

CONFUCIAN CULTURE AND COMPETITION LAW IN EAST ASIA

Competition law is a significant legal transplant in East Asia, where it has come into contact with deeply rooted variants of Confucian culture. This timely volume analyses cultural factors in mainland China, Japan and Korea, focusing on their shared but diversely evolved Confucian heritage. These factors distinguish the competition law systems of these countries from those of major western jurisdictions, in terms of the goals served by the law, the way enforcement is structured and the way subjects of the law respond to it. Concepts from cultural studies inform a new and eclectic perspective on these dynamics, with the authors also drawing on ideas from law and economics, comparative law, East Asian studies, political science, business management and ethics, and institutional economics. The volume presents a model for cultural analysis of comparative legal topics and contributes to a greater understanding of the challenges to deeper convergence of competition laws between East and West.

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CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press & Assessment
978-1-108-48823-5 — Confucian Culture and Competition Law in East Asia
Jingyuan Ma, Mel Marquis
Frontmatter
[More Information](#)



Shaftesbury Road, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment,
a department of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of
education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108488235

DOI: 10.1017/9781108762342

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First published 2022

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data
Names: Ma, Jingyuan, author. | Marquis, Mel, author.

Title: Confucian culture and competition law in East Asia / Jingyuan Ma, Central University
of Finance and Economics, China; Mel Marquis, Monash University, Melbourne.

Description: 1. | Cambridge, United Kingdom ; New York, NY : Cambridge University Press, 2022.
| Includes bibliographical references and index.

Identifiers: LCCN 2022004757 (print) | LCCN 2022004758 (ebook) | ISBN 9781108488235
(hardback) | ISBN 9781108738569 (paperback) | ISBN 9781108762342 (epub)

Subjects: LCSH: Antitrust law—East Asia. | Competition, Unfair—East Asia. | Confucianism and
law—East Asia. | Philosophy, Confucian—East Asia.

Classification: LCC KNC750 .M35 2022 (print) | LCC KNC750 (ebook) | DDC 343.507/21—dc23/
eng/20220430

LC record available at <https://lcn.loc.gov/2022004757>
LC ebook record available at <https://lcn.loc.gov/2022004758>

ISBN 978-1-108-48823-5 Hardback

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PREFACE

The modern concept of competition law as a proper activity of the State (or group of States, in the case of regional integration areas) and the philosophical orientations that underlie that concept are largely ‘Western’ inventions. Shortly after the enactment of the first modern (national) antitrust law in the world in Canada in 1889, the United States promulgated the Sherman Act in 1890, and throughout the twentieth century this iconic Act had an enduring and growing international influence. In many dimensions, the dominant paradigms of the competition laws of the United States and the European Union have been assumed to be models fit for emulation in the competition laws of nations around the globe. While the United States and European Union models have important differences, they both embrace (notwithstanding vibrant academic discussions) the conceptual foundations of classical and neoclassical economic principles. The extent to which these models resonate and are received as ‘transplants’ in other parts of the world, and in the present case East Asia, is an ongoing matter of inquiry and debate.

It is best to use the term *transplant* with care: it should not be assumed that a borrowed legal institution has the same features as the original model, or that it will be accepted or function in similar ways in a new and possibly quite alien environment. While recognizing the problematic nature of transplants, it is clear that the transplant metaphor (or, with more nuance, the ‘hybrid transplant’ metaphor) is apt, in varying degrees, when describing the competition laws of East Asia, that is, those of China, Japan and Korea. ‘Anti-monopoly law’ was originally adopted in Japan under the compulsion of the United States after the World War II, while Korea and China later adopted their own competition laws as part of their increasing reliance on the principle of a market economy. Whereas competition laws and their enforcement in China, Japan and Korea have been influenced in important ways by EU competition law in particular (and to some extent, and less obviously, by the German tradition), and while these countries have often adopted terms and

concepts typically developed and used in the United States and Europe, their respective competition laws display their own particularities. It suffices here to mention only three examples:

- the goals of competition law in East Asia are more diverse and over time have been influenced by concerns related to industrial policy;
- there is a clear predominance of administrative enforcement of competition law and, at the same time, generally slow progress in developing both private damages actions (especially where plaintiffs lack resources or are rationally apathetic, as in the case of small and medium-sized enterprises (SMEs) or individual consumers) and criminal enforcement; and
- competition compliance programmes have become common, but the role and function of compliance officers are sometimes more akin to those of a senior executive than they are to those of an independent professional.

In this book we suggest that the introduction of competition law in East Asia is conditioned by a two-sided cultural adaptation. First of all, and subject to the caveats above, the genesis and development of competition laws in East Asia should be considered in the context of the debate on legal transplants. The literature regarding transplants suggests that the incorporation of competition laws in Japan, Korea and China faces significant challenges, especially insofar as there is only a relatively weak ‘competition culture’ in these countries, and there are doubts about whether it is possible to cultivate such a culture so that it becomes deeply embedded and shapes commercial behaviour. Second, from the perspective of East Asian countries, competition law also reflects the century-long debate on how the Confucian tradition can be ‘inherited’ in such a way that, where fruitful, it can accommodate Western economic and commercial ideas and influences – often with local adaptation and hybridization. The process of borrowing ideas, rules, remedies, conceptual constructs and analytical tools is influenced by local culture and local social norms – and this is equally true in the context of the adoption, implementation and enforcement of economic law and regulation. Differences in culture, tradition and social norms can provide helpful explanations for variations in the characteristics and patterns of law enforcement as well as compliance with legal obligations.

