獅子山學會

The Lion Rock Institute

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Mr. Andrew LEUNG Kwan-Yuen
Chairman
Bills Committee on Competition Bill
Legislative Council
Hong Kong Special Administrative Region
c\o Legislative Council Secretariat
Friday, Nov 19, 2010

Submission to the Legislative Council

Bills Committee on Competition Bill

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For well over 5 years The Lion Rock Institute has devoted considerable time and effort in trying to explain to the Hong Kong government, members of the legislature as well as the general public why the proposal to introduce a cross-sector competition law regulator is flawed from both an economic and legal perspective.

Flawed Economics

From an economic perspective some of the issues we have highlighted include the following:

- The government has never gone beyond vague and unsubstantiated assertions about the supposed economic benefits of this law.

- The government has made vague allegations but has never specifically identified any company or any particular behavior by a company which can clearly be said to be economically harmful and which would demonstrate the need for the proposed law.

- The government has never produced a credible cost-benefit analysis demonstrating the case for the proposed competition law.

- The government has never explained why it has ignored the opinions of leading Nobel Prize-winning economists such as Friedrich Hayek, Ronald Coase, Milton Friedman and James Buchanan who are clearly on the record as being against competition laws.

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- The Fraser Institute of Canada has clearly said that the introduction of the competition law will lead to a reduction in economic freedom in the territory and threaten Hong Kong's "world's freest economy" status.

- Many of the leading proponents of the proposed competition law are lawyers whose understanding of economics is poor but who have a clear financial interest in seeing the bill passed.

- The true causes of "cartels", "monopolies" and "prevention, reduction or distortion of competition" in Hong Kong are always government intervention or protection of particular industries which the competition law does nothing to address. If the Hong Kong government were serious about increasing competition it would be better off opening up industries where it restricts the entry of new competitors (e.g. Hong Kong Exchange) or phasing out the direct or indirect support it provides to particular organizations (e.g. Trade Development Council) or putting in place measures to restrict it from offering sweat-heart deals to particular companies in future (e.g. Hong Kong Disneyland, Cyberport).

Bad Law

From a legal perspective some of the issues we have highlighted include the following:

- The law contains numerous broad and vaguely-drafted provisions which give the to-be-established competition authorities wide, open-ended and inherently arbitrary powers to decide on what type of current or future commercial conduct or commercial agreements will and will not be permitted in Hong Kong.

- The proposed "competition" law notoriously does not even contain a definition of the term "competition". The law nevertheless allows the competition commission to penalize companies which "prevent, restrict or distort competition". One immediately sees the problems with this approach if, for example, the government were to decide to pass a patriotism law which allowed the government to penalize companies which "prevent, restrict or distort patriotism" but contained no definition of patriotism. The same would be true for laws which penalized behavior which prevented, restricted or distorted other laudatory terms like "harmony" or "motherhood". Like competition, everyone is in favor of these concepts in theory, but unless the power given to authorities to penalize business or people is clearly defined action which seeks to take action in their name will inevitably lead to infringement of individual political and property rights.

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- While the government has said that the competition commission will offer additional guidance in future, there are open questions as to whether delegating so much effective law-making power to the competition commission infringes the Basic Law.

- The vagueness of the provisions creates considerable business uncertainty and creates a risk that any existing or future deal could be invalidated wholly or partially by the authorities.

- As a result, the introduction of the proposed competition law will inevitably result in a dramatic increase in litigation and increase the compliance cost and legal risks for doing business in Hong Kong.

- The competition law will clearly benefit the legal community. They are not experts in economics and never argue the economic merits of the proposal. If they did not stand to gain financially they would, I believe, clearly be against the proposed law because it clearly contrary to fundamental legal principles.

- The vagueness of the law and the ability of the commission to except particular companies or forms of behavior will lead to increasingly politicization of the market, invite lobbying and advantage politically favored companies. The competition law is really politics masquerading as law. It will do nothing to increase genuine competition in Hong Kong.

Additional Writings

We have attached some selected articles from both leading local and international publications discussing the proposed Hong Kong competition law or competition laws generally:

1. *聯手加價與競爭法皆不可取* by Peter Wong & Wong Kin-Ming, HKEJ, Feb 04, 2008
2. *「褪色一哥」給香港的啟示* by Peter Wong, HKEJ, Feb 11, 2008
3. *認真了解市場上的價格差異* by Wong Kin-Ming, HKEJ, 2008-04-21
4. *自由競爭勝公平競爭* by Shih Wing-Ching, AM730, 2008-05-08
5. *沒有競爭法 香港仍勝出* by Shih Wing-Ching, AM730, May 09, 2008
6. *沒有公平的競爭法* by Peter Wong, HKEJ, May 12, 2008

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7. *"Obstacle Course"* by Dan Ryan, published in South China Morning Post, May 29, 2008

8. *"How to Make Hong Kong Uncompetitive"* by Dan Ryan, published in The Wall Street Journal, April 2, 2008

9. *從 iPhone 到《競爭法》* by Wong Kin-Ming, HKEJ, Jul 07, 2008

10. *競爭法使中小企得不償失* by Shih Wing-Ching, HKEJ, Aug 04, 2008

11. *"Cartel Crusade Lacks Definition"* by Dan Ryan, published in Australian Financial Review, August 4, 2009

12. *容我向 Neway 致敬* by Peter Wong, HKEJ, Mar 10, 2010

13. *利字當頭：港鐵陷害* by Simon Lee, Apple Daily, Jun 30, 2010

14. *反競爭法在針對誰* by Peter Wong, HKJE, Jun 30, 2010

15. *"Bad Buy"* by Dan Ryan, published in South China Morning Post, July 8, 2010

16. *"Competition Law and (Dis)order"* by Dan Ryan, published in The Wall Street Journal, July 15, 2010

We have also attached our original submission to the Commerce, Industry and Tourism Branch dated August 5, 2008.

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We thank you for your time and would be pleased to discuss further with any committee members who may have questions.

Yours sincerely,

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日期: 2008-02-04
作者: 黃健明 王弼

聯手加價與競爭法皆不可取

港九粉麵製造業總商會在報章刊登廣告，強烈建議同業把各類麵製品的批發價和零售價調升百分之二十至二十五，引來政府及消委會關注。在商務及經濟發展局局長馬時亨去信「提醒」後，商會最後撤回加價建議。政府對「建議」如此嚴陣以待，但聯手加價又是否真的可達謀取暴利的奇效？

早於一九六〇年，當時的主要產油國便組成石油輸出國組織（ＯＰＥＣ），成立目的明目張膽地要「協調價格」。可是，即使石油輸出國組織控制當時世界石油生產的重要份額，「協調價格」的企圖最後還是功敗垂成，油價在高見三十五美元後，便在八十年代回落至十五美元以下。

協調者各懷鬼胎

石油輸出國組織無以爲繼，「協調」的困難是其中主要關鍵。「協調」價格須要「協調」生產，於是組織對成員定下生產限額；只是出口收益珠玉在前，「唯利是圖」的各國又豈會乖乖「協調」、嚴守限額？結果，「協調」還是逃不過博弈論（Game Theory）的囚徒困境（Prisoner's Dilemma），各成員國超額生產情況普遍，價格亦無從「協調」。內憂難除、外患又至，高油價更加刺激組織以外的產油國加快勘探、加大生產，石油輸出國組織「協調價格」不成，影響力反而隨其所佔世界產油量之比重與日俱減。

石油輸出國組織「協調」生產力不從心，對需求的轉變就更加無能爲力。各種替代能源在高油價鼓勵下應運而生，消費者也紛紛投入節能產品的懷抱一日本汽車便因而大行其道，使石油需求下降。

由此可見，即如石油這樣短期較難替代的物品，產油國還是難以獨斷獨行、按一己之意「協調價格」。

回看港九粉麵製造業總商會的「強烈建議」，以其只能以報章廣告形式建議加價，已經可知商會爲同業「協調價格」的能力非常有限，甚至可以說是黔驢技窮。另一方面，批發和零售粉麵肯定較發現石油容易，要是商會成功「協調價格」、謀取暴利，其他「唯利是圖」的行外商家，又豈會坐視不理？商家爭相加入「暴利」行業，雖無惠澤消費者之意，卻有其實。即使商會的「強烈建議」真有控制供應之奇效，粉麵的替代品不少，消費者也自然會以消費選擇懲罰「暴利」商家；畢竟，石油消費模式尚可改變、何況粉麵？

商會的「強烈建議」，不少評論使之成爲盡快定立公平競爭法的理由。有立法會議員便認爲，雖然聯手加價的效果成疑，但亦應定立公平競爭法以禁之，以防同類情況再次出現。可是，立法猶如兩刃利劍，必須權衡利弊。我們只要細閱公平競爭法的諮詢文件，便不難發現其中內容如濫用市場地位、綑綁銷售等空泛概念處處，會爲企業營運帶來不少不明朗因素；亦難免有人會利用法例來打擊對手，而律師費和訴訟費高昂，非中小企所能負擔，難怪諮詢結果顯示中小企對新法大表疑慮。

競爭法製造特權者

「當價格上升時，法官說是壟斷；價格下跌時，他們說是掠奪性定價；價格不變的話，則是合謀」（When the prices went up the judges said it was monopoly, when the prices went down they said it was predatory pricing, and when they stayed the same they said it was tacit collusion.），是經濟學者高斯（Ronald H. Coase）對美國反壟斷法（anti-trust law）的意見，也簡潔地帶出所謂「公平競爭」的含糊性；價格怎變，指控不變。

其實，沒有人會反對政府促進公平競爭，但由石油到粉麵，競爭之源從來來自開放的市場（潛在競爭與現存競爭同樣重要）和消費者的自由選擇，這也是政府促進競爭的正途。因此，獅子山學會認爲，政府應該致力打破藉由特權或法例保護的壟斷行業，如電力市場，促成聯網，使兩電競爭；或如航空業，讓香港開放第五航權。但觀乎最近政府和兩電簽署的新《管制計劃協議》，繼續容讓壟斷存在，其促進公平競爭的誠意可見一斑。政府不願對症下藥，卻以一刀切、含糊的法例促進競爭。

更令人憂慮的是，公平競爭法諮詢文件建議政府可享有酌情豁免個別行業，其中一個理由是反競爭行爲「對公眾的利益大於對消費者的損害」，而「公眾利益」又不知如何計算，故政府便可以繼續製造特權階級，企業恐怕難見其利、卻受其害。

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「褪色一哥」給香港的啓示

港九粉麵製造業總商會於一月二十八日「強烈建議」同業加價，事件令久違了的公平競爭法討論再次升溫，而獅子山學會上星期便論及所謂「公平競爭」的含糊性，會誘使營商者利用公平競爭法來打擊對手；不巧遇上美國微軟宣布以四百四十六億美元向雅虎提出收購、以挑戰Google在網上搜尋及廣告市場的領導地位。這個新鮮出爐的事件正好提供了上佳的案例，突顯公平競爭法或反壟斷法鼓勵內耗、使營商者不思進取的特性。

消息公布初時，業界也對這宗收購不甚了了，更形容微軟和雅虎的合併只不過是「兩個醉酒佬互相扶持」的把戲，對互聯網固有的形勢影響不大；但正當外界對Google的「一哥」地位不表示懷疑、期待它一如以往以強者姿態從容面對挑戰時，事情反而因Google的緊張介入而變得峰迴路轉。

互扣「壟斷」帽子

Google的法律發言人 David Drummond 在其公司的官方網誌上開宗明義的表示：「微軟敵意收購雅虎，不是普通的財技併購。」他還發出一連串用詞惹火的提問（如指出微軟違法的往績），質疑微軟此舉是想把它的壟斷從個人電腦伸延到互聯網。最後，他促請世界各地的官員也應問問自己這併購會否損害消費者利益。說穿了，就是打出反壟斷法的牌，叫政府禁止這宗交易。

另一邊廂，微軟卻認爲Google在網上搜尋器及廣告市場擁有支配地位，微軟與雅虎合併只會促進業內的競爭，巧妙地繞過使用曾叫自己吃過大虧的壟斷等字眼，但有效地指出現在真正的壟斷者是Google。在有反壟斷法的國家，各企業都爭着把「壟斷」這帽子扣到競爭對手的頭上，這是千古不變的現實。

但究竟誰是誰非？從兩家公司的規模來看：微軟市值二千六百六十億美元；營業額五百一十億美元；Google市值一千六百三十億美元、營業額一百零六億美元。單以大小角度，微軟收購雅虎後更如虎添翼，當然是壟斷者，但若只以網上搜尋收入來計算，佔有七成五份額的Google，壟斷者非它莫屬。可是Google指控微軟把「壟斷從個人電腦伸延到互聯網」卻又不是沒有歷史依據：當年微軟如何把網景（Netscape）擠出網頁瀏覽器市場，又有誰敢擔保它今天不是依樣畫葫蘆把其個人電腦霸主地位伸延到互聯網市場？

競爭法鼓勵內耗

寫到這裏，可能已有讀者急不及待的指出港府所擬定的公平競爭法是不管企業合併的，也不管市場是否有壟斷者（只要政府認爲它的存在是「對公眾的利益大於對消費者的損害」），所以上述情況不會在香港出現。可是，就算沒有壟斷的指控，要找出其他所謂罪狀又有何難（可參考上周文章）？ 我們想指出的是，在反壟斷法的陰影下，強如微軟和Google也不得不互相指控，更遑論在所謂公平競爭法下的香港大中小企業？ 這樣法例既打開了企業借刀殺人之門，企業又哪有不用之理？ 當營商者不以創新和增強自己產品的質量來競爭，只顧埋首鑽空子以法例打擊對手，社會資源白白耗掉，而錢只進了少數律師的口袋，這是我們香港人實事求是的精神嗎？

全球化下無「惡霸」

再者，公平競爭法在現代社會能否促進競爭實在是一大問號：在一百多年前世界第一個類似的法例在美國出現時，資訊權只掌握在權貴，加上交通不便，所謂市場其實很局部（localized）、規模很小，要壟斷市場和操縱價格可能不難。可是在全球一體化和資訊革命的大環境下，各商品的價格只要上網查考就一目了然，而且競爭者來自五湖四海，只要問問銀行交易員今天套戥交易的機會是如何的少、廠家的邊際利潤是如何的微薄、新界有多少主婦已跑到深圳買菜，現實告訴我們，大多數的反競爭行爲，早已被全球一體化和互聯網打破；而餘下的，多是在政府的蔭庇下繼續存在，想想香港的公用事業和大陸的國企吧！

最後，我們想舉出一個例子來讓各位思考：在現今強調創新的社會，縱使如微軟般財雄勢大，亦不能以其操作系統的壟斷來支配整個電腦行業的發展，更因執迷於維持其軟件業的壟斷而錯失開發網上搜尋及廣告市場的先機，使其在高科技界的地位亦由Google頂上，微軟能否力挽狂瀾，不得而知。

歷史的巨輪無情地轉動，觀乎回歸後，香港總抱着人有我有的心態，從保育、環保、控煙到公平競爭法，無一不唯外國馬首是瞻；相對從前帶領世界走進劃一低稅率的潮流，現今港人缺乏創新思維，如果問香港會否由中國的窗口，淪爲中國的一個城市，答案恐怕是指日可待。

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作者: 黃健明

認真了解市場上的價格差異

消費者委員會最近一項調查發現，超級市場的貨品售價普遍較小型獨立零售店爲高，兩者價格差異可達一倍。其實，不同團體早已對類似調查樂此不疲，結果雷同，無非想要帶出超市謀取暴利「證據確鑿」的訊息。

超市與小型獨立零售店（下稱小店）貨品存在價格差異，常見解釋在於訊息費用。消委會呼籲市民格價，但大部分市民並非如消委會般「受薪格價」，因此格價成本可以甚高。有報章記者早前親身試驗，以購買十件不同貨品爲例，在各店格價較在同一超市購買能夠節省30多元，時間成本卻是個多小時。格價或得或失，不能只看得益而不理代價。

