by then public), KFTC recently amended its internal guidelines in furtherance of their effort to clarify the scope of the rules.

## 3. Special Traits of KFTC

In terms of the implementation and execution of the MRTFA, one of the most outstanding character is that the Korean FTC has investigative and policy-making power, that it possesses excessive authority for enforcing the law when dealing with the complaints. As compared to the legislative process in the United States where the main force of the case would come from the complaint, the Korean FTC could be defined as administrative and authoritative agency that exercise its power at the full strength. This is by no means flawless and there has been legislative attempts to overcome problems with letting KFTC too intrusive; however, when the legislative procedure and system are not yet fully settled in at developing countries, this type of powerful FTC may bring about fast implementation and effective enforcement of the competition law.

# Ⅳ. Comparison and Conclusion

The comparative overview of the competition protection regimes of South Korea and China's SARs Hong Kong and Macao has demonstrated the following major differences as well as commonalities. In terms of maturity of the competition law regime the surveyed jurisdictions are very distinct from each other. South Korea's MRFTA has been adopted in 1980 and the KFTC is engaged in the enforcement activities since 1990. As a result, South Korea has accumulated substantial experience in enforcement of competition rules, which led to the continuous amendments of the MRFTA aimed at improving the enforcement framework by clarifying the substantive rules and enhancing the investigatory and sanctioning powers of KFTC. Hong Kong SAR is a newcomer in the world of competition law regimes with its Competition Ordinance entering into force only on 14 December 2015. As a result, the Hong Kong Competition Commission is currently making its first steps in the enforcement of the new law. At the same time, unlike many other emerging competition regimes, the Hong Kong Competition Commission has already undertaken substantial work in the field of competition advocacy aimed at familiarizing Hong Kong businesses and consumers with the new law to ensure timely compliance. Furthermore, the Hong Kong Competition Commission has adopted and published a set of detailed substantive and procedural guidlines explaining in detail various aspects of the Competition Ordinance's implementation. In Macao SAR the discussions on the scope and shape of the future competition law regime are still ongoing. Following the public consultation conducted in 2014 the government has continued working on the amendments to the consumer

protection legislation that would include publicly enforceable competition rules. However, at this point, no decisive steps have been taken in this regard and Macao SAR remains one of the few jurisdictions worldwide that have not yet introduced a comprehensive competition law.

As open market economies, South Korea, Hong Kong and Macao have all witnessed the need to protect their marekts from the abuses of market power (in the form of unilateral monopolistic actions and anti-competitive agreements). In South Korea the “three powders” cartel has prompted the adoption of the MRFTA. In Hong Kong the 1996 report of the Consumer Council has urged the government to start the discussion on the adoption of the comprehensive competition legislation. In Macao 2014 public consultation has indicated overwhelming public support for introduction of publicly enforceable competition rules.

Despite the above mentioned differences in the current stage of development of their competition laws, all three jurisdictions surveyed have encountered similar problems on the way of incorporation of competition laws into their legal systems. In South Korea and Hong Kong the adoption of competition law has been a relatively long process with various groups opposing the adoption of competition legislation. Difference between the opposition in South Korean on one hand and Hong Kong/Macao on the other is that the voice came mainly from the large conglomerates in South Korea whereas the Hong Kong and Macao markets may not have such distinctive large players to form their unified voice. In Hong Kong this opposition has resulted in certain limitations of the scope of Competition Ordinance and the powers of the Competition Commission including the exemptions of numerous entities from application of competition rules. In Macao the discussion continues as the

legislature and the government have not been entirely convinced on the need for competition rules that would supplement the existing sector-specific regulations.

All of the three surveyed jurisdictions have attributed special attention to the SMEs, some a little more in depth than others, as both the addressees of the competition rules and as potential victims of competition law infringements. In South Korea the SMEs benefit from certain carve-out clauses for the SME associations as well as special provisions targeting large scale undertakings. In Hong Kong the Competition Commission spared no effort to reach out to the SMEs during its competition advocacy campaign launched to familiarize the Hong Kong business community with peculiarities of the Competition Ordinance. The Competition Commission has developed a SME-tailored guidelines on competition law compliance and reviewed the practices of numerous SME associations in order to ensure they are compliant with the Competition Ordinance. In Macao on the other hand, the government has pledged its continuous support for the local SMEs through a variety of tax incentives, financial support schemes, human resources and training programs, etc.