The book’s starting point is that most studies on competition law and policy in East Asian countries have neglected the value of understanding the deep cultural roots and the impact of the Confucian tradition(s) on

the development of law and its enforcement in the competition field. From this point of view, a simple ‘legal transplant’ theory is insufficient for a full understanding of the emergence and development of competition law in East Asia. In countries with distinct and historically driven moral and ethical systems, social norms, economic structure and conceptual views of the role of markets, competition law may exhibit characteristics that are substantially different compared to the systems common in the ‘West’. The book therefore contends that cultural factors should be taken into account when analysing the differences between the competition laws of China, Japan and Korea and those in the United States and Europe. Such factors are important in that they may pose challenges to a greater degree of convergence of competition law between East and West. But beyond the matter of convergence, a culture-based analysis facilitates a deeper understanding of the particular features and functioning of the competition laws in these East Asian countries.

For these reasons, the book traces the connection between Confucian tradition and the adaptation of modern competition law within the Japanese, Korean and Chinese varieties of Confucian society – recognizing that ‘Confucian’ is a relative, not an absolute or monolithic, characteristic. Subject to that caveat, the book discusses the relevance of what we call (as an umbrella term) ‘Confucian culture’ in analysing the particular patterns and features of competition law in the countries concerned. And it examines the relevance of Confucian culture in the East Asian context as it pertains to several dimensions: *business culture* and its impact on, inter alia, the compliance efforts of enterprises subject to competition law; *political and bureaucratic culture* and the related dependence on administrative enforcement of competition law (in contrast to other models); *litigation culture*, or lack thereof, and the generally slow development (with some exceptions) of private enforcement of competition law in the region; and *legal culture* and prospects for either the establishment or intensification of cartel criminalization.

The book provides an as-yet unexplored explanatory tool that can facilitate a fuller understanding of particular features of competition law in East Asia such as the goals it serves, the way enforcement is structured and the way subjects of the law respond to it. In order to do so, the book draws – in varying degrees – on studies of East Asian countries in the fields of law, business and business ethics, economics, management, political science, history, social psychology and broader aspects of cultural studies. It also endeavours to cover, in some depth, each of the relevant countries (China, Japan and Korea) as well as the overall region.

The book aims to help contextualize East Asian competition law and further aims, as mentioned previously, to make it easier to understand the features observed in these countries which distinguish them from the typical legal templates of major Western jurisdictions. At the same time, the book explores how a culture-based understanding can serve to inform strategies that promote better competition law compliance on the part of enterprises operating in East Asia.

The authors gratefully acknowledge the colleagues, friends and loved ones who directly or indirectly provided support, encouragement and wisdom to this project. They include Dean Wu Tao, who kindly supported the CUF Chair Professor Programme in 2016 and 2019; and several collaborators and experts with whom we have been privileged to work or consult in varying contexts: Professor Shingo Seryo (Doshisha), Professor Giorgio Monti (Tilburg and EUI), Professor Wang Xiaoye (CASS Beijing and Shenzhen), Professor Allan Fels (Melbourne), Dean Hwang Lee (Seoul), Eun Hye Kim (EUI), Professor Shuya Hayashi (Nagoya), Professor Tadashi Shiraishi (Tokyo), Professor Michael Faure (Maastricht), Professor Malcolm Feeley (Berkeley), Professor Tom Ginsburg (Chicago), Professor Alberto Heimler (Rome), Professor William Kovacic (Washington D.C.), Professor Daniel Sokol (Los Angeles), Professor Niels Philipsen (Maastricht), Professor Stefan Weishaar (Groningen) and Dr Caspar Schwalbe (Cambridge).

We are also grateful to our students in courses we have taught on Comparative Competition Law at the Central University of Finance and Economics in Beijing, and at Doshisha University in Kyoto.

Finally, we warmly thank the anonymous expert reviewers of the manuscript on which this book is based, as well as the superb and helpful editorial staff at Cambridge University Press.

ABBREVIATIONS

AMA	Anti-Monopoly Act
AML	Anti-Monopoly Law
B2B	business-to-business
BCE	before the common era
CASS	Chinese Academy of Social Sciences
CAT	UK Competition Appeal Tribunal
CCA	China Consumers Association
CCP	Chinese Communist Party
CE	common era
CEO	chief executive officer
CPL	Consumer Protection Law
GNP	gross national product
GVG	Gerichtsverfassungsgesetz
ICN	International Competition Network
JFTC	Japan Fair Trade Commission
JPY	Japanese yen
KFTC	Korea Fair Trade Commission
KRW	Korean won
METI	Ministry of Economy, Trade and Industry
MITI	Ministry of International Trade and Industry
MOFCOM	Ministry of Commerce of the People’s Republic of China
MRFTA	Monopoly Regulation and Fair Trade Act
NDRC	National Development and Reform Commission
NGO	non-governmental organization
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal (of the European Union, or of the European Communities)
R&D	research and development
SAIC	State Administration for Industry and Commerce
SAMR	State Administration for Market Regulation
SASAC	State-Owned Assets Supervision and Administration Commission
SME	small and medium-sized enterprise

xiv	LIST OF ABBREVIATIONS
SOE	state-owned enterprise
SPC	Supreme People’s Court
TFEU	Treaty on the Functioning of the European Union
USAMGIK	United States Army Military Government in Korea
USD	United States dollar