格價亦有代價

類似格價調查存在多時，應有助市民大大減低獲取超市貨品較貴的訊息，可是價格差異存在依然，超市亦無關門大吉，緊要之處並非單在超市是否謀取暴利，而是簡直把價升量降的需求定律完全推翻。其實，解讀這類價格調查結果之時，對於其所得之價與量，應要謹慎分析。

超級市場的慣常減價策略，是在特定時間爲特定貨品進行大減價，折扣幅度可以很大；即以消委會調查中提及的「差價之王」——急凍蝦餃爲例，超市不少時間都是以買一送一方式減價。

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在不同地方所銷售的同一品牌蝦餃，「有質」之量甚重，購物環境、便利程度、商譽等委託於每包蝦餃算價的因素容易被人忽略，單純因爲同一品牌蝦餃的價格差異便認定超市「謀取暴利」的言論於是大有市場。

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日期：2008-04-21
作者：黃健明

認真了解市場上的價格差異

獅子山學會

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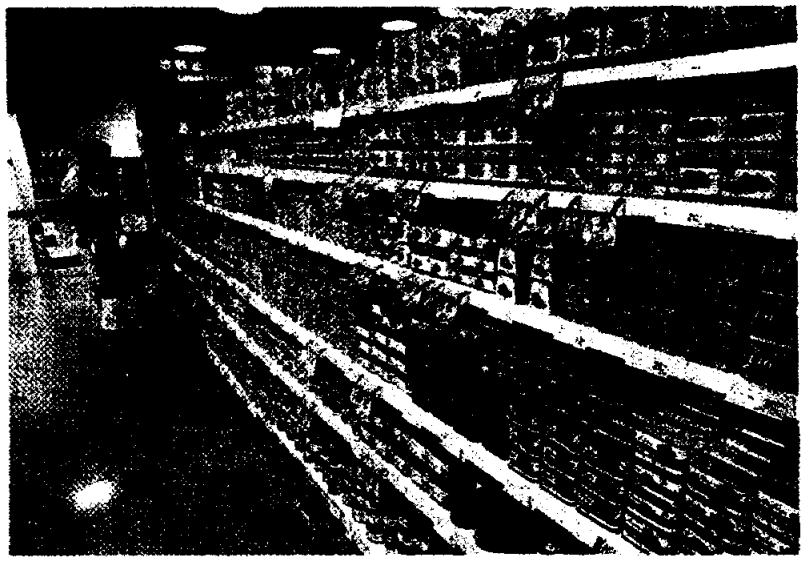

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消費者委員會最近一項調查發現，超級市場的貨品售價普遍較小型獨立零售店為高，兩者價格差異可達一倍。其實，不同團體早已對類似調查樂此不疲，結果當同，無非想要帶出超市謀取暴利「證據確鑿」的訊息。

超市與小型獨立零售店（下稱小店）貨品存在價格差異，常見解釋在於訊息費用。消委會呼籲市民格價，但大部分市民並非如消委會般「受薪格價」，因此格價成本可以甚高。有報章記者早前親身試驗，以購買十件不同貨品為例，在各店格價較在同一超市購買能夠節省30多元，時間成本卻是個多小時。格價或得或失，不能只看得益而不理代價。

格價亦有代價

類似格價調查存在多時，應有助市民大大減低猜取超市貨品較貴的訊息，可是價格差異存在依然，超市亦無關門大吉，緊要之處並非單在超市是否謀取暴利，而是簡直把價升量降的需求定律完全推翻。其實，解讀這類價格調查結果之時，對於其所得之價與量，應要謹慎分析。

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作者: 施永青

自由競爭勝公平競爭

香港向來只講自由競爭，認爲在沒有外力干預下的競爭才是最公平的。香港聞名於世的，是它的「Laissez-faire policy」，即不干預政策，而不是立法最爲公平。可惜，近年來了一股歪風，覺得只講自由不夠好，因爲自由必然會造成以大欺小，恃强凌弱，故必須立法爲市場主持公道。這聽來十分「正義」的呼聲，實際上是希望以公平競爭來取代自由競爭，要香港人爲了公平去出賣手上的自由，這真是值得的嗎？

我們不妨先看看我們的上一代，是怎樣在自由與公平之間作選擇的。香港人的上一代，大都來自中國大陸。是甚麼力量吸引我們的上一代離鄉別井來香港尋找新生活的呢？是香港的自由呢？還是香港的公平呢？當年的大陸其實比香港更喜歡講公平，結果是「做又三十六，唔做又三十六」，連個人奮鬥的機會也沒有了。香港人就是不稀罕由黨委書記提供的公平，才冒著生命的危險，也要到一個陌生的地方去追求自由，可見自由遠比公平可貴。

當年的香港，沒有公平競爭法；法律提供的，是對私有財產的保護，個人可以保有自己的勞動所得，並可以自由地加以運用。當年來香港，既沒有福利，亦沒有工作保障，唯一的好處是可以自由搵工，不用接受政府的工作分配。不喜歡替人打工的，做小生意亦可，大家各顯神通，接受優勝劣敗。

這麼多年來，來香港參與這場自由競爭的人群裡，並非只有成功者，沒有失敗者，但失敗者沒有認爲這場競爭對他們不公平，輸了就要求立法，把遊戲規則改得對自己有利一些。因爲，參與這場遊戲的人都知道，大家的遊戲規則都是一樣的，是由上天制定的，一視同仁的，輸了只能怪自己技不如人。

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相反，由俗世上自以爲聰明的人所訂出來的法例，無可避免有主觀成分，有利益的考慮，有意志的扭曲，所劃出來的界綫，在對某些人有利時，亦會對某些人不利，難有公平可言。歷史上的不公平環境，大多數皆由不恰當的立法所造成。如非有電訊條例，大東電報局就不可能壟斷香港的市場這麼多年。

因此，爲市場訂定人爲的「公平法則」，只會破壞市場機制，扭曲正常的正常運作，而且會增加經營者的成本，最終害苦了消費者。立法的過程，其實只是各派政治勢力較量的過程。佔有優勢地位的政黨，一定會偏幫自己所代表的選民利益，很難做到真正的公平。所以，我對訂定公平競爭法沒有信心。

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作者: 施永青

沒有競爭法 香港仍勝出

昨文的題目是《*自由競爭勝公平競爭*》，其實這個題目已經過時，因爲現時政府已不再稱之爲公平競爭法，而只簡稱競爭法。本來，追求公平乃人類理想，把法例冠以公平的稱號，有利佔領道德高位，減少反對者的聲音；現時把公平兩字也刪去，是否反映倡議者自己心知肚明，知道這樣的立法只會虛有其表，無法真正滿足市民的期望，故先行降溫。

我接觸過不少支持立法規管自由競爭的政客，他們都以其他先進國家都已就此立法，來說明香港亦有立法的迫切性；但同一個事實一樣可以證明香港沒有立法的迫切性，因爲香港沒有立法一樣發展得很好，並沒有輸蝕給有這類立法的地方。現實是有這類立法的地方，一樣會出現壟斷性的企業；美國就有微軟、艾克森、沃爾瑪等龍頭企業，成功地在全球進行不公平競爭，賺得驚人利潤；故像香港這麼細小的地區，自行訂一套競爭法，根本起不到甚麼作用。這類聊備一格的法，其功能只是讓政客展示，他們已有爲市民謀幸福罷了。

香港雖然沒有競爭法，但只要政府不立例保護個別企業，市場上就不愁沒有競爭；任何有利可圖的行業，都可在香港吸引本地或國際的資金加入競爭；他們爲了相互競爭，就得不斷討好消費者，這才是令消費者利益得到保障的最好機制；既不用政府花氣力，亦遠比立法有效。

可惜，政客卻引導市民把希望寄託在立法身上，現在單是搞諮詢已搞了好幾年，將來即使成功立法，也得先有投訴，再等立案，然後才可以進行調查，還要給被告有答辯及上訴的機會，到真正有判決時，小市民已飽受欺凌，損失慘重了。可見靠立法所能產生的成效，遠不及任由企業之間的相互競爭。

香港現時有不少人，受了政客的誤導，對立法規管競爭，抱有不切實際的期望。他們以爲，立法之後，超級市場就不可以隨便加價，而小商戶也一樣可以在大商場租得門市店面；但這些都是立法最嚴的資本主義社會也不會出現的事，市民不應對此存有幻想。

長期以來，香港雖然沒有競爭法，但市民的生活一樣可以隨著香港的經濟發展而有所改善，只是九十年代之前改善得快一些、普遍一些，近十年則慢了下來，而且偏利於中上層。這是因爲香港的經濟已發展至國際頂峰，要繼續高速發展當然有難度。然而，香港的基層亦不妨設想一下，若果換轉讓他們去那些有爲公平競爭立法的地方生活，他們是否一定可以比活在香港更好？如果答案是否定的，我們又何苦急於爲公平競爭立法？

沒有競爭法 香港仍勝出

昨文的題目是《自由競爭勝公平競爭》，其實這個題目已經過時，因為現時政府已不再稱之為公平競爭法，而只簡稱競爭法。本來，追求公平乃人類理想，把法例冠以公平的稱號，有利佔領道德高位，減少反對者的聲音；現時把公平兩字也刪去，是否反映倡議者自己心知肚明，知道這樣的立法只會虛有其表，無法真正滿足市民的期望，故先行降溫。

我接觸過不少支持立法規管自由競爭的政客，他們都以其他先進國家都已就此立法，來說明香港亦有立法的迫切性；但同一個事實一樣可以證明香港沒有立法的迫切性，因為香港沒有立法一樣發展得很好，並沒有輸蝕給有這類立法的地方。現實是有這類立法的地方，一樣會出現壟斷性的企業；美國就有微軟、艾克森、沃爾瑪等龍頭企業，成功地在全球進行不公平競爭，賺得驚人利潤；故像香港這麼細小的地區，自行訂一套競爭法，根本起不到甚麼作用。這類聊備一格的法，其功能只是讓政客展示，他們已有為市民謀幸福罷了。

香港雖然沒有競爭法，但只要政府不立例保護個別企業，市場上就不愁沒有競爭；任何有利可圖的行業，都可在香港吸引本地或國際的資金加入競爭；他們為了相互競爭，就得不斷討好消費者，這才是令消費者利益得到保障的最好機制；既不用政府花氣力，亦遠比立法有效。

可惜，政客卻引導市民把希望寄託在立法身上，現在單是搞諮詢已搞了好幾年，將來即使成功立法，也得先有投訴，再等立案，然後才可以進行調查，還要給被告有答辯及上訴的機會，到真正有判決時，小市民已飽受欺凌，損失慘重了。可見靠立法所能產生的成效，遠不及任由企業之間的相互競爭。

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作者: 王弼

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文件中的一大修訂是把原先的七類反競爭行爲減至四類，分別爲操縱價格、串通投標、限制產量和市場分配，似是對反對派的妥協。而基於中小企對競爭法的疑慮，政府亦建議成立競爭事務委員會，盡量避免法庭訴訟；消委會更聲稱會改變將來的角色，協助中小企作出關於競爭法的訴訟，以此利誘中小企對法案的支持。政府努力的各方討好，以爭取法案能順利通過，可惜文件（發布會的投影片）盡處的最後一句法例「不適用於政府或法定機構」，便使政府的努力化爲烏有。明顯地，政府不是真心相信這法例可促進競爭，反而深明這法例的荒謬之處，所以把自己排除在外，隔岸觀火。

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另一令人非議的條款當然是競爭事務委員會和審裁處的缺乏獨立性和公信力。

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如上述所言，委員會的成立是希望減低訴訟費以爭取中小企支持，可惜如此在競爭法下中小企又是否永遠站在「有殺無賠」的境地呢？而再被冠以「謀取暴利」的大企業被打下馬後貨品價格又會否下降呢？要知道市場競爭總牽涉搶佔市場，把對手手中的顧客搶到己方。有了競爭法後，任何搶奪客源的舉動都可能被界定爲反競爭行爲，企業一是放棄競爭，但等於自殺行爲（不過這也可能被界定爲合謀定價）；一是僱用律師團隊以取得法律意見，以免自己誤墮法網，所增加的成本不菲，可謂未見官先打三十大板。如日後與政府或對手對簿公堂所花的律師費堂費更是天文數字，所增的成本必然轉嫁到消費者。所以，競爭法反而導致物價上升，這是很多市民意料不到的。

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獅子山學會

王弼

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消委會更聲稱會改變將來的角色，協助中小企作出關於競爭法的訴訟。

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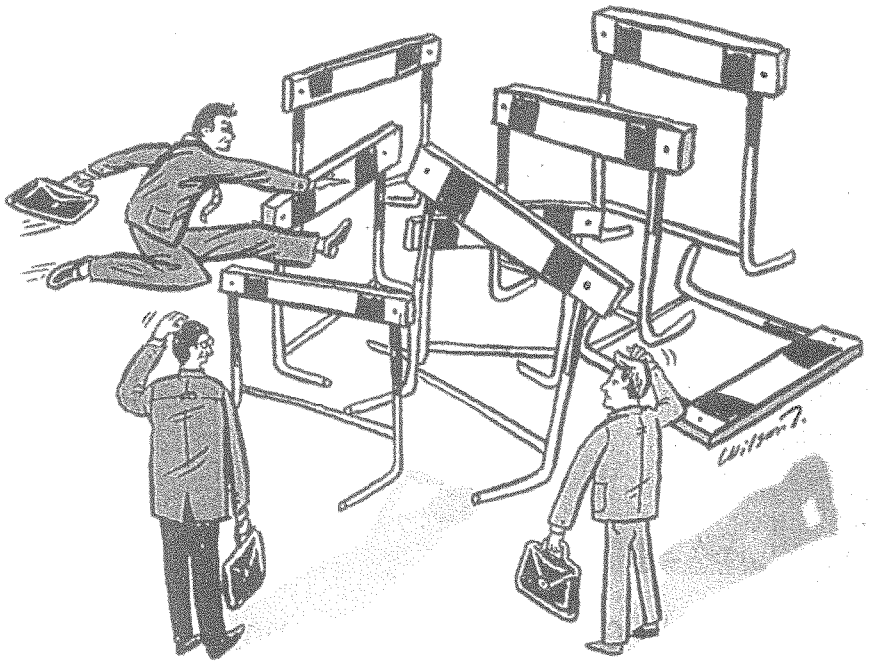
A proposed law will probably discourage business competition, rather than protect it, writes **Dan Ryan**

Obstacle course



Earlier this month the government released its much-anticipated report on its proposal to introduce a cross-sector competition law. Those looking for a compelling rationale for why we need such a law will be left scratching their heads. Not only does the report contain some glaring omissions, but it also reveals a basic misunderstanding about the nature of competition itself.

The report claims to be based on sound economics yet not one single economist is cited in the whole 57-page document. Any intellectually honest exercise would have at least taken account of the host of economists who think that competition laws make no sense. These include Alan Greenspan, Nobel-prize winners Milton Friedman, James Buchanan, and Ronald Coarse, as well as other leading economists like Thomas Sowell and William Baumol. Which economists is the government relying on to support its claims that the competition law it is proposing is right for Hong Kong? The report does not say.

> Most significantly, nowhere in the report do the authors actually define what they mean by "competition"

You will also search in vain in the report for any type of cost-benefit analysis on the proposed competition law. The report makes speculative and unsubstantiated claims about the supposed benefits of introducing the new regulator but ignores or downplays the very real costs to the economy. The only clear statement about costs in the report is that the annual budget for the new regulator will be at least HK$86 million. But that is just the tip of the iceberg. The more significant costs are the regulatory risks and compliance and legal fees that all Hong Kong businesses will face under the proposed regime. Such costs will inevitably and regrettably have to be passed on to consumers in the form of higher prices and a less diverse range of goods. Where is the hard evidence that such additional regulatory burdens and costs will actually result in a net benefit to the Hong Kong economy as a whole? Again, the report does not say.

Most significantly (and frankly embarrassingly) is the fact that nowhere in the report do the authors actually define what they mean by "competition". Surely, you say, a report which cost the government more than HK$18 million to produce and which takes competition as its core subject matter must have defined the term somewhere? Sorry to disappoint, folks. It's just not there.