In terms of the institutional frameworks for the enfocement of their competition laws, the three surveyed jurisdictions have followed different institutional models in line with their legal system traditions. In South Korea the legislator has opted for a single agency administrative enforcement model, where the KFTC carries out both investigatory and sanctioning functions while the courts exercise the judicial review of the KFTC's decisions. The Hong Kong's enforcement framework has been modelled after that of the US, where the Competition Commission investigates the case and brings it to the attention of the Competition Tribunal, which is

empowered to impose the pecuniary sanctions if the infringement has been proved. In Macao the dicsussion on the scope and shape of the future competition law regime are still ongoing, so it remains to be seen which institution will be empowered with the task of competition law enforcement. Currently it is performed by various sector regulators while the Consumer Council offers only voluntary conciliation, mediation and arbitration services in respect of minor consumer disputes.

While both Hong Kong and Macao are currently in their early phases of the development and implementation of the competition rules, there are several focus areas where they could learn from a more mature South Korean competition enforcment experience: (1) investigatory practices - the KFTC has accumulated a substantial experience in investigating clandestine anti-competitive conduct applying its investigatory powers including leniency program, which should be studied by the emerging competition regimes of Hong Kong and Macao; (2) extraterritorial application of competition rules - being open market economies Hong Kong and Macao should be able to draw valuable lessons from South Korean experience in extraterritorial application of its competition laws; (3) treatment of SMEs - while SMEs should be increasingly aware of the need to comply with competition rules, the enforcement authorities should undertake specific competition advocay actions in order to ease the compliance costs and enhance SMEs' standing as victims or complainants in competiiton proceedings; (4) merger control - at a later stage of the development of their competition regimes both Hong Kong and Macao can consider South Korea's experience in this field. And of course the South Korean side could obtain the takeaway of learning the enforcement

practices in the newly emerging competition law regimes. Specifically, the most vivid traits from the Hong Kong and Macao SARs in their introduction of competition law would be that the law was brought about to meet the needs to protect less protected players in their fully developed markets, whereas the competition law in South Korea was driven in line with the national economic development plan. The angle to adopt in implementing the competition law is different from the onset due to the position and the current development status of the market economy in each state, and inherently different views induce diverse purposes and effects of formulating and embracing the law; namely, the support for the development plan in South Korea versus protection of the SMEs in Hong Kong and Macao SARs. Now that the economy has grown and developed substantially in its scale in South Korea, the reflections from the Hong Kong and Macao's adoption of competition law should provide ample reference in reviewing its current competition law with a fresh look to improve the law towards protective scheme as well, while maintaining and keeping the economic development at the front line of the competition policy.

The comparison of the laws, policies, and systems of the surveyed jurisdictions is summarized in the table below.

| | Hong Kong SAR | Macao SAR | South Korea |
|---|---|---|---|
| Competition Law | Competition Ordinance since 2015 | No comprehensive competition law enacted | Monopoly Regulation and Fair Trade Act since 1980 |
| Competition Law Enforcement Agency | Hong Kong Competition Commission | None | Korea Fair Trade Commission |
| Opposition to Competition Law | No distinctive large players | No distinctive large players | Large congomerates |
| Consideration for SMEs | SME-tailored competition law compliance guideline to ensure SME's compliance with Competition Ordinance | Tax incentives, financial support schemes, human resources and training programs | Specific provisions of MRFTA carve out SMEs from its application |
| Enforcement Model | Competition Commission performs investigations, Competition Tribunal imposes sanctions | Undergoing discussion | Single agency administrative enforcement – KFTC performs both investigation and sanction |

# References

## Academic Literature

A. Emch and D. Stallibrass, China's Anti-Monopoly Law: The First Five Years (Kluwer, 2014)

A. Emch, "Services Regionalism in the WTO: China's Trade Agreements with Hong Kong and Macao in the Light of Article V(6) GATS" Legal Issues of Economic Integration No. 4 (2006)

Adrian Emch, Henry Wheare, The Hong Kong Competition Commission publishes draft leniency policy, 23 September 2015, e-Competitions Bulletin September 2015, Art. N° 76097.

A. Stratakis, "Comparative analysis of the US and EU approach and enforcement of the essential facilities doctrine" E.C.L.R. 27(8): 434-442 (2006).