The absence of a definition of competition is troubling when you actually consider that the focus of the law is to give the regulator wide-ranging powers to take action against businesses which engage in conduct that supposedly "substantially lessens competition". One might reasonably ask – if the term "competition" itself is not defined – how does the regulator know whether some form of business behaviour substantially lessens it? "Oh, leave it to us," they say. "We will decide what is competitive and what is not". Such a vague law with such arbitrary powers of enforcement would make Robert Mugabe blush. There are concerns in some legal circles that giving a regulator such dramatic powers over the private sector may infringe the Basic Law.

The absence of a definition of competition also points to a deeper misunderstanding in the report. Competition, properly defined, has nothing to do with the behaviour of particular market participants. Rather, it is where there is the potential for a new market participant to compete for the consumers who are currently buying their goods and services from one or more market participants.

Hong Kong has traditionally understood that competition is only reduced when government restricts market entry of new competitors through tariffs, arbitrary licensing schemes or overly complicated government regulation which favours incumbents and outright bans on competitors. This is why, instead of introducing a competition law, Hong Kong has focused instead on ensuring that in most industries there is an open market. The message is clear – to create competition, create an open market.

In an open market – where there is no government restriction on a new competitor entering – all that happens if companies agree to jointly raise prices or submit similar bids is that an opportunity is created for a new competitor to steal customers away by offering a lower price or win the tender by submitting a lower bid.

Most Hong Kong businesses understand this instinctively. All that a competition regulator would do is penalise honest commercial operators and turn legitimate business competition into legal disputes. Who wants that?

The proposed law would also do nothing to open up those few industries in Hong Kong in which new competitors are prohibited, for example gambling.

Plans to introduce such a massive change on the basis of such a deeply flawed report should be of concern to all Hong Kong businesses and consumers. Those of us who oppose the proposed competition law are not against competition. We believe instead that this proposal is unnecessary regulation of the economy and a bad arbitrary law that would actually reduce competition and threaten Hong Kong's hard-won economic success.

Dan Ryan is a director of The Lion Rock Institute

The Roots of Chinese Nationalism

By Emily Parker

The Chinese media decry violent Tibetan rioters; the West criticizes the Chinese crackdown. The Western press describes Chinese censorship; Chinese netizens slam Western media bias. A Chinese official calls the Dalai Lama a "political exile bent on engaging in activities aimed at splitting the motherland," while in the West he is described as a man of "peace" and "reconciliation." Americans and Europeans debate boycotting the Olympics to protest China's human-rights record; Chinese commentary describes Western arrogance toward a "developing country that is going to host the games."

Are we all living on the same planet?

It may be tempting to write off these Chinese nationalist attitudes as the results of state propaganda. And Beijing is certainly fanning the flames, at least for now. But as Chinese outrage explodes on the Web and among Chinese abroad, it's clear that Chinese nationalism is not just coming from the top down. It's not hard to find a Chinese person who expresses a "nationalist" view—that Tibet is part of China, or that the Western media is biased—but is also a vehement critic of the Communist Party. In some cases, nationalists have accused Beijing of not defending Chinese interests strongly *enough*.

So what does it mean to love China? And who decides, the Communist Party or the Chinese people themselves?

Meanwhile, those outside the country are asking their own questions. Perhaps what they want to know most is this: Will China's "love of country" *(aiguozhuyi)* somehow amount to hostility toward us? There have been several moments over the past decade when the short answer to this question, particularly where Americans and Japanese were concerned, appeared to be "yes."

One of the more dramatic outbursts took place in 1999, when NATO bombed the Chinese Embassy in Belgrade, killing three Chinese people. Many Chinese refused to believe fervent U.S. pleas that the bombing was a tragic accident, and tens of thousands took to the streets, with some throwing bricks and Molotov cocktails. U.S. Ambassador Jim Sasser was trapped in the American embassy for days as demonstrators pelted the building with stones.

> Don't blame state propaganda alone for hardline sentiments.

In 2005, thousands of Chinese people took to the streets again, this time in reaction to Japan's bid for a permanent seat on the United Nations Security Council. The emotional, occasionally violent demonstrations were also protests against what many Chinese felt was Japan's failure to address the past—including textbooks that whitewashed Japan's historical atrocities and then Prime Minister Junichiro Koizumi's repeated visits to Japan's Yasukuni Shrine, where war criminals are enshrined.

These expressions of outrage were rooted in the perception that China was victimized by a foreign country. This idea of a wounded, defeated nation has deep roots in education and propaganda. In "China's New Nationalism," Peter Gries discusses how the narrative of China's "century of humiliation" has framed its interactions with the West. This narrative starts, he says, with China's defeat in the First Opium War and the British acquisition of Hong Kong in 1842, includes unequal treaties with the British and the Japanese in the 19th century, and continues with the "War of Resistance" against Japan in the 1930s and 1940s.

Running through this narrative is a potent streak of pride and indignation, and these emotions bleed into the business sphere. American and Japanese companies have learned the perils of appearing to treat China as an "inferior" nation. In 2004, Nike ran an ad on the mainland that featured American basketball star LeBron James battling, and defeating, Chinese symbols such as dragons and a kung-fu master.

Memo to Nike: If you run this kind of ad in China, the dragons better win. A brouhaha erupted, Chinese "national dignity" was wounded, and the Nike ad was banned. In 2005, a McDonald's television ad that showed a Chinese man begging for a discount was taken off the air, apparently because it was too humiliating.

A year before the Nike incident, Toyota ended up pulling and formally apologizing for advertisements featuring stone lions bowing to a Prado SUV. The issue was that lions, ancient symbols of Chinese power, were bowing to a Japanese product. Several years before that, some Chinese accused Toshiba of treating them as inferior because, following accusations of a laptop defect, the company compensated U.S. consumers but not their Chinese counterparts. Toshiba sales saw a steep drop on the Chinese marketplace.

These nationalist outbursts may have been influenced by years of propaganda, but they are not always dictated from the top. In fact, the widespread popularity of the Internet is allowing the people to influence the state media. A Chinese journalist who worked for CCTV, a major state media outlet, explained to me how this works. The journalist, who requested that he not be named, described his own experience covering Japan's bid for a permanent seat on the Security Council. An Internet petition opposing the bid reportedly obtained over 40 million signatures.

Public opinion may have played a decisive role in determining the state media reporting, not the other way around. "After the reactions on the Internet, the government changed, so we had to change. We had to report every day on how these efforts [to gain a seat on the Security Council] were going. Before this era, government could act unilaterally. Now, when something happens on the Internet, the government has to change policy."

As Beijing has tried to forge friendlier relations with Japan, public patriotism has threatened to get in the way. In 2004, the Chinese authorities shut down the popular Patriots' Alliance Web site founded two years earlier. The site had criticized Japan, the U.S., and occasionally the Chinese government for being too weak. It apparently crossed the line after launching an online petition protesting the Railways Ministry's decision to award contracts to Japanese companies. The petition obtained over 67,000 online signatures in under 24 hours.

* * *

Chinese outrage over Tibet could again put Beijing in a tough position. Stoking popular nationalism may have once been a convenient way to shore up faith in the party, but a public spewing rhetoric about the West bullying China has no place in a "One World, One Dream"-themed Olympic Games. The Olympics will provide a window into China's self-image and global ambitions, and one imagines that Beijing will not want to show the world a face that is contorted with anger.

Many Chinese might tell you that one particularly proud moment in recent history was in August 1984, a mere six years after Deng Xiaoping opened China's doors to the world. The moment was the Los Angeles Olympic Games, where China took home 15 gold medals. For a country that had once been called "the sick man of Asia," this was a truly historic moment. China has come a long way since.

Let's hope the Beijing Olympics will pave the way for a new *aiguozhuyi*—one that reflects a confident nation whose patriotism is dictated neither by resentment nor by the Communist Party. Let the games begin.

Ms. Parker is an assistant editorial features editor at The Wall Street Journal. Her chapter on Chinese nationalism will appear in "China's Great Leap: The Beijing Games and Olympian Human Rights Challenges," (Seven Stories Press, May 2008).

How to Make Hong Kong Uncompetitive

By Dan Ryan

HONG KONG—A series of record-breaking fines in American and European competition cases is focusing attention and concern again on the power and purpose of competition regulators themselves—just ask Microsoft. So the Hong Kong government's ongoing attempt to create such a regulator of its own is puzzling, to say the least.

Unlike most jurisdictions around the world, Hong Kong does not have a general competition law regulator. (The sole exception is a limited—and unnecessary—regime governing the telecommunications and broadcasting industries.) Yet somehow without such a regulator Hong Kong is consistently rated the freest and most competitive economy on the planet. How can this be?

Hong Kong's current "competition regulator" is its economic freedom and open market. The government keeps tariffs low and, with a few well-known and limited exceptions like the horse racing monopoly, it has maintained few government-imposed barriers to entry. This doesn't mean that certain companies haven't been able to dominate particular industries. But their ability to exploit that dominance to consumers' detriment is constrained by the constant threat that new competitors could pop up to challenge them.

Those in favor of a competition law regulator often point to the dominance in Hong Kong of two large supermarket chains—PARKnSHOP and Wellcome—as if this alone demonstrates there is a "cartel" in the retail sector. Yet strangely this has proved no barrier to new competitors establishing themselves in the territory. Neither has it prevented the explosion of small food chains offering high-end produce. Traditional markets where many locals prefer to shop do a roaring trade.

> Pass a competition law.

Proponents like to claim that competition laws are grounded in economic theory. This is simply false. Many of the most respected economists of the 20th century are against competition laws. They include Alan Greenspan, Nobel prize-winners Milton Friedman, James Buchanan and Ronald Coase, as well as other influential economists such as William Baumol.

Yet despite having years of practical success under its belt, the Hong Kong government is now in the process of drafting legislation to establish its own cross-sector competition regulator. It has indicated the legislation will be enacted in 2009 and the draft bill is due to be released at the end of April.

The pressure to do this has come from competition lawyers, regulators and academics. These groups, incidentally, have the most to gain from the establishment of a new regulator—international law firms are already bulking up their practices to take advantage of competition law-related disputes and regulators and academics are eyeing positions in the new regulatory body. The movement is also driven by unfounded expectations among certain sections of the community that a competition law regulator can be used to artificially force prices down.

The Hong Kong government has not yet confirmed exactly what powers the new regulator will have, exactly what form it will take, or exactly what kinds of business conduct will now be deemed "illegitimate competition." To date, the publicly available information has indicated that the new body will be focused on two main areas which are given the pejorative-sounding terms "restrictive trade practices" and "predatory pricing." The former covers a variety of cooperative commercial agreements that businesses make with each other. The latter deals with situations where a company engages in a price war by selling goods below cost.

The initial competition law regulator in Hong Kong will likely have less extensive powers than its peers in either the European Union or the U.S. The strategy seems to be to bring in the new regulator gently at first so as not to spook the business community, and then increase its powers later on. That's exactly what's happened in other jurisdictions. And there isn't one example of a competition regulator being disbanded.

In Hong Kong the introduction of a competition regulator would mark a step backward to a less competitive environment. Such regulators invariably introduce costs and inefficiencies of their own. Criminal penalties for directors are inevitably introduced, along with fines and penalties for non-compliance with the regulator's dictates. Compliance introduces significant costs on both small and large businesses. Many mergers and acquisitions that might actually benefit consumers risk being restricted or scuttled. Regulatory action also tends to be unevenly targeted, with regulators focusing on foreign businesses and businesses that are "too successful."

Hong Kong has a long and proud history of rejecting the worst excesses of state regulation that other countries have adopted. Unfortunately the current government has allowed itself to be talked into accepting that the very policies that have allowed its economy to thrive are somehow "defective" or "not fully developed."

It would be commendable if instead the Hong Kong government stood up for itself and extolled the virtues of its traditional approach to promoting competition—low tariffs and limited regulatory barriers to entry. Other countries would be a lot more competitive and their consumers would have access to cheaper and better goods and services if they followed Hong Kong's example—rather than vice versa.

Mr. Ryan is a director at the Lion Rock Institute, a Hong Kong-based think tank.

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從iPhone到《競爭法》

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蘋果推銷iPhone的策略，是在大部分地區只與當地一個電訊營運商的電訊服務「綑綁銷售」。在香港，和記電訊旗下的3香港「率先」推出iPhone，但必須同時與3香港簽定兩年服務合約。對於如此安排，城市大學法學院顧敏康教授和湯家驊議員認爲有違公平競爭，因而應該盡早通過《競爭法》，除之而後快。

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細看蘋果與各地電訊營運商的合作模式，並非向電訊營運商收取一筆可觀的「獨家代理」費用，而是與電訊營運商對iPhone用戶的收入分成；據聞一般介乎10%至20%。分析這種分成安排，不得不提一件經典的「綑綁銷售」案例。案發之時，電腦不如現在輕巧，運作更要借助一種紙卡。當年，國際商業機器(IBM)租出電腦後，規定客戶必須使用該公司提供的紙卡，於是引來「綑綁銷售」的指控。可是，後來的研究發現，這種電腦與紙卡的「綑綁銷售」，無非是利用紙卡作爲量度電腦的使用量，方便國際商業機器把出租電腦的收費模式，由固定月租變成多用多付。

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要是蘋果認爲消費者對於iPhone的需求各異，或視之爲潮流飾物、或視之爲綜合通訊娛樂設備，而後者可以大大刺激電訊服務使用量，超乎一般型號的流動電話。如此，蘋果與電訊商的「綑綁銷售」及分成安排，正如國際商業機器的紙卡，並非旨在削弱競爭，而是用於量度iPhone用量，從而把iPhone的售價由每部定價變成以使用量收費。

分成協議較以每部定價更爲複雜、牽涉更多成本。正因如此，除了因爲需要清楚劃分利益歸屬以鼓勵產品推廣宣傳外，減低制定分成協議的費用亦使蘋果傾向在大部分地區，只與一個電訊商的服務進行「獨家綑綁」。

流動電話以其使用量定價，或許聽來有點匪夷所思，但社會上各種合約安排本來就時刻推陳出新，更何況這種安排是出自把蘋果起死回生的喬布斯（Steve Jobs）。

社會各種制度安排不是零和遊戲，正如擔任美國聯邦上訴法院法官的法律經濟學家理察・波斯納（Richard Posner）所言，這種「綑綁銷售」在增加生產商的利潤之餘，不代表會損害消費者利益及社會效率。以iPhone爲飾物的用家，在這種安排下付出的機價會相對較低。何況，在流動電話能夠以其使用量定價的情況下，可以預期手機生產商會更加傾向設計方便易用的介面及創新的功能，以求刺激用戶使用電訊服務來增加收入。這種安排，可以說是爲流動電話開創新的競爭層面，而非削弱競爭。

《競爭法》易誤中副車

《競爭法》的用意雖善，可是從iPhone銷售策略的例子中，可見各種商業運作複雜難解、競爭與反競爭行爲糾纏不清，使政客與利益團體便於利用、裁決容易誤中副車。

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黃健明

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蘋果iPhone的策略是以使用量定價　《彭博圖片》

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所謂「綑綁銷售」，通常是生產商把擁有壟斷優勢的產品與另一產品「綑綁」，消費者必須同時購買。想當然者認為，生產商因而可把壟斷優勢從一種產品「伸延」至另一產品。暫且不提這種想當然的「伸延論」早已備受質疑。就生產商把壟斷優勢「伸延」本身其他產品，以賺取更多利潤，表面上仍然看似「合情合理」。可是，既然壟斷優勢來自iPhone，蘋果與其以「綑綁銷售」將「壟斷」伸延至電訊服務才賺取利潤，何不直接提高iPhone售價？

假如消費者願意以8000元購買一個iPhone連兩年電訊服務的組合，蘋果把iPhone定價3000元，利用「綑綁銷售」把電訊服務「壟斷」，將電訊服務的收費由競爭下的2000元急增至5000元，蘋果果直接以6000元出售iPhone，然後給用家在市場自行選擇電訊服務，對於蘋果的盈利並無影響。

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日期: 2008-08-04
作者: 施永青、鍾淑貞

競爭法使中小企得不償失

香港計劃設立競爭法可追溯到陳坤耀主政消費者委員會的年代，記得他當年做了一個研究，指出香港地產商有壟斷市場的情況。就我的經驗而言，香港地產商之間的競爭非常激烈。

他們在物業公開發售前會將一切資料保密，因爲消息一旦泄漏，對手便可能會散播對自己不利的消息：如長江得悉新鴻基將推出新樓盤，便會說自己的樓盤銷情欠佳兼撻訂，要減價速銷。發展商又會在對手樓盤展銷廳附近派出旅遊巴士或專人向參觀者派傳單，標榜自己正在出售的樓盤更價廉物美；競爭的手段層出不窮，由此可見香港地產商之間勾心鬥角、競爭激烈的情況，然而外間經常批評地產行業出現壟斷，是全因爲政府勾地政策出現問題所致的。

勾地政策失誤導致壟斷

因勾地政策失誤，以致土地供應的減少，地產商可供出售的單位數量亦因而急降，在八十年代期間一年可以賣出三萬個單位，現在一年只能賣出一萬多個單位。然而大多數的地產商也爲上市公司集團，需要每年都作業績滙報，但土地供應減少，相對地可供出售的單位亦同樣減少，成交減少連帶集團收入相告下降。爲了爭取更多的收入，地產商只能夠無所不用其極地爭取合現盈利。其實只要政府在宏觀調控上增加土地供應量，地產從業員便會因爲要達到預期業績而努力地向一眾客人推銷，又豈敢像如今般斗膽做出一些有損業界和客戶利益的事情？所以很多政策根本毋須政府立法也可收其之效。

現在競爭法之所以被提倡，很大程度是因爲政客希望在選舉前爭取選票，標榜自己爲市民爭取利益、爲人民謀福利。就以諮詢文件顯示大部分市民都支持有競爭法，這是當然的，因爲他們都受騙而不自知。例如有指豬肉市場的開放會使豬肉價格得以下降；但實際上華潤的壟斷正爲我們提供平價豬肉，倘若沒有華潤的壟斷，相信目前的豬肉價格將會更高。除了豬肉價格外，也有政客提出在競爭法下汽油價格將得以調低，可惜大家有沒有想過油價是由國際市場所定並不是依靠任何立法而得以扭轉的。

港人昔日逃避公平競爭

試想，爲什麼政府把《公平競爭法》的「公平」一詞刪去？因爲政府心虛，明白競爭法不可能有什麼大作爲。市場是講求自由經濟競爭而不是公平競爭的，有自由便有公平，有立法便沒有公平。立法妨礙自由，只有free fight才是公平。其實，香港人昔日也是因逃避公平競爭法而來到香港的，只是大家忘記罷了，但我卻記憶猶新。大陸社會主義就最爲公平，社會主義講求集體利益，一切不公平的情況也可交由黨委書記判斷；現在我們又組成競爭事務委員會，將來說不定又有一個黨委書記爲我們主持公道！

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所以我認爲競爭法通過後，對營商者而言，只有顧慮更多和經營成本上升而已。香港過往一直未爲競爭立法，但經濟仍快速發展，並沒有影響到香港的繁榮。相對外國推行競爭法是有其政治因素支持的，因爲可以利用法例來打擊外來競爭者；可是他們本土仍有Google、麥當勞、波音飛機等壟斷市場，這並不見得能爲消費者提供更便宜的貨品。目前香港還未就有關條例立法，已被世界公認爲最經濟自由的地方。現在是因爲有人要爭取選票？還是要營造政績的關係而企圖扭曲或改變香港的發展方向而立此法例？實在值得大家深思。原影片可到http://lionrockhk.blogspot.com/2008/07/blog-post_15.html瀏覽獅子山學會顧問施永青演詞獅子山學會研究助理鍾淑貞整理

信報財經新聞

日期：2008-08-04
作者：施永青・鍾淑貞

競爭法使中小企得不償失

獅子山學會

施永青、鍾淑貞

競爭法使中小企得不償失

香港計劃設立競爭法可追溯到陳坤耀主政消費者委員會的年代，記得他當年做了一個研究，指出香港地產商有壟斷市場的情況。就我的經驗而言，香港地產商之間的競爭非常激烈。

他們在物業公開發售前會將一切資料保密，因為消息一旦泄漏，對手便可能會散播對自己不利的消息：如長江得悉新鴻基將推出新樓盤，便會說自己的樓盤銷情欠佳兼搓訂，要減價速銷。發展商又會在對手樓盤展銷廳附近派出旅遊巴士或專人向參觀者派傳單，標榜自己正在出售的樓盤更便宜物美：競爭的手段層出不窮，由此可見香港地產商之間勾心鬥角、競爭激烈的情況，然而外間經常批評地產行業出現壟斷，是全因為政府勾地政策出現問題所致的。

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獅子山學會顧問施永青演講
獅子山學會研究助理鍾淑貞整理

Cartel crusade lacks definition

ing vaguely worded laws
ds the wrong message
ur Asian neighbours,
es **Dan Ryan**.

Unbalanced . . . competition law regulators have failed to properly define a number of common terms. Photo: GREG NEWING

ustralians have reacted with indignation over the past few weeks as one of their patriots was detained in China arious offences ranging from ng "state secrets" to other ecified "economic crimes". e events have highlighted the ers in legal systems that allow riminal prosecution of iduals under vague charges, h a state agency itself has broad ers to interpret.

t in the week following Stern detention — in a move that ot go unnoticed in Beijing — ralia passed laws that give the ralian Competition and sumer Commission the power bject business people to up to ars' jail for the ill-defined term ...cartel conduct".

...is a highly ...ticians and ...to include all ...that should be ...commercial behaviour. ...expect someone ...ACCC chairman Graeme ...to be extremely judicious in ...of the term.

...d, in an article in *The ... Financial Review* last ...d in other public ..., he has provided no ... — and has been outright ...of legal and business ...about the need for one — ...instead that it should be ...enough for everyone to ...and".

...failure by competition law ...tors to define the terms they ...all too common. In the past ...ars of debating different ...ition law "experts" in Hong ..., not one has given a precise ...ition of "cartel". When ...lenged, ex-ACCC chairman ...n Fels could not provide a definition for even the more basic ...agreement".

The legislation does not specifically define the term cartel, either. Instead it avoids the issue by providing a circular definition and labelling a range of agreements between businesses "cartel provisions".

But there is far from unanimity among economists that any of the behaviours labelled this way are in fact cartels or automatically cause any economic harm. Take, for example, the prohibition under the law that criminalises agreements to "fix prices".

It sounds terrible until you ask yourself in what sense the price of a particular good or service can be said to be fixed if it is possible for a new competitor to enter the market to sell it at a lower price.

The legislative movement to bring in this law gained momentum primarily because of the alleged Visy-Amcor "cartel". Now that Visy chairman Richard Pratt is dead and Samuel has stopped issuing press releases accusing him of "ripping off" anyone who has ever bought a packaged chocolate bar, it might well be worth thinking again about the extent to which it is even economically possible for Visy and Amcor to have "fixed" the price of packaging services in Australia.

This is given that other packaging companies continue to gain market share by offering lower prices that undercut these two incumbents.

It might also be worth asking why Australia now has laws against commercial behaviour that some of the most influential economists of the 20th century believe cause no economic harm.

A far more sensible reform would be to pass legislation to limit the ACCC's powers to those markets where government regulation keeps new competitors out.

These are the only markets in which it can properly be said that cartels and monopolies can occur.

It does great damage to the rule of law in Australia to have such vaguely worded, inherently arbitrary and economically questionable criminal laws on the books. It also sends the wrong message to other countries in the Asian region about the developme of their legal systems.

China introduced its own competition law regime — modell on the ACCC's — last year. Chine authorities do not yet have the power to impose criminal penaltie on business people for breaches o competition-related offences.

It would not be surprising to se them introduced, especially given the increasing number of loose assertions from Chinese officials about foreign cartels in the miner trade and other industries.

If, in the future, Australian business executives are prosecute in China for the same economic crimes that have just been enacted Canberra, no doubt many in Beiji will appreciate the irony.

Dan Ryan is a director of the Lion Rock Institute, a Hong Kong-base think tank.

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信報財經新聞

日期: 2010-03-10
作者: 王弼

容我向Neway 致敬

話說漢高祖劉邦一統天下後，由於自己和功臣們都是地痞流氓出身，不知宮廷禮儀爲何物，每次金鑾寶殿上御宴，群臣們喝酒爭功，醉了就大喊大叫，拔出寶劍，就往殿柱亂砍，完全不成體統。劉邦心裏不滿，卻不知如何是好。

另一邊廂，自開山鼻祖孔夫子以來，統治者對儒家理論都是無甚興趣，就算對這「聖人」、「亞聖」等都是敷衍了事，秦始皇更焚書坑儒，儒家學者幾百年裏都沒過幾天好日子，是最沒出色的了。可是在叔孫通的眼裏，有劉邦這個大客戶，儒家學者出人頭地的日子終於來了！

在晉見劉邦，解釋了儒家學說能如何幫助皇帝安定政權後，叔孫通立刻啓程到魯城，徵召儒學專家，共商擬定皇家禮儀。可是卻有幾個專家對叔孫通的大計嗤之以鼻，說：「樂章禮儀是何等大事，必須累積高貴的品德教化一百年，然後才有資格制定。天下剛剛安定，死亡的人屍骨未寒，你怎會成功？你走吧，不要污染我們。」叔孫通聽了，失笑說：「腐儒，不知道天下不斷在變。」

投資夕陽行業高風險

從焚書坑儒到儒術獨專二千年，叔孫通堪稱千古「撈底王」吧。而讀死書的所謂專家卻從來充斥市面，古今不變。老闆們可能都有這個經驗，就是請到了擁有無數「沙紙」，左一個PhD，右一個MBA，再加ICFA，總之十八般武藝像是樣樣精通，可是做起事來，講多過做；紙上談兵，引經據典，但常識欠奉，跟實際完全脫節。

私人公司的老闆在自嘆遇人不淑後，還可以立刻止蝕。但自從港英埋下最毒的炸彈，就是硬把大專院校升格爲大學，我們的最高學府就成爲這些所謂專家的溫床。這一撮人以學者自居，經常接受傳媒採訪，爲時事做評論；但其評論卻往往「露底」，反映他們的分析能力就如叔孫通所言，「不知道天下不斷在變」。這些「專家」的存在實在是對真正學者的一種威脅，正所謂：「一粒老鼠屎，壞了一鍋粥」嘛。

最近發生Neway收購加州紅的事件，就是典型的例子，讓這些專家露了底。有經濟學家便指出，在一間卡拉OK獨大的情況下，消費者必然受到影響，因爲公司不用再提供優惠和折扣吸引市民，令價格提升，因爲收購意味「一統天下」，「市民梗係冇咁着數啦」，其言論可謂經濟學一〇一條件反射式答案，未必經過腦袋的思考，但出自經濟學家的口中，令人惋惜。

卡拉OK已經是公認的夕陽行業，從90年代的Neway、前衛、Big Echo、NICAM、Top One、嘉禾、創藝與活力energy和加州紅等，百花齊放的盛況，到今天剩下的Neway還有勇氣付錢以圓「一統天下」的夢想，管理層一是有蘋果電腦喬布斯（Steve Jobs）的能耐，有起死回生之術；一是對香港人集體回憶有無限的承擔，願以私人資金捍衛之（至少Neway沒有要求政府撥款幾個億，成立什麼「唱K發展基金」）。無論是上述哪一個理由，都值得獅子山學會同仁站立鼓掌致敬吧！

最怕政府以法例保護

所以，所謂「市民梗係冇咁着數啦」，不知從何歸納出來。更簡單的說，如果今天有廠家壟斷了打字機的製造，我們是否應多謝他？這讓我們可以對孩子們說：「看看你現在多幸福，爺爺便是用這東西打文件養活一家的…。」不只打字機，就算是曾雄霸全球的微軟，今天在雲端運算（Cloud Computing）技術愈趨成熟下，用家對其是否壟斷視窗或文書處理系統也沒有太大反應了，反正近乎免費的Google Apps 和Chrome更好使好用。所以就算某某行業存在壟斷，也不可沒頭沒腦便說市民「冇咁着數」。

可見，世上有太多的例子，在「唯利是圖」的資本家中，一定有人能創造新的商品打破壟斷，天下不斷在變，用不着政府勞心。商場上誰都知花無百日紅的道理，有的都是政府以法例保護，即現代術語「官商勾結」是也，看看香港多少壟斷是由政府御准便知了。所以，當有輿論因Neway收購加州紅事件而重提《公平競爭法》，你真的相信被功能組別把持的立法會，會給我們真正的公平競爭？

獅子山學會行政總監

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信報財經新聞

容我向Neway 致敬

獅子山下

王弼

容我向Neway致敬

話說漢高祖劉邦一統天下後，由於自己和功臣們都是地痞流氓出身，不知宮廷禮儀為何物，每次金鑾寶殿上御宴，群臣們喝酒爭功，醉了就大喊大叫，拔出寶劍，就往殿柱亂砍，完全不成體統。劉邦心裏不滿，卻不知如何是好。

另一邊廂，自開山鼻祖孔夫子以來，統治者對儒家理論都是無甚興趣，就算對這「聖人」、「亞聖」等都是敷衍了事，秦始皇更焚書坑儒，儒家學者幾百年裏都沒過幾天好日子，是最沒出色的了。可是在叔孫通的眼裏，有劉邦這個大客戶，儒家學者出人頭地的日子終於來了！

在晉見劉邦，解釋了儒家學說能如何幫助皇帝安定政權後，叔孫通立刻啟程到魯城，徵召儒學專家，共商擬定皇家禮儀。可是卻有幾個專家對叔孫通的大計嗤之以鼻，說：「樂章禮儀是何等大事，必須累積高貴的品德教化一百年，然後才有資格制定。天下剛剛安定，死亡的人屍骨未寒，你怎會成功？你走吧，不要污染我們。」叔孫通聽了，失笑說：「腐儒，不知道天下不斷在變。」

近期由Neway併購競爭對手加州紅一事，引發人們對行業壟斷的議論紛紛。但對夕陽行業來說，壟斷市場的說法是否可以成立呢？ （互聯網圖片）

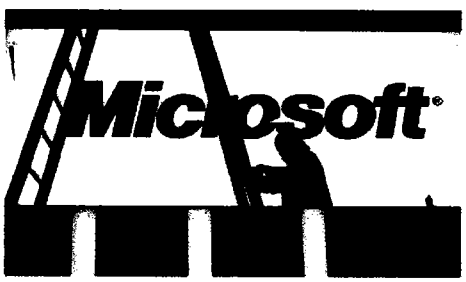
投資夕陽行業高風險

從焚書坑儒到儒術獨專二千年，叔孫通堪稱千古「勞底王」吧。而讀死書的所謂專家卻從來充斥市面，古今不變。老闆們可能都有這個經驗，就是請到了擁有無數「沙紙」，左一個PhD，右一個MBA，再加CFA，總之十八般武藝像是樣樣精通，可是做起事來，講多過做；紙上談兵，引經據典，但常識欠奉，跟實際完全脫節。

私人公司的老闆在自嘆遇人不淑後，還可以立刻止蝕。但自從港英埋下最毒的炸彈，就是硬把大專院校升格為大學，我們的最高學府就成為這些所謂專家的溫床。這一撮人以學者自居，經常接受傳媒採訪，為時事做評論；但其評論卻往往「露底」，反映他們的分析能力就如叔孫通所言，「不知道天下不斷在變」。這些「專家」的存在實在是對真正學者的一種威脅，正所謂：「一粒老鼠屎，壞了一鍋粥」嘛。

最近發生Neway收購加州紅的事件，就是典型的例子，讓這些專家露了底。有經濟學家便指出，在一間卡拉OK獨大的情況下，消費者必然受到影響，因為公司不用再提供優惠和折扣吸引市民，令價格提升，因為收購意味「一統天下」，「市民梗係冇啲着數喫啦」，其言論可謂經濟學一〇一條件反射式答案，未必經過腦袋的思考，但出自經濟學家的口中，令人惋惜。