A. Svetlicinii and M. Botta, "Article 102 TFEU as a Tool for Market Regulation: "Excessive Enforcement" Against "Excessive Prices" in the New EU Member States and Candidate Countries" 8(3) European Competition Journal (2012)

A. Teixeira Garcia, "Unfair Commercial Practices and Cyber Consumer Protection" in Tong Io Cheng and Salvatore Mancuso (eds.) New Frontiers of Comparative Law (LexisNexis, 2013)

A. Teixeira Garcia, "Brief Note About Intellectual Property in Macau" in Manuel Trigo (ed.) Report on Macau Law (LexisNexis, 2014)

Carolyn Bigg, Ian Wood, Hong Kong's Competition Authorities publish the final guidelines on how they propose to interpret, apply, investigate and enforce the new Competition Ordinance, 27 July 2015, e-Competitions Bulletin July 2015, Art. N° 77141

Chen Edward K.Y, Lin Ping, "Competition Policy under Laissez-Faireism — Market Power and its Treatment in Hong Kong", Review of Industrial Organization, (21)2002(2)

Cheng Leonard K, Wu Chang-Qi, "Competition and Competition policy", Pacific Economic Review, (5)2000(2)

Cheng Thomas K, "Ready for Action: Looking Ahead to the Implementation of Hong Kong's Competition Ordinance", Journal of European Competition Law and Practice (2014)5(2)

C-H Wu, "A New Landscape in the WTO: Economic Integration Among China, Taiwan, Hong Kong, and Macao" in C. Hermann and J.P. Terhechte (eds.) European Yearbook of International Economic Law (2012)

C. Lee and Y. Fukunaga, "ASEAN Regional Cooperation on Competition Policy" Journal of Asian Economics 35 (2014)

C. Wang, "Comentário sobre a Lei da Concorrência nos Jogos de Macau", Administração No. 87, Vol. XXIII, 2010-1, p. 158.

Deirdre McEvoy, Jake Walter-Warner, The Hong Kong Competition Authority releases draft leniency guidelines, 23 September 2015, e-Competitions Bulletin September 2015, Art. N° 76721.

D. Fruitman, Vietnam Chapter in M. Williams (ed.) The Political Economy of Competition Law in Asia (Edward Elgar, 2013)

D. Gerber, “Asia and global competition law convergence” in M. Dowdle, J. Gillespie, I. Maher Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law (Cambridge, 2013)

D. Geradin and D. Henry, “Competition Law in the new Member States: Where do we come from? Where do we go?” in Modernisation and Enlargement: Two Major Challenges for EC Competition Law (Intersentia, 2005).

D. Wei, “Antitrust in China: An Overview of Recent Implementation of Anti-Monopoly Law” European Business Organization Law Review 14(1)

E. Fox and M. Gal, “Drafting Competition Law for Developing Jurisdictions: Learning from Experience” in Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law (Edward Elgar, 2014).

Emiliano Marchisio, “Critical remarks on collective dominant position in EU and Italian antitrust law” European Competition Law Review 2013, 34(11)

F. Delgado, “Some Aspects Concerning the International Legal Status of Macao SAR” in Manuel Trigo (ed.) Report on Macau Law (LexisNexis, 2014)

Geraldine Johns-Putra, Miranda Noble, “Hong Kong”, Competition Law in Asia Pacific: A Practical Guide, (2015)

Heiko Haupt, “Collective dominance under Article 82 E.C. and E.C. merger control in the light of the Airtours judgment” European Competition Law Review 2002, 23(9)

Hickin John, O'Brien Gerry, "Hong Kong's Competition Law Landscape - Present and Future", Asia Law, March 2008

Ho Suk-Ching, Chan Chi-Fai, "In Search of a Competition Policy in a Competitive Economy: The Case of Hong Kong", The Journal of Consumer Affairs, (2003)37(1) 68-85.

Hyeshin Cho, KLRI Competition Law Workshop Booklet (May 12, 2016)

Hyeshin Cho, A study on the problems of Korean Competition Law for the Harmonization of Competition Policy and SEMs Policy, Competition Law Research, Vol.29 (2014)

J.C. Oliveira, J. R. Leao, P. Cardinal, P.P. Vidal, "An Outline of the Macau Legal System" 23 Hong Kong L.J. 358 (1993).

J. Godinho, Macau Business Law and Legal System (LexisNexis, 2007); J. Fan and A.D. Pereira, Macau Commercial and Economic Law (The International Encyclopedia of Laws, Kluwer, 2007).

J. Godinho, The Macau Commercial Code: An English Unofficial Translation (12 September 2013)

J. Hu, "Closer Integration, Controversial Rules: Issues Arising from the CEPA Between Mainland China, Hong Kong, and Macao" 18 Pace Int'l L. Rev. 389 (2006)

J. Padilla and M. Gal, "The Follower Phenomenon: Implications for the Design of Monopolization Rules in a Global Economy". Antitrust Law Journal, Vol. 76, No. 3, (2010).

Jungku Park, Review on problems and suggestions for SME policies: focused on establishing SME policy that is competition-friendly, LEG Working Paper Series, 2010-10

Kling/Thomas, Kartellrecht, Vahlen, 2007, S. 494

Koon Wing Yee v Insider Dealing Tribunal (2008) 11 HKCFAR 170.

Kwok Kelvin Hiu-Fai, "The New Hong Kong Competition Law: Anomalies and Challenges", World Competition Law and Economics Review, (2014)37(4)

Lin Ping, "Competition Policy in East Asia - The Cases of Japan People's Republic of China, and Hong Kong", Working Paper Series No.13, Centre for Asian Pacific Studies, Lingnan University, November 2002.

L.T. Orlanski, "Searching for the Basis of International Convergence in Competition Law and Policy" Global Antitrust Review 4 (2011)

L. Wang, "Macao's Return: Issues and Concerns" 22 Loy. L.A. Int'l & Comp. L. Rev. 175 (1999)

M. Motta, Competition Policy, Theory and Practice (Cambridge University Press, 2004)

Marc Waha, Julienne Chang, The Hong Kong Legislative Council introduces a cross-sector competition law regime, 14 June 2012, e-Competitions Bulletin June 2012, Art. N° 48223.

]M. Dabbah, "Measuring a System of Competition Law: A Preliminary View" (2000) 21 European Competition Law Review 369.

M. Dreher and J. Koerner, Germany National Report in P. Këllezi, B. Kilpatrick, P. Kobel (eds.) Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors (Springer, 2014)

Nick Taylor, Peter J. Wang, Sébastien J. Evrard, Emily S.Y. Lam, Donald Hess, The Hong Kong Legislative Council finally passes a comprehensive competition law, 22 June 2012, e-Competitions Bulletin June 2012, Art. N° 49929

Noah A. Brumfield, Mark Gidley, Yi Ying, The Hong Kong's Government publishes the final guidelines concerning competition law provisions, 27 July 2015, e-Competitions Bulletin July 2015, Art. N° 77164

P. Nunes Correia, "The Juridical System of Macau: A Comparative Law Perspective" in Manuel Trigo (ed.) Report on Macau Law (LexisNexis, 2014)

P. Nunes Correia, "The Macanese Legal System: A Comparative Law Perspective" in Tong Io Cheng and Salvatore Mancuso (eds.) New Frontiers of Comparative Law (LexisNexis, 2013)

Rittner/Dreher, Europaisches und deutsches Wirtschaftrect - Eine systematische Darstellung, C.F. Muller Verlag, 2008, S. 393, at 584, recited Ohsung Kwon, Cooperation of SMEs and MRFTA, Kyunghee Law Review, Vol. 25, No. 1, 1990

R. Karova and M. Botta, "Five Years Enforcement of the Competition Law in the Republic of Macedonia - Time for an Assessment" Mediterranean Competition Bulletin No. 2 (November 2010).

Robert E. Connolly, The Hong Kong Competition Commission receives an application for a block exemption for liner shipping agreements (Hong Kong Liner Shipping Association), 17 December 2015, e-Competitions Bulletin December 2015, Art. N° 77718.

Scott Hammond, The Hong Kong Competition Commission issues a "Commencement Notice" for the introduction of a Competition Ordinance which is scheduled to come into force on December 14, 2015, 18 January 2013, e-Competitions Bulletin May 2016-III, Art. N° 79676.

Sharon Henrick, Joshua Cole, The Hong Kong's Competition Commission gives some advice to companies preparing for implementation of the Competition Ordinance, 14 June 2014, e-Competitions Bulletin June 2014, Art. N° 73552

Svetlicinii Alexandr, "The Limits for the Global Proliferation of Competition Law: The Case of Macao SAR", European Scientific Journal, (2014)

T. Cheng, "Ready for Action: Looking Ahead to the Implementation of Hong Kong's Competition Ordinance" Journal of European Competition Law & Practice 5(2) (2014)

Thomas K. Cheng, "Ready for Action: Looking Ahead to the Implementation of Hong Kong's Competition Ordinance" (2014) 5(2) Journal of European Competition Law & Practice

Williams Mark, Competition Policy and Law in China, Hong Kong and Taiwan, (Cambridge: Cambridge University Press, 2005).