卡拉OK已經是公認的夕陽行業，從90年代的Neway、前衛、Big Echo、NICAM、Top One、嘉禾、創藝與活力energy和加州紅等，百花齊放的盛況，到今天剩下的Neway還有勇氣付錢以圖「一統天下」的夢想，管理層一是有蘋果電腦喬布斯（Steve Jobs）的能耐，有起死回生之術；一是對香港人集體回憶有無限的承擔，願以私人資金捍衛之（至少Neway沒有要求政府撥款幾個億，成立什麼「唱K發展基金」）。無論是上述哪一個理由，都值得獅子山學會同仁站立鼓掌致敬吧！



天下不斷在變，強如軟件界巨擘微軟，近年要雲端運算技術的威脅，亦要不斷擴展其他業務，確保其在市場的優勢。 （彭博圖片）

最怕政府以法例保護

所以，所謂「市民梗係冇啲着數喫啦」，不知從何歸納出來。更簡單的說，如果今天有廠家壟斷了打字機的製造，我們是否應多謝他？這讓我們可以對孩子們說：「看看你現在多幸福，爺爺便是用這東西打文件養活一家的…。」不只打字機，就算是曾雄霸全球的微軟，今天在雲端運算（Cloud Computing）技術愈趨成熟下，用家對其是否壟斷視窗或文書處理系統也沒有太大反應了，反正近乎免費的Google Apps和Chrome更好使好用。所以就算某某行業存在壟斷，也不可沒頭沒腦便說市民「冇啲着數」。

可見，世上有太多的例子，在「唯利是圖」的資本家中，一定有人能創造新的商品打破壟斷，天下不斷在變，用不着政府勞心。商場上誰都知花無百日紅的道理，有的都是政府以法例保護，即現代術語「官商勾結」是也，看看香港多少壟斷是由政府御准便知了。所以，當有輿論因Neway收購加州紅事件而重提《公平競爭法》，你真的相信被功能組別把持的立法會，會給我們真正的公平競爭？

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蘋果日報

日期: 2010-06-30
作者: 利世民

利字當頭：*港鐵陷害*

世民手頭有現金，打算長線持有港鐵（066）。可是，理由卻是我最不希望見到的一個。

曾經在香港以外的地方乘搭鐵路的人，一定會讚嘆港鐵整潔和方便。毫無疑問，物業發展收入補貼，讓港鐵可用蝕本方法辦客運服務。不過，蝕本不一定服務好，有補貼更和優質管理精神背道而馳。所以，港鐵總算是一家管理超卓的好公司。

世民問股壇女俠胡孟青，對港鐵這間公司的看法。「香港好多大牌公司，不理會中文傳媒。港鐵就不一樣，對分析員和股評人有問必答。可惜，搞得掂財經界，又面對不了公眾客戶，加價有許多障礙。」

用政策扼殺競爭

加價和政治壓力，在香港已經變成所有大公司的共同問題，不是港鐵獨有。可是，香港的交通政策，卻是明目張膽向港鐵傾斜。世民就曾親身經歷過一件事，說明了鐵路優先的霸道。話說將軍澳有一屋苑，向來有一條綠巴線服務，接連到藍田。屋苑業主委員會和綠巴營辦商，希望將服務伸延至觀塘。運輸署反對，理由是觀塘承擔不了每小時多6班小巴，這說法是否成理，可用客觀事實推翻，運輸署爲了當年新通車的將軍澳線，而要取締其他所有交通工具，也是有白紙黑字的紀錄。

像港鐵這種管理超卓的公司，竟然都要用政策去扼殺競爭，不是陷害是甚麼？政府推出競爭法的條文，但詳細內容欠奉。港鐵會被豁免嗎？又或者，政府會說明港鐵不會有任何特權嗎？我信港鐵會繼續有特權，繼續可以用地產變收入，補貼客運服務，進行不公平競爭。我信親疏有別，所以港鐵是合法壟斷，PE再高都合理。

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信報財經新聞

日期: 2010-06-30
作者: 王弼

反競爭法在針對誰

獅子山學會一向旗幟鮮明反對特區政府訂立「反競爭法」——該草案由最初冠名「公平競爭法」，經我們猛力抨擊後當局偷偷地把「公平」兩字刪去。無他，2008年進行公眾諮詢已表明政府部門和法定機構免受監管，而無論西方的英國皇室控制印撲克牌專利權，壟斷直至1602年始被法庭推翻；或東方中國歷來朝廷的鹽鐵專賣，政府本身就是反競爭之源，歷史就是最有力的證據，所以稱這法案爲「反競爭法」也絕不爲過。

重提競爭法意有所指

政府最近又悄悄在立法會重提競爭法，表面理由當然是爲民請命。在香港日漸民粹的氣候下，把社會問題歸究於大財團當然極有市場。不過，市民以爲反競爭法代表大財團的末日，買東西會便宜一點就大錯特錯。

正如上述，政府有豁免權，意味港鐵、國泰到各公共事業仍然可以大賺御准壟斷錢。所謂法定機構不管，那大財團也應吃點苦頭吧？可是，2008年政府在推出反爭競法諮詢文件前，開刀的對象卻不是「剝削者」大資本家，而是小本經營賣粉麵的商人——當時港九粉麵製造業總商會在報章刊登廣告，強烈建議同業把各類麵製品的批發價和零售價調升百分之二十至二十五，時任商務及經濟發展局局長的馬時亨便立刻去信「提醒」，商會最後撤回加價建議。

相對發水樓也好，天匯事件也好，就算推出什麼「九招十二式」，地產商還不是依然顧我、悠哉悠哉過活嗎？那有像賣粉麵的小商人慌忙回避？我不相信政府有意用反競爭法壓逼小商販，那只是這法例必然的副作用。

無論如何，從政府一向對超級大財團的態度，對付真正的壟斷者肯定不是政府的目的。既然老虎打不了，徒叫市民失望，最後成爲政敵的把柄，爲何政府還要通過這樣的法例？

有說最低工資是曾蔭權最不想通過但因抵不住政治壓力而要立法；不過，反競爭法卻是他的心之所屬。而且，他竟然在政改的大是大非後便急急計劃向立法會提案，便顯得事不尋常。

政治藝術：別只看表面

有報道指曾特首與建制派在政改事情鬧得不愉快，要以燒烤作和頭酒補鑊，欲以雞脾打其牙骹軟。問題是我們曾特首從一開始已非阿爺的真命天子，勢孤力弱，早已難討價還價，所以才鬧出所謂第二支管治團隊。曾特首既自稱政治家，對西環、民建聯、工聯會和其他建制派當然知道要忍讓，所以副局長分餅仔等事，是可以預期的。

而忍辱負重的曾特首，終於在政改事情被逼往牆角，絕地反擊，繞過西環甚至港澳負責人而直通天庭，雖然政改通過吐氣揚眉，但過橋抽板，讓建制派「有辱無榮」，得罪那麼多老主顧，難道燒烤宴就可冰釋前嫌？往後又如何使他們支持自己施政？

政治藝術，從來像在湖中游泳的天鵝，表面平靜，實質雙腳在水底猛力掙扎；平時笑面迎人，背後互相撕咬，才是政治永恒真理。而正如拿破崙說，勝利女神眷顧的是擁有最多大炮的一方，所以政客發展政治勢力版圖是非常重要的。

要在得罪人後還期待他們繼續支持自己，就是自己有討價還價的武器在手。從世界各地案例，如歐盟以反競爭法對付美國巨企如微軟、英特爾、蘋果等，是歐洲保護主義好使好用的外交武器。

香港的反競爭法也很可能是這樣的工具：政治家透過委任反競爭法委員會成員，對各行業監管，包括在港的中資機構——實情是從豬肉入口，我們已可見到中資機構在糧食、能源，甚至金融如人民幣業務，很多對內地的經貿往來，在市場都有舉足輕重的位置，反競爭法對這些中資機構有否影響？政治家乘這法例勢鞏固自己地位，增加與第二支管治團隊討價還價的籌碼。政府在政改翻面後急急向立法會提反競爭法案，又有什麼稀奇？

獅子山學會行政總監

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信報財經新聞

王弼

反競爭法在針對誰

王弼｜獅子山學會

獅子山學會一向旗幟鮮明反對特區政府訂立「反競爭法」——該草案由最初冠名「公平競爭法」，經我們猛力抨擊後當局偷偷地把「公平」兩字刪去。無他，2008年進行公眾諮詢已表明政府部門和法定機構免受監管，而無論西方的英國皇室控制印撲克牌專利權，壟斷直至1602年始被法庭推翻；或東方中國歷來朝廷的鹽鐵專賣，政府本身就是反競爭之源，歷史就是最有力的證據，所以稱這法案為「反競爭法」也絕不為過。

如果真的要反壟斷，政府是率先應被處理的對象。像港鐵是否應列入「法定機構」，仍是意見紛紜。（資料圖片）

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無論如何，從政府一向對超級大財團的態度，對付真正的壟斷者肯定不是政府的目的。既然老虎打不了，徒叫市民失望，最後成為政敵的把柄，為何政府還要通過這樣的法例？

有說最低工資是曾蔭權最不想通過但因抵不住政治壓力而要立法；不過，反競爭法卻是他的心之所屬。而且，他竟然在政改的大是大非後便急急計劃向立法會提案，便顯得事不尋常。

政治藝術：別只看表面

有報道指曾特首與建制派在政改事情鬧得不愉快，要以燒烤作和頭酒補鏡，欲以雞脾打其牙骹軟。問題是我們曾特首從一開始已非阿爺的真命天子，勢孤力弱，早已難討價還價，所以才鬧出所謂第二支管治團隊。曾特首既自稱政治家，對西環、民建聯、工聯會和其他建制派當然知道要忍讓，所以副局長分餅仔等事，是可以預期的。

而忍辱負重的曾特首，終於在政改事情被逼往牆角，絕地反擊，繞過西環甚至港澳負責人而直通天庭，雖然政改通過吐氣揚眉，但過橋抽板，讓建制派「有冚無榮」，得罪那麼多老主顧，難道燒烤宴就可冰釋前嫌？往後又如何使他們支持自己施政？

政治藝術，從來像在湖中游泳的天鵝，表面平靜，實質雙腳在水底猛力掙扎；平時笑面迎人，背後互相撕咬，才是政治永恒真理。而正如拿破崙說，勝利女神眷顧的是擁有最多大炮的一方，所以政客發展政治勢力版圖是非常重要的。

要在得罪人後還期待他們繼續支持自己，就是自己有討價還價的武器在手。從世界各地案例，如歐盟以反競爭法對付美國巨企如微軟、英特爾、蘋果等，是歐洲保護主義好使好用的外交武器。

香港的反競爭法也很可能是這樣的工具：政治家透過委任反競爭法委員會成員，對各行業監管，包括在港的中資機構——實情是從豬肉入口，我們已可見到中資機構在糧食、能源，甚至金融如人民幣業務，很多對內地的經貿往來，在市場都有舉足輕重的位置，反競爭法對這些中資機構有否影響？政治家乘這法例勢鞏固自己地位，增加與第二支管治團隊討價還價的籌碼。政府在政改翻面後急急向立法會提反競爭法案，又有什麼稀奇？

獅子山學會行政總監
info@lionrockinstitute.org

A holistic plan, tapping public passion, will move Hong Kong closer to its dream of a world-class harbourfront, writes **Nicholas Brooke**

Quay asset

Hong Kong is known worldwide for its first-class harbour and for the memorable skyline of high-rise towers set against a backdrop of sweeping green hills. Nevertheless, many would agree that in recent years the city has failed to capitalise on its unique natural asset so that our waterfront today offers limited access and few opportunities for the enjoyment of either residents or visitors.

However, the past six years have seen not only a fundamental change of public attitude towards the harbourfront but also real efforts by both the Harbour-front Enhancement Committee and the government to establish a framework to achieve improvements, draw up planning principles and prioritise projects that can bring immediate community benefits.

The recent announcement of the new Harbourfront Commission takes this preparatory work to the next stage: the commission is charged with the overall co-ordination and monitoring of harbourfront planning, which aims to ensure that design, development and management are effectively integrated.

This is particularly important as the government controls some 70 per cent of the harbour waterfront through different departments and agencies, and there is a need for an overarching entity to co-ordinate and monitor their activities, to address incompatible land uses and resolve conflicts.

Although the new commission is not a statutory body, it has a much wider remit than its predecessor, the Harbour-front Enhancement Committee. And given its terms of reference, I expect it to be proactive rather than reactive in addressing waterfront issues. It will act as an advocate and champion for the harbour; the intention is to bring about holistic and responsive changes.

The commission also intends to work in partnership with the private sector to tap its flair and creativity, so as to build a well-designed harbourfront that the public can enjoy. At the same time, the commission will adopt a more flexible approach to the harbourfront's management. Potential partners could include not only businesses with operational capabilities but also non-governmental organisations, district councils, special-purpose companies and even new forms of community-based trusts.

The commission comprises 28 members, of whom the majority will be non-officials, both individuals and representatives of organisations, together with the directors of relevant government departments. Secretary for Development Carrie Lam Cheng Yuet-ngor will act as vice-chairwoman, reflecting the priority that the administration attaches to the commission's work.

As the chairman, I see the need not only to bring together all the various ongoing initiatives but also to integrate these into a master plan for the harbour as a whole, so as to ensure that individual projects fit into the overall waterfront planning vision.

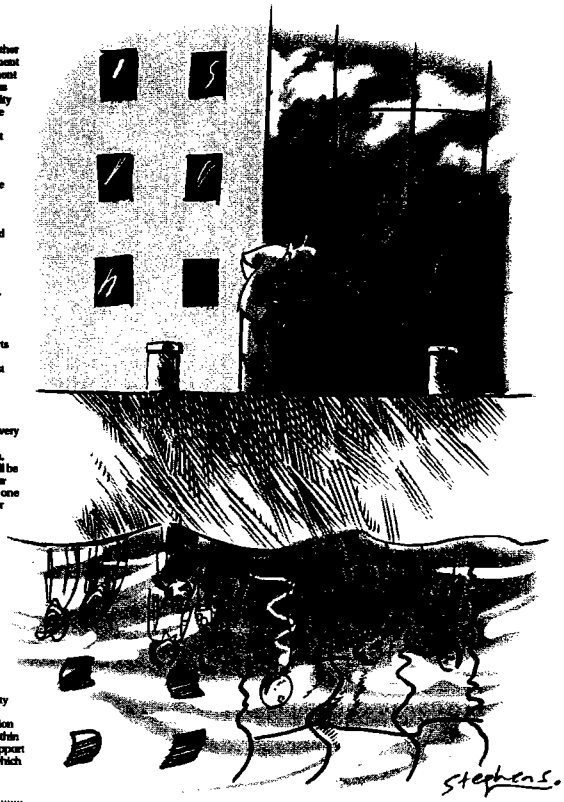
To realise the long-term objective of a world-class harbourfront, we need the people's support. Indeed, I see community involvement as essential to the success of the commission. Though the commission has yet to discuss and agree on the details of our work, I support the creation of task forces to drive individual projects which could, and should, include public representation. Panels of experts can advise the commission on design and management issues, and the most appropriate mode of public engagement, whether in projects initiated by the commission or proposals submitted by other groups.

An immediate challenge is the delivery of the master concept for the nearly completed Central reclamation which, given its location and prominence, will be seen as the yardstick for future harbour projects – we really do need to get this one right. There is also the need to monitor plans for Kai Tak, the impact of the Central-Wan Chai bypass on the north shore of Hong Kong Island, and plans for Tsim Sha Tsui, Island East and Hung Hom: the list goes on.

The Hong Kong harbourfront is an important public asset which should rank alongside other great waterfronts of the world; it should be accessible, vibrant and attractive, and bring people together. The development of a world-class waterfront will require strong leadership, effective procedures and close co-operation with the community and the private sector.

Above all, I hope that the commission can generate the necessary passion within Hong Kong people so that they will support its efforts to create a harbourfront of which we, and future generations, can all be proud.

Nicholas Brooke is chairman of the Harbourfront Commission



Dan Ryan

Bad buy

For over five years, the Lion Rock Institute has been trying to draw public attention to the flaws in the government's plan to introduce a cross-sector competition law in Hong Kong. The central problem with the proposed law is that it is based on a misdiagnosis of what causes monopolies. Our view has always been that the creation of monopolies and the reduction in competition in Hong Kong are ultimately the result of government action. Unfair competition occurs where the government offers sweetheart deals to companies (for example, Hong Kong Disneyland and Cyberport), restricts the entry of new competitors into a particular market (the stock exchange, Hong Kong Jockey Club), or underwrites organisations which compete against private businesses (the Trade Development Council).

The proposed competition law does nothing to address any of these concerns.

The focus of the government's law instead is on agreements between purely private businesses – agreements to sell goods at the same price, for example. The assumption is that those types of agreements must automatically result in a reduction in competition. Yet one must acknowledge that economists differ as to whether such agreements can be said to cause economic harm. We believe that all agreements to sell goods at the same price provide an opportunity for a third party to enter the market and sell the same or replacement goods at a lower cost.

It is unfair to prosecute businesses through a law that is based on contested economic theory. A more sensible approach would have been to limit the application of any competition law to those markets where the government restricts the entry of new competitors. Yet, regardless of which side you stand on these economic arguments, from a purely legal perspective, it is simply impossible to accept the competition bill as it is worded. Indeed, it is impossible for anyone who cares about the rule of law in Hong Kong to support this proposed law.

Say the government decided to introduce a patriotism bill but did not actually define patriotism and instead gave an unelected patriotism commission the open-ended right to decide what types of conduct "prevent, restrict or distort patriotism in Hong Kong". Change "patriotism" to "competition" and that is exactly what the competition bill proposes.

> From a legal perspective, it is impossible to accept the competition bill as it is worded

More troubling is the justification by officials for such vague laws by claiming that it is important that one is "not too prescriptive" about what type of conduct is unpatriotic (sorry, anti-competitive), otherwise businesses engaged in such conduct will "just find ways to get around such laws".

It is odd that no one from the government has actually been able to point out any current examples of anti-competitive conduct by private businesses.

And it would be no reassurance at all if a patriotism commission says it will provide exemptions for particular types of unpatriotic conduct or that, if anyone is concerned about whether their planned conduct would be considered unpatriotic or not, all they need to do is apply to the patriotic commission for approval. Yet that is exactly the framework of powers the competition commission will have under the proposed law.

Vaguely worded laws where bureaucrats have wide discretion to punish a range of conduct are the hallmark of third-rate legal systems. The absence of these types of laws is ultimately what preserves the integrity of Hong Kong's legal system and distinguishes it from that found across the border.

It is true that if the competition law is passed it will not be as immediately dramatic as the passing of a patriotism law but, because the nature of the law is the same, it will have the same corrosive effect on the rule of law in Hong Kong. But no doubt legislators will simply dismiss such concerns with the tired line that competition, like patriotism, is a good thing – and who could possibly be against a law to promote it?

Dan Ryan is director of The Lion Rock Institute, Hong Kong's leading free-market think tank
Alex Lo is on holiday

Hong Kong

Progress on air quality? You must be choking

Edwin Lau

Of the many environmental problems facing Hong Kong, air pollution is without doubt the one that every citizen desperately wants to see the government tackle.

Two years after it appointed a consultant in 2007 to review our air-quality objectives, it introduced a four-month public consultation which ended last November. Yet, environmental officials are still no nearer a clear road map to better air. Reporting to lawmakers last week, they were mute as to whether new air-quality objectives would be set and said time was needed to reach a consensus on a basket of 10 measures proposed last year to reach a set of interim targets.

Meanwhile, the people in Hong Kong continue to be exposed to health-threatening pollution. According to health expert Anthony Hedley, hundreds of premature deaths are caused each year because of our poor air quality.

The government accepts that the transport sector is a major cause of roadside air pollution. So isn't it high time to get tough, use a big stick and set a timetable to phase out all polluting vehicles of the lower European emissions standards – Euro II or lower – including franchised bus fleets, which contribute 40 per cent of vehicle pollution? There are about 5,800 franchised buses operating in Hong Kong, of which 75 per cent are of Euro II standard and below. A strict timetable must be implemented to phase out the most polluting buses, irrespective of their natural retirement schedule.

Of all the proposed measures, this would bring about the biggest environmental benefit. It should also be possible to implement at the same time two other proposals from the consultation findings: a rationalisation of bus routes and the introduction of low-emission zones.

In addition, the government should consider making it compulsory to disclose information regarding fuel consumption and carbon dioxide emissions for all private and commercial vehicles sold here. Then hefty licence fees and a progressive carbon tax should be imposed on the worst polluters. The income could be used to subsidise fares for ordinary folk to ride greener buses and other forms of public transport.

> Tsang asked us to 'Act Now' on political reform. I am asking him to 'act now' to combat pollution

With regard to the proposed idling-engine legislation, and the calls by taxi and minibus drivers for exemptions, let's not forget that Singapore – with its perennial tropical heat – passed similar legislation without exemptions. Taxi and minibus drivers should be encouraged to fit a device to run their air conditioning while the engine is off.

As well as tightening controls on the building of massive developments, to avoid the wall-like effect that traps roadside pollution and urban heat, the government needs to mandate a stringent energy consumption code for all existing and new buildings, within a reasonable time frame.

Finally, the government cannot continue to put on the back-burner the city's mounting solid-waste problem. The "producer responsibility" bill, with the intention of charging for waste, was seen as a silver bullet in tackling the problem as far back as 2005. Yet the Environment Bureau has dragged its feet and this effective proposal still has not become law.

Since 2009, Taipei has implemented various legislative measures including charging for waste, resulting in a 60 per cent drop in the amount of solid waste sent to landfills. The government ought to speed up this legislation which will cut waste and turn recycling into a profitable and sustainable industry for Hong Kong and the region.

Chief Executive Donald Tsang Yam-kuen asked us to "Act Now" on political reform. I am asking him to "act now" to combat pollution. Using the excuse of seeking a consensus is not only impossible but also irresponsible.

Edwin Lau Chi-feng is director of Friends of the Earth (HK)

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If you have an idea for an opinion article, e-mail it to oped@scmp.com

World Cup

Distant goal for African women's soccer teams

Juliet Yoreme

When I was born, 25 years ago, it would have been rare – even taboo – to find African women discussing soccer. But that is what my girlfriends and I now do. I grew up in Kenya, where the English Premier League is followed zealously. Kenyans are so passionate about the Premier League that last year an Arsenal fan hanged himself after his team lost to Manchester United.

Kenyan women love soccer, too. And, as the World Cup moves into its final stage, my girlfriends have started to argue. We don't exchange blows like men, but we are just as passionate.

That we, young African women, are talking more about the sport is a sign of hope for women's soccer on the continent. A senior sports writer with a Kenyan daily paper recently told me that, this time, women seem to be interested in learning the rules. They want to enjoy the game, rather than sit in the company of their male relatives, oblivious to what's happening on the pitch.

But will the 2010 World Cup bring African women more than just fodder for gossip? Holding the 1994 World Cup in the United States increased soccer's popularity there. And, in 1999, the US hosted and won its second women's World Cup, leading to a women's soccer revolution in the country. The label "soccer mom" has become common in the US, as more women enrol their children in soccer camps. Will holding the world's greatest single sporting event in Africa spark similar interest for the continent's women?

I was encouraged recently to read about Stéphanie Dhaflis, a female player who has become one of South Africa's top sports personalities. Her success clearly shows that African women football players can reach great heights. But for most African young women and girls, it's not that simple.

Although women's soccer in Africa is as old as the republics themselves (the first teams appeared in West Africa in early 1960), soccer on the continent is still a man's sport. Most African wives dread the season. They become soccer widows, as their husbands flock to bars. Even wives of men who watch the game at home have got other issues to deal with. For instance, Joyce, my former workmate, has a husband who is a diehard Manchester United fan. Every season, he breaks at least one piece of furniture when his team loses.

Given male dominance in Africa, any chance to improve the state of the sport that might arise from the World Cup will most likely benefit men. Until brought to a level where they can compete in international tournaments beyond Africa, women's soccer teams will continue to struggle. And, considering the rampant corruption that plagues our continent, it might take a century to see male soccer teams managed and funded sufficiently.

American women improved their game because soccer moms do not heavily rely on husbands to fund their daughters' training. As more African women continue to be educated, I dream of the day when we, too, will be able to decide for ourselves.

Juliet Yoreme, a writer and documentary filmmaker, was awarded Clendenen Magazine's Fisherty documentary award in 2009. Copyright: Project Syndicate

Society

One name, two lives and someone to look up to

Michael Gerson

It is a rare and frightening gift for someone to glimpse an alternative fate in another life. On the same day that Wes Moore was reading an article about his own receipt of a Rhodes scholarship, he also read about an unrelated Wes Moore arrested for murder. Both men shared Baltimore roots and similar stories of poverty and father absence. One graduated from college and became a White House fellow; the other will spend the rest of his life in a correctional facility.

Wes Moore connected his namesake in prison out of what he calls "pure curiosity". The result is a book, *The Other Wes Moore: One Name, Two Fates*, that illuminates the roles of disadvantage, privilege and personal responsibility in the shaping of a life.

Both Wes Moores emerge as bright, energetic boys facing betrayals they did not deserve and temptations they did not resist. The author Moore vividly describes a circa-1980 urban world flooded by crack, set to a hip-hop soundtrack, and ruled by a violent, lawless conception of male honour.

Both Wes Moores end up handcuffed in the back of police cars. Both receive second chances. Only one robs a jewellery store and kills an off-duty policeman who had five children.

The author Moore admits a broad role for luck, fate and personality. But the two stories have a clear theme: the importance of parental influence, and the desperate search for substitutes when that influence is absent.

Both boys had caring, single mothers. But tenacity turns out to be as important as caring. The imprisoned Wes Moore's mother lived in denial about her son's drug dealing. The author's mother sent her son to a private school she couldn't afford. When he began skipping class and failing, she threatened him with military school. "She had to be bluffing," thought Moore. She wasn't.

In the most wrenching moment of the book, the troubled Wes Moore encounters his father, whom he rarely sees, in a stupor on a couch. After waking him, this father looks into the eyes of his son and asks: "Who are you?" The author's father dies when Wes is three, but remains an image of manhood, "calm, reassuring, hardworking and sober".

When a father is absent, examples and mentors assume great importance. The imprisoned Wes Moore finds a model in his gangster older brother. Sent to a military school in Pennsylvania, the author encounters a 19-year-old African-American cadet, leading one of the proudest units at the school. "I had never seen a man, a peer, demand that much respect from his people ... This was real respect, the kind you can't beat or scare out of people." This is the transforming effect of military life on many young men – the discovery of a kind of male honour rooted in character.

There remains a mystery at the heart of individual fate. Many are born into circumstances that would test the strongest character. Many are born with unearned advantages they do not even recognise. But there is one decisive form of privilege that many of us can control and confer to others – the tenacious love of a parent or mentor.

Michael Gerson is a Washington Post columnist

Competition Law and (Dis)order

[Business Asia]

By Dan Ryan

One of Hong Kong's greatest commercial strengths is the rule of law. Both global and local businesses operate right on the doorstep of China with all the traditional common-law protections found in America or Britain. The territory has the additional advantage of not having suffered in the same way from the massive growth of the regulatory state that has affected other "developed" jurisdictions over the years. Yet a new bill presented to the territory's legislature by the government yesterday would undermine Hong Kong's advantage, ironically enough in the name of defending "competition."

The proposed competition law, broadly modeled on antitrust regimes in other economies, introduces two new, very broad and ill-defined prohibitions on businesses in Hong Kong. The first prohibits agreements or concerted practices that "prevent, restrict or distort competition." The second prohibits a market participant with "a substantial degree of market power" from engaging in conduct deemed to be an "abuse" of that power.

The problem for businesses is that Hong Kong's proposed law suffers the same flaw as all other competition regimes: an inherent vagueness and arbitrariness. The draft bill doesn't even define the term "competition." Other critical terms are also undefined and thus provide no real certainty at all. How, for example, does one distinguish "predatory behavior towards competitors" or "agreements that limit or control production, markets, technical development or investment" from legitimate commercial behavior?

Will it be permissible to provide customers with free gifts to accompany purchases, or to deeply discount in an end-of-season sale? How about distribution or production agreements where, say, a global health or pharmaceutical company decides to work with a local company on an exclusive basis to develop and market a particular type of drug or medical device? And what if members of a trade association share commercial information among themselves while formulating policy positions on matters of joint concern? How will they know precisely what they can and can't do?

These flaws in the draft are more serious than mere semantics. The proposed competition law would subtly but importantly change the basic nature of Hong Kong's commercial landscape. Until now companies have been able to assume that any commercial conduct is legal as long as it is in accordance with industry-specific regulations and doesn't constitute a crime, like fraud or insider trading, that has a fairly specific and well-established definition.

Now companies will have to guess about the meaning of "competition." While the definition might seem obvious, it's not. To see how, imagine instead that this were a "patriotism law" establishing a new Patriotism Commission to ensure companies were sufficiently patriotic. It would frequently be difficult to say how patriotic was patriotic enough in any given case, even though everyone thinks they know in the abstract what patriotism is.

The government seems to be aware of these concerns, to an extent. It has indicated that the new Competition Commission will provide examples of what it considers anticompetitive behavior. The government also has tried to reassure businesses that the commission will punish only commercial behavior that clearly reduces competition and will exempt behavior that the commission is satisfied does not.

But the proposed law's backers fail to understand that, in practice, all types of agreements and business conduct (or at least any significant enough to catch the regulator's eye) will have to be cleared with the new regulator for businesses to achieve the certainty they need. Businesses will also have to worry that the commission might change its mind about what behavior it considers anticompetitive in future.

Hong Kong's antitrust bill threatens the rule of law that makes the territory so attractive to business.

The cost of getting it wrong, or even coming close to the line, would be high. The Competition Commission would be given wide-ranging investigative and enforcement powers, including the ability to enter and search premises, to seize and retain evidence and to compel the production of documents and testimony before the Commission. Even for those companies that are eventually found not to have violated the law, the legal process would be punishment itself in terms of massive compliance costs and damage to commercial reputation.

The Competition Commission would have the power to impose administrative fines of up to 10 million Hong Kong dollars ($1.3 million) and, through court proceedings, additional fines could be levied of up to 10% of a group company's global revenue for each financial year in which the alleged infringement occurred. The authorities could also order the sale of assets; require the licensing of technology and content to competitors; force the termination of existing or contemplated commercial agreements; and prevent someone from ever serving as a director of a company in Hong Kong again.

Hong Kong already enjoys one of the most competitive economies anywhere in the world. This is due largely to a long history of policies like entrepreneurship-spurring low taxes and free trade, but also thanks to its strong legal tradition. It would be a mistake for the government to turn its back on the competitive advantages its legal system offers, and instead allow a new bureaucratic agency to determine what it decides is "competition."

Mr. Ryan is director of the Lion Rock Institute, a free-market think tank in Hong Kong.

Real Government Efficiency

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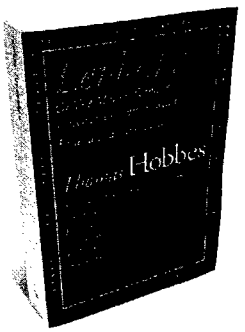

Leviathan
By Thomas Hobbes, edited by Ian Shapiro
(Yale, 583 pages, $16)

By Jeffrey Collins

The philosopher Thomas Hobbes is now a good deal more popular than he once was. When his "Leviathan" appeared in 1651 it was denounced everywhere. England's King's Charles II, a believer in the divine right of kings, disliked its coolly rational account of sovereignty. The Church of England loathed its attacks on Christian orthodoxy. Hobbes later claimed that agents of the king tried to assassinate him and bishops of the church to burn him alive. If they tried, they failed, but during his lifetime "Leviathan" was banned in England and across Europe. Upon his passing in 1679, Hobbes was known (after his birthplace) as the "Monster of Malmesbury."

But today "Leviathan" is considered one of the greatest works of political theory ever written. It is a standard text in college courses, mercifully replacing the slumping Marx. The very title of Hobbes's masterpiece has become a byword for the modern state. In bookstores we encounter titles such as "The American Leviathan," "The Islamic Leviathan" and even "The Obama Leviathan." Those seeking the genuine article can sample Hobbes's own "Leviathan" in at least 10 paperback editions.

This latest version—edited by Ian Shapiro and accompanied by commentaries from scholars writing for a general audience—appears in Yale University Press's "Rethinking the Western Tradition" series. There is some irony in this. Among Hobbes's more immodest habits (he had few that were otherwise) was his presentation of himself as history's first political scientist. Contemporary to both Galileo and Newton, Hobbes boasted that he had applied the iron logic of the Scientific Revolution to the hitherto soft subject of human politics. He scorned the "traditions" of Western thought and dismissed predecessors such as Aristotle and Aquinas as insipid moralists. Being immortalized by Yale alongside John Ruskin, Cardinal Newman and other luminaries of the "Western tradition" is not exactly what he had in mind.

No matter. If he failed to render politics a perfect science, Hobbes nevertheless earned his place in the canon. "Leviathan" is an ingenious account of the modern state and its intellectual foundations. Hobbes composed the book during the English Civil War of the mid-17th century, when armies clashed over the limits of monarchical power, the prerogatives of Parliament and the rights of subjects. Most debate during this ruinous age was conducted in a historical idiom, as an effort to commandeer the traditions of English common law (or the Bible) for rival points of view.

Hobbes would have none of this. He "scientifically" attacked Aristotle's venerable claim that men are naturally sociable. He rejected all presumed natural hierarchies, which ranked humans according to nobility, sex, race or religion. Instead, he portrayed men as equal rivals in a state of nature, which he characterized as a "war of all against all."

When a liberal pundit fawns over China's global-warming policies, one sees the Hobbesian within.

Hobbes's contemporaries understood politics as something descended from the ages or the heavens, but Hobbes built politics from the ground up. Self-interested individuals, craving protection for their lives, contracted to create sovereign states. Sovereigns (preferably monarchs) provided this service, but the price was unfettered power and unqualified obedience. Once sheltered under sovereignty, subjects enjoyed only the right to life. They could neither demand the return of their surrendered rights nor expect to share in the exercise of power. Hobbes thus acknowledged equality, rights and individual interest but sacrificed all of these on the altar of political order. To Hobbes, men live either in an anarchic hell of equal misery or in a society unified by a single, absolute will. There was no third way.

Much of this is well-known. The question is why Hobbes's account has enjoyed such popularity in recent decades. The likes of John Locke and James Madison long ago demonstrated the limits of Hobbes's raw statism. But many of us, lately, seem to prefer Hobbes's vision of society to theirs. Why should this be so?

One might point to several reasons. Hobbes's snide irreligion, once the main complaint against him, may now commend him to those who perpetually fear the supposed return of theocracy. His tendency to portray humans as appetitive beasts flatters our present eagerness to explain every aspect of human conduct in biological terms. Hobbes was also acutely suspicious of democracy. He considered it a breeder of faction. When pundits such as Thomas Friedman decry "broken government" and fawn over China's "enlightened" response to global warming, one wonders if the Hobbesian within the liberal breast is stirring.

Yale's edition of "Leviathan" lacks a biography of Hobbes and an account of his times, but it does included four interpretive essays exploring some of the fraught areas of Hobbes's writing, and there are a lot of those. Hobbes often felt the need to veil his meanings. "A wise man should so write," he remarked, such that "wise men only should be able to commend him."

Mr. Shapiro has done well here and found some shrewd commentators. David Dyzenhaus's essay intelligently contests the common claim that "Leviathan" deployed the language of natural law as a mere rhetorical ploy; by Mr. Dyzenhaus's lights, Hobbes did indeed believe that some dictates of ethical reasoning constrained naked statecraft. Elisabeth Ellis adroitly surveys Hobbes's modern reception among everyone from socialists to game theorists. Bryan Garsten, writing on the religion of "Leviathan," shows the importance of anti-clericalism to Hobbes's project and its influence. In his own essay about Hobbes's contempt for democratic deliberation, John Dunn writes that "Leviathan" has made "very deep inroads" into the modern mind. Mr. Dunn correctly observes that Hobbes often seems "our philosophical contemporary." What we make of his company is its own question.

Mr. Collins, a professor of history at Queen's University in Kingston, Ontario, is the author of "The Allegiance of Thomas Hobbes."

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August 5, 2008

By E-mail

Dear Sir/Madam,

Re: Response to Hong Kong Government's Detailed Proposal for a Competition Law

Executive Summary

The Lion Rock Institute strongly opposes plans to introduce a cross-sector competition law regulator in Hong Kong as outlined in the Commerce and Economic Development Bureau May 2008 document entitled "*Detailed Proposals for a Competition Law – A Public Consultation Paper*" (the "Detailed Proposal").

The key reasons for this can be summarized as follows:

1. The Detailed Proposal is based on flawed economic theory that proves largely unworkable in practice and produces undesirable unintended consequences.

2. The Detailed Proposal would result in vague, arbitrary law, do damage to the rule of law in Hong Kong, and be contrary to the best of the territory's Common Law legal tradition.

3. The Detailed Proposal goes beyond the constrained approach that was recommended in earlier consultation, lacks sufficient economic input and results from a flawed process.

4. The Detailed Proposal fails any honest cost-benefit analysis - the costs of adopting the law are greater than any possible benefit the new regulator would bring.

5. The Detailed Proposal would represent the biggest expansion of the state in the Hong Kong economy in the last 50 years and be contrary to Hong Kong's traditional "positive non-intervention" approach on which the territory's economic success has been built.

In this submission we will expand further on the points above. We will also outline some potential ways in which the harmful effect of regulator could be mitigated – although we continue to believe the best solution over all would be not to introduce this new regulator at all.

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1 Based on Flawed Economics

Competition laws only make sense if the economics behind them make sense. There is no other rationale for them. If the economics behind the proposed competition law do not make sense, then the competition law proposal does not make sense.

1.1 Why Competition Laws Do Not Make Sense in a Market as Open as Hong Kong

The Detailed Proposal fails to promote competition and public benefit on two grounds. Firstly, recent economic analysis has undermined the fundamentals of conventional antitrust law approaches and has shown that it undermines efficient outcomes. Secondly, even conventional approach to competition policy is not easy to apply in a very open market in a single city like Hong Kong that is highly integrated with a hinterland in a different jurisdiction.

It is now well established that competition depends not on the number of participants in a particular market but on the potential for a new player to enter the market and challenge an existing incumbent. The idea of contestability undermines the traditional analysis on market structure that looks at the number of firms as important in defining the amount of competitive rivalry in the market.

In an open market competition is not reduced if a new competitor decides to challenge an incumbent and fails. It is also not reduced if two or existing competitors decide to cooperate or merge their operations in a market.

The only way competition can be reduced – that is, where the contestability of a market is reduced – is where there are government-imposed barriers to entry which restrict the ability of new competitors to emerge to challenge existing incumbents.

1.1.1 Competition Law Regulators Have Static View of the Market

It is important to understand that competition law regulators - no matter how sophisticated - can never predict accurately what new potential competitor will emerge to threaten an existing incumbent or what new products will be launched which reshape the market itself. Competition laws instead rely on a static view of the market in which no new potential competitors can emerge and no new products can be launched.

A classic example of the inability of competition law regulator to anticipate the potential contestability of a market is the high-profile case competition law case against Microsoft in the late 90s. At the time that the competition law regulators made their decision against Microsoft, Google was not even a dot on the horizon.

The competition law regulators in both the United States and Europe simply had no idea that such a new competitive threat would emerge which would challenge Microsoft's position and reshape the personal computer market.

The regulators simply got it completely wrong. But the truth is they can never get it right. They can never accurately predict what new competitors will enter the market, what new products will be launched, what new markets will be created or how existing markets will be reshaped in the years ahead. The best economists in the world guided by the most sophisticated economic modeling can not accurately predict this.

1.1.2 How Government Imposed Barriers to Entry Reduce Competition

The key economic points to grasp are that:

1. The only way a business or group of businesses (no matter how big) can permanently monopolize a market or dictate the price that a particular good is sold at is if there are government-imposed barriers to entry into a particular industry keeping potential new competitors out.

2. The only way that any business behavior can be said to reduce competition in a market – i.e. reduce the potential for new competitors to enter the market - is where there are government-imposed barriers to entry keeping new competitor out.

3. Where a government regulation creates a closed-market – i.e. one where new competitors can not freely enter then - there is an arguable case for some sort competition regulator. However, the establishment of a regulator in a closed market will always be a second best solution as the regulator will never be able to determine what the level of competition would be where the market open to new competitors. The best solution is to remove the government-imposed barrier to entry and create an open market.

It is because Hong Kong – with certain limited exceptions – has created an open market in which competitors may freely enter that it does not need a competition law.

Hong Kong simply does not have anywhere near the same extent of government barriers to entry that are found other countries with competition laws such as tariffs, government subsidy, arbitrary bureaucratic licensing regimes, unnecessary complicated regulations which favor incumbents and outright bans on new competitors in a particular industry. Notable exceptions, however, include healthcare, gambling and gaming, capital-raising through stock markets and amusement parks.

1.1.3 Why Private Actions By Incumbents Can Not Reduce Contestability of a Market

Many proponents of competition laws would give lip service to many of the above statements. However, they would content that even with no government barriers to entry the potential for new competitors to emerge can also be reduced the *private* actions of by incumbents i.e. by agreements that private companies make between themselves, or by particular market behavior that drives out competition or dissuades new competitors from entering the market.

Real world experience is that private actions by existing incumbents can never reduce the potential for new competitors to enter the market. The fact that a large amount of capital is required to enter particular industries is not a barrier to entry to new competitors when capital markets are efficient as in Hong Kong.

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Agreements between existing incumbents 1) rarely hold for long 2) invite new entrants 3) may increase efficiency and deliver welfare gains 4) can be challenged by bother buyers and suppliers.

A competition law regulator – as outlined in the Detailed Proposal - would do nothing to remove government-imposed barriers to entry in industries where they exist. It simply accepts such barriers as a given. Nothing in the Detailed Proposal indicates that it will open up those industries in Hong Kong for which there is an outright ban on new competitors such as The Jockey Club. Equally nothing in the Detailed Proposal indicates that it will remove any of those limited indirect government barriers to entry of new competitors in the Hong Kong market.

Where there are no government-imposed barriers to entry in a particular industry a competition law regulator is simply redundant and interferes with legitimate business competition. It imposes direct and indirect costs which will be discussed further in [1.4 – Fails Cost / Benefit Analysis].

1.2 Who are the economists who support the Detailed Proposal?

The Detailed Proposal does not cite one single economist in support of the law it is proposing. The debate in Hong Kong has been dominated by lawyers, not by leading economists. It is notable that many of the leading participants in the debate lack any formal economic credentials.

This is not surprising. The "antitrust community" is itself a large interest group that is seeking to expand globally. It is estimated that "the worldwide gross receipts of the antitrust community of lawyers, economists, and government officials in the more than 100 countries that now have such regimes totals at least $20 billion annually (and that does not count the cost to the businesses involved)." (Ky P. Ewing, Jr. ***The antitrust source***, April 2008)

The government repeatedly claims they are relied on "expert" economic advisors when compiling the Detailed Proposal however they have never publicly stated who these leading economists are.

If the economics behind the Detailed Proposal is so uncontroversial, as proponents of the competition law regulator claim, surely the government should be able to provide a clear list of those leading economists which are in favor of the law. If the government is so confident in the abilities and the status of the economists which are advising it, why the need for so much apparent secrecy surrounding who these individuals are?

In fact, leading local economists, including Richard Wong of Hong Kong University and Francis Lui of HKUST, specifically examining Hong Kong's situation have spoken out against such a law for Hong Kong – in some cases for decades.

1.3 Why does the Detailed Proposal ignore the economists who are against competition laws?

The Detailed Proposal shows little awareness of eminent economists who oppose competition laws.

Given that Hong Kong has been able to prosper without the need for a cross-sector competition regulator for so long it is incumbent on the government to at the very least provide some sort of honest critique about why it disagrees with the economists who oppose competition laws. There is an additional obligation on the government to respond to those economists, like Milton Friedman, whose economic policies Hong Kong has largely followed for at least the last 50 years.

Some from the government have informally suggested to us that we are misreading the criticism by leading economists of competition law and that the comments of Milton Friedman, James Buchanan, Ronald Coase, Alan Greenspan and others were somehow confined to competition laws in the United States or focused on competition laws as they existed in the past.

We believe that no honest reading of their work or statements would support such a claim. Their statements attack the flawed economic principles behind competition laws and there is no reason why their attack on the economics of competition law should be confined to one particular country. After all, the laws of economics are not country specific. In any event, any critique that the competition laws in the United States are unnecessary, meddlesome or lack economic logic would equally apply to those same laws in the European Union which are widely recognized as being more anti-business in both substance and in application than those in the United States (witness the more onerous fines applied in Europe in the Microsoft case, the more prompt clearance of the proposed BHP-Rio Tinto merge in the United States as opposed to that in the EU, etc.).

We do not rely simply on argument by authority. The rules being proposed do not make sense even on their own terms. Take, for example, the rules against "price fixing".

Why Rules Against So-called "Price Fixing" Do Not Make Sense in an Open Market

The following example illustrates why laws against price fixing do not stand up to any rigorous scrutiny. Consider the following:

Scenario A: Imagine there a market where there is a single supplier of a particular good or service. The single supplier has 100% share of the market. The single supplier decides increase the price of the good or service by 20%.

Scenario B: Imagine there is a market with only two (or three or more) suppliers of a good or service. The incumbent suppliers have together 100% share of the market. Both agree to increase the price they are selling their good or service by 20%.

Competition laws nowhere in the world would prohibit the price increase in Scenario A. They would almost certainly scrutinize and likely penalize Scenario B. However, the economic effect is exactly the same in both case i.e. the cost of a particular good or service increases by 20%.

Why penalize Scenario B where the economic effect is identical to Scenario A?

Again, the only way that competition can be reduced in a market - i.e. where the contestability of a market is reduced - is where there are government barriers to entry (either direct or indirect) which restrict the ability of new competitors to enter the market.

In an open market, a single supplier controlling 100% of the market can charge whatever it likes - but its ability to continue to increase the price is constrained by the threat that a new competitor will enter the market.

Where two existing suppliers decide to agree to effectively "act as one" by agreeing to charge the same price they should be free to do so. However, their ability to continue to charge this price - or even higher prices - will be constrained by the threat that a new supplier will enter the market.

2 Legal Concerns

The proposal would penalize (or at the very least subject to intrusive, unwarranted and costly regulatory scrutiny) certain business agreements or business conduct which are currently legal in Hong Kong.

The Detailed Proposal contains two broad general prohibitions:

(a) participation in agreements and concerted practices that have the purpose or effect[1] of substantially lessening competition; and

(b) abusing substantial market power with the purpose or effect of substantially lessening competition.

The Detailed Proposal has indicated that the to-be-established Competition Commission will issue guidelines on behavior the exact type of behavior will be generally considers to infringe these two broad prohibitions.

2.1 Vague, Arbitrary Law

Because of the broad prohibitions and the broad powers delegated to the Competition Commission, it is impossible to say under the Detailed Proposal exactly what sort of commercial conduct will be prohibited at present.

One immediately sees the legal concerns with such vague wording used in the Detailed Proposal if one simply replaces the word "competition" from the two general prohibitions. For example, imagine if the government were to establish a regulator with the power to prosecute Hong Kong businesses or individuals for any of the following:

"Participation in agreements and concerted practices that have the purpose or effect of:

1. *substantially lessening patriotic feeling*
2. *substantially lessening morality*
3. *substantially lessening national security*
4. *substantially threatening state secrets."*

At the very least if the government felt the need to enact a law on any of these matters then it would be imperative that the type of conduct that was trying to be caught by the regulator was spelt out in minute detail. The powers of the regulator to prosecute a company or individual for breach of the law would also have to be carefully prescribed. Any new refinement in the type of activity which would be subject to prosecution would deserve full legislative in advance of the law being changed rather than simply delegating the power to make law to an unelected body.

The government may believe there is a clearer rational for prosecuting "anti-competitive" conducts rather than "anti-patriotic" conduct (although as explained in 1.1 the economic rationale for the proposed competition law is seriously flawed). However, as purely a legal matter there is no

[1] See comments in 2 (point 7) on why "economic harm" rather than "purpose or effect" should be used.

difference in type between such vague arbitrary laws regardless whether the ultimate concern driving them is economic or political.

It is important to understand that even if no prosecution or investigation is ever launched by the Competition Commission simply by having these vague arbitrary laws on the books undoubtedly leads to greater legal uncertainty and regulatory risk for business. There is simply no way of knowing by reading the law itself whether a particular type of business agreement or behavior would be prosecuted under the law.

> **There is, as many have noted, not even a definition of 'competition' in the Detailed Proposal.**
>
> **Without such a definition how is it possible to say for certain exactly what type of conduct "substantially reduces" competition?**

2.2 Why Giving Power to Competition Commission To Exclude Arrangement Where the Economic Benefit Outweighs the Economic Harm is No Reassurance for Business

It is true that the Competition Commission has wide-ranging powers to exclude particular business conduct from the law if the economic harm outweighs the economic benefit or whether there is a public interest. Proponents of the law claim that this should eliminate any concerns that the Commission may abuse its powers. However, what the proponents of the law fail to appreciate is that by giving the regulator such powers in the first place to determine what conduct will and will not prohibited fundamentally changes the relationship between business and the state in Hong Kong.

It is commonly said that the biggest difference between a free society and a unfree society is that in the a free society there is a presumption that unless the law specifically forbids you from engaging in a particular action you may do it whereas in an unfree society there is a presumption that you may not engage in a particular action unless you are specifically permitted to do.

The introduction of a competition law regulator would change the presumption and make Hong Kong a less free place to do business.

It would have a chilling effect on Hong Kong business because one would not be able to say with any certainty (and without the official approval of the regulator) exactly whether an agreement, a pricing strategy, a distribution agreement, or any variation of agreements would be permitted. Without such certainty and with the risk of possible legal penalties businesses will simply decide that it is not worth the risk to strike particular business deals to the ultimate detriment of the Hong Kong economy.

2.3 Harmful to Rule of Law

The Detailed Proposal gives enormous power to the competition law regulators. The experience in other jurisdictions has been that there is inevitably pressure to target unpopular business personality or businesses that are deemed "too successful". Political pressure is also brought to bear on the regulator to take against those services which are consumers interact with daily i.e. petrol, groceries, etc.

2.4 Constitutional vulnerabilities

2.4.1 Koon Wong Yee

We understand that the government is aware and has already has received submissions from The Hong Kong Law Society and others regarding the constitutional vulnerabilities relating to the proposed penalty regime outlined under the Detailed Proposal. The problem is that fines under the competition law proposal which are sufficiently large to be a deterrent may be treated as criminal rather than simply and administrative fine. Thus, without providing the recipient of the fine the same protections that would apply in a criminal case the penalty regimen may be struck down as being unconstitutional.

2.4.2 Basic Law

We believe what has not been given due consideration is that the introduction of a competition law regulation may also be subject to challenge for being in breach of the Basic Law.

Many of the provisions of the Basic Law have not been tested and would provide an arguable basis for invalidating many if not all of the powers of the competition law regulator as well as its ability to effective law making powers. We will not outline all the potential bases for action but the following should be of some concern:

2.4.2.1 Article 5 – 'Socialist Systems and Policies'?

There is a general question of whether these proposed laws are inherently 'socialist systems and policies' or alternatively the arguably lesser standard of not being in accordance with the 'capitalist system and way of life' as existed prior to July 1, 1997. While some may be inclined to dismiss such concerns there are certainly a number of credible economists who would be able to provide expert testimony on the socialist thinking behind the enactment of these laws and/or the socialist effect of these laws elsewhere in the world.

If Article 5 means anything it provides at least some form of bulwark against the expansion of the state control over the economy. In this respect it should be noted that there is simply no precedent in pre-July 1, 1997 Hong Kong for a government regulator having the ability to effectively regulate the entire private sector economy of Hong Kong according to what are very broad (and as we have noted highly contested) economic principles.

2.4.2.2 Article 8 - 'Competition Commission as Legislature?'

Article 8 requires that "*the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region*".

While certain delegated legislation is permitted there are legitimate concerns as to whether delegating a to-be-established regulator what amounts to broad-ranging legislative authority to make what are arguably laws about what conduct individuals and corporations can not engage in amounts to the ability to make laws for Hong Kong which should be the exclusive responsibility of the legislature (Article 66).

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3 Concerns about over-reaching the consensus on this Issue

The Lion Rock Institute has concerns about whether the legal and economic advice the Hong Kong government is receiving on the issue of competition law is consistent with the earlier input from consultative processes, world-class and impartial.

We acknowledge that some in Hong Kong have in good faith argued for cross sector competition law in Hong Kong. However, the extensive prior consultative process pointed to a consensus on the need for any such law to be narrowly focused on a defined set of behaviors that have given rise to concerns competitive markets may be undermined. Many leading participants have suggested that Hong Kong needed law that:

1) Took into account the specific issues of Hong Kong as a very open economy

2) Avoided the uncertainties and regulatory burden of European and US competition law as it stands

3) Was consistent with the common law traditions and constitutional arrangements in Hong Kong.

What was wanted was a minimalist approach that possibly codified existing practices on specific issues where concerns have been raised.

What is offered in the detailed proposal is at odds with this mandate.

Although there is no draft legislation, the scheme offered is a standard adoption of international competition law and the administrative apparatus to support that.

Gestures to customizing a very standard approach to a Hong Kong environment are the suggestion that a specific merger law not be adopted, that different concentration thresholds be used, allowance for exemptions and authorization and the exclusion of government activities and directing attention away from vertical agreements.

However, these gestures are at odds with the specific proposals likely to be legislated.

Public Choice theory offers some reasons why what is offered by the Detailed Proposal is distant from the needs of the Hong Kong community. In a simplified account this theory suggests that concentrated interests have a strong incentive to influence policy outcomes, whilst the dispersed interests of the community will be under represented.

The Detailed Proposal reads strongly as influenced by interests that have directed outcomes towards a preferred model that is not appropriate for Hong Kong:

1. Drafting of the proposal has engaged lawyers who have made proposals closely modeled on their own experience in other countries. Law firms have a strong interest in maximizing their investment in existing approaches and structures. They also have an incentive to prefer models with more potential fees to minimal approaches or codification of existing practices;

2. The civil service has been closely involved in the framing of the proposals. They have an incentive to maximize opportunities for expanding the administrative roles and discretion available under the model; and

3. Existing businesses that have limited competition (large through government policy) have a strong incentive to avoid the consequences of the law.

Given these inherent "public choice" problems, a careful process needs to be designed to ensure suitable outcomes for the wider community in Hong Kong.

However, two particular issues suggest that the process has not been careful to avoid these problems:

1. Hong Kong government engaged a law firm owned by a member of Hong Kong's executive counsel as its principle advisor.

Ron Arculli is a member of the Hong Kong Executive Counsel. He is also a senior partner of the law firm Arculli, Fong & Ng. It would be most unusual (and almost certainly forbidden) in most other developed jurisdiction for the government to instruct the law firm of a cabinet-level official to provide advice on a new law such as this especially where they stand to gain financially.

We do not allege any wrong-doing. However, the outcome of the proposals is deficient in analytical rigor and that there is a need for greater transparency from the government on this point.

2. The principle advisor has close ties to heavily government regulated and uncompetitive firms.

In addition to role on the Executive Counsel, Ron Arculli is also currently the Chairman of the Hong Kong Stock Exchange. He is also a former chairman of the Hong Kong Jockey Club. The Hong Kong Jockey Club has a government-created monopoly over gambling in Hong Kong (by law no other competitors are allowed). The Hong Kong Stock Exchange is not strictly speaking a government-created monopoly but an application to establish a new stock exchange requires the approval of the Hong Kong government and it is unlikely that such approval will be granted in the foreseeable future[2].

We believe that given Mr. Arculli's close association with two of the biggest government-created monopolies in Hong Kong there is at the very least a perception of a potential conflict of interest. We do not allege any wrongdoing but would simply alert the Hong Kong government to the fact that any advice, particularly in relation to which entities it is appropriate to grant exceptions to, may be compromised.

[2] The fact that the Hong Kong government owns a stake in the Hong Kong Stock Exchange creates a disincentive to approve new exchanges (because this would mean the value of the Hong Kong government stake would be likely to fall). It is thus likely that the Hong Kong Stock Exchange will be the only exchange in Hong Kong – or at least the only one covering equities.

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4 Fails Cost / Benefit Analysis

The introduction of a cross-sector competition law regulator in Hong Kong does not make sense if the economic costs to the Hong Kong economy – both direct and indirect – exceed the purported benefits of this new legal regime.

4.1 Benefits?

As outlined earlier is simply not possible for the regulator to anticipate what new competitors or new products will enter the market in future to threaten the position of existing incumbents. Thus any economic benefits a regulator claims it is bringing to Hong Kong's economy is based on flawed understanding of what competition actually is.

At the very least the supposed benefits of the competition law regulator are speculative and unsubstantiated. Even it one accepts that any of future rulings could provide an economic benefit to the Hong Kong economy these benefits would have to be shown to exceed the economic costs or the competition law regulator would result in net loss to the economy.

4.2 Costs – Direct and Indirect

The direct costs of operating the competition law regulator are estimated by the government to be at least HKD 86 million per year[3]. We should also add the costs the government has incurred in instructing outside counsel as well as the individual public servant man hours which have been spent on the Detailed Proposal. To that we should also add any legal advice which Hong Kong corporations have had to incur in preparing for the possible introduction of the new law.

The more significant costs in introducing the new competition regulator will be the indirect costs. The Detailed Report does not mention these suggesting it has either deliberately ignored them or is unaware that they exist – but they are very real. Hong Kong businesses will be forced to incur significant legal fees in ensuring that they are incompliance with the new law as well as in defending themselves against the inevitable actions which will be taken against them by the regulator and the general public. These costs will regrettably be passed on the Hong Kong consumers in the form of higher prices or a less wide range of goods. The introduction of a new competition law will also result in making Hong Kong a less attractive destination for foreign multinationals. Large foreign companies are often targeted by competition law regulators globally and Hong Kong will be no exception.

[3] The government website indicates that: *"the competition commission would require an annual budget of up to $80 million and the initial cost of operating the [competition] tribunal would be about $6 million a year"* : (http://news.gov.hk/en/category/businessandfinance/080506/html/080506en03001.htm).

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5 Contrary to Policy Which Has Caused Hong Kong's Economic Success

One of the arguments routinely used by those in favor of introducing a cross-sector competition law regulator in Hong Kong is that "other countries have one". However, this argument is open-ended – does it mean that we should similar mirror all of the onerous regulation, high tax rates and other legislation that exist in Europe or North America? This argument also avoids any analysis about the experience of overseas jurisdictions and whether there has been any evidence that competition laws have actually improved their economies.

Hong Kong has a proud reputation of rejecting unnecessary regulation and owes its economic prosperity to this approach. If Hong Kong had simply adopted the regulatory proposals that had come out of Europe in the last 50 years then it would be significantly poorer than it is today.

The proposal to introduce a competition law also flies in the face of Hong Kong's well established policy of "positive non-interventionism". While the exact wording of this policy has varied what has remained constant is that the Hong Kong government has not unnecessarily meddled in the economy unless there is absolutely compelling rationale for doing so. This clearly does not exist in the case of the Detailed Proposal.

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6 Possible Ways of Mitigating the Harmful Effects of Law

We regrettably feel that the Hong Kong government has raised expectations that it will pass a competition law. We believe very strongly that the best solution is not to pass such a law and for Hong Kong officials to explain to the public clearly why it is not in the territory's economic interest to do so. However, if the competition law is to be introduced then we would propose the following ways of mitigating the harmful effects of the law.

1. Introduce threshold requirement to prove that there is some government restriction or regulation which limits the ability of new competitors to enter the market before any action is taken by the regulator

As we have tried to explain throughout this submission it does not make sense to have a competition law regulator in open markets i.e. those in which there are no direct or indirect government-imposed barriers to entry which restrict the entry of new competitors.

There are some areas of Hong Kong economy in which there are direct or indirect barriers (imposed by government) which do impose some type of legitimate regulatory barrier to the entry of new competitors.

We would thus propose that there be a threshold requirement before either any action is taken by the Competition Commission that it is required to demonstrate that there is some government barrier to entry keeping other competitors out of a particular market. We would also insist that this threshold requirement be satisfied before any private action can be taken in civil action by a potentially plaintiff.

By implementing this change the government would go a long way to satisfying the concerns of the Lion Rock Institute.

2. Exclude Goods

Even the proponents of competition law regime have trouble explaining why goods should be included in the competition law regime and tend to focus their comments on the service industries. In an open market like Hong Kong where goods are freely imported from all corners of the world and there are effectively no tariffs on any goods it does not make sense to make out that any one type of goods can not be replaced by another sourced from elsewhere.

3. Exclude SMEs

The Detailed Proposal has provided for a *de minimus* exception for SME. However, it states that these enterprises could still be subject to "hard core" conduct such as price rigging, bid-rigging, output restrictions and market allocation.

However, none of these forms of so-called "hard core" conduct make sense – see Appendix D for further explanation. We would thus propose that it would simply make more sense to complete exclude SME from the new competition law regime.

4. Use more narrowly defined tests than "substantial lessening of competition" and "market power" and ensure market definition is not geographically bounded

Other jurisdictions have explored ways to limit competition law by narrowing the tests used to assess conduct. One option would be to require demonstration of "market dominance" rather than simply market power. Rather than "substantially lessening competition", a general test, specific forms of conduct could be proscribed.

We also believe that in drafting, it is important to ensure that the application of tests for market power look at markets that are broader than Hong Kong and recognize open borders for goods, services and people. For example, it is clear that in many industries the potential for entry from China based companies is a substantial contributor to competitive rivalry, even if China firms do not today operate in Hong Kong. We find it difficult analytically to find many markets where the relevant market would be defined as Hong Kong. Framing the legislation should not force artificial boundaries to be imposed on analysis by the limited jurisdiction of the HKSAR government. Too narrowly defining markets leads to excessive competition law interference because market concentration is artificially defined based on political rather than economic boundaries.

5. Firm the commitment not to introduce a merger law

By not ruling out a merger law and framing an open ended process of complaint or Competition Commission initiated review, the government creates significant uncertainty for mergers and business combinations that reach the proposed market share thresholds for scrutiny of markets. Introduction of a merger section should be specifically ruled out.

6. Sunset clause

No evidence has been offered of a continuous problem in Hong Kong with lack of competition. Rather specific reform areas (often heavily influenced by government intervention) have been highlighted as needing scrutiny. This suggests that a sunset clause on the structures created would be a suitable way to deliver the scrutiny in a time limited way, whilst minimizing the risk of creating a highly interventionist structure that would undermine competitive processes in dynamic markets. We suggest a 5 year limit would be appropriate.

7. Law should focus on "Economic Effect" not "Purpose and Effect"

As explained earlier, the use of the term 'purpose or effect' means that even agreements that can be shown not to have any economically detrimental effect are caught by the prohibition. In other words if two café owners decided to jointly increase the price of a cup of coffee to USD 100 then the law would say that they should be prosecuted because they had the purpose of reducing competition regardless of the fact that other cafes continue selling their coffee at USD 2 per cup and there is no economic downside to consumers. The whole supposed rationale for a competition regulator is based on reducing economic harm. The use of "purpose or effect" results in the law being widened to include behavior for which there is no harmful economic effect.

8. Give private businesses the ability to challenge the government statutory bodies which distort the Hong Kong market.

If the objective of this law is to create a more competitive business environment in