Williams Mark, “Competition Policy: One Theory, Three Systems”, China Perspectives (Online), (2004)

Williams Mark, “Hong Kong: myths, perceptions and reality”, Competition Policy and Law in China, Hong Kong and Taiwan, (Cambridge: Cambridge University Press, 2005) 223.

Williams Mark, “Lion City and the Fragrant Harbor: The Political Economy of Competition Policy in Singapore and Hong Kong Compared”, The Antitrust Bulletin, (2009)54(3)

Wu Richard W.S, Leung Grace L.K, “Competition Regulation in the Hong Kong Telecommunications”, Telecommunications Policy, (2008)

Y. Jung and S.W. Chang, “Korea’s Competition Law and Policies in Perspective Symposium on Competition Law and Policy in Developing Countries” 26(3) Northwestern Journal of International Law & Business (2006)

Yosop Choi, Korean Competition Law, workshop held by KLRI on May 12, 2016

Youngsu Shin, Legislative History of Monopoly Regulation and Fair Trade Act, 30 years of Fair Trade Commission, Fair Trade Commission

Yuan Cheng, Robert Gavin, Marc Peter Harvey, Hong Kong Government makes amendments to the proposed Hong Kong Competition Bill, 25 October 2011, e-Competitions Bulletin October 2011, Art. N° 40990.

Zhao Xiao-jing, Cheung Sai-On, Guo Yi-shan, “Hong Kong's First Competition Law influence on construction contracting”, Journal of Legal Affairs and Dispute Resolution in Engineering and Construction, (2014) 6(2)

## Legislation and Institutional Publications

CAC Regulations

Commercial Code, approved by Decree-Law no. 40/99/M of 3 August 1999, Official Bulletin of Macao SAR No. 31 of 3 August 1999

Competition Ordinance (Cap. 619) of 14 June 2012.

Constitution of the Republic of Korea

Consumer Council, Competition Policy: The Key to Hong Kong's Future Economic Success, November 1996

Dispatch of the Chief Exectuive 267/2003.

Hong Kong Consumer Council, https://www.consumer.org.hk/ws_en/.

Hong Kong Legislative Council, Official Record of Proceedings, 7 October 1992, 16.

Hong Kong SAR Legislative Council, http://www.legco.gov.hk/index.html.

International Competition Network, Factsheet and key messages

Japanese Anti-Monopoly Law, Article 19

Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the question of Macao, http://bo.io.gov.mo/bo/i/88/23/dc/en/.

Macao Basic Law, Article 2. See also Y. Ghai, "The Basic Law of the Special Administrative Region of Macau: Some Reflections" 49 Int'l & Comp. L.Q. 183 (2000); W. Tao, "Rule of Law in SAR Macao Since Its Return to China" 5 China Legal Dev. Y.B. 119 (2011); G. Liu, "National Laws Applicable to the Macau Special Administrative Region" in Manuel Trigo (ed.) Report on Macau Law (LexisNexis, 2014), pp. 27-44.

Mainland and Macao Closer Economic Partnership Arrangement, signed on 17.10.2003, entry into force 01.01.2004

Monopoly Regulation and Fair Trade Act

Relatório Final da Consulta Pública sobre a Revisão da Legislação relativa à Protecção dos Direitos e Interesses dos Consumidores (9 February 2015)

The Basic Law of the Macao Special Administrative Region of the Peo ple's Republic of China, adopted by the 8th National People's Congress at its 1st Session on 31 March 1993, unofficial English translation is available at http://bo.io.gov.mo/bo/i/1999/leibasica/index _ uk.asp.

The Constitution of the People's Republic of China, adopted at the 5th Session of the 5th National People's Congress and promulgated for implementation by the Announcement of the National People's Congress on 4 December 1982, Article 31, English translation is available at http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm.

Trade Policy Review of Macao, China, WT/TPR/S/281, WTO Secretariat, 25 March 2013

UNCTAD Guidebook on competition systems (Geneva, 2007)

Whitepaper of Monopoly Regulation and Fair Trade Act, Economy Strategy Department, 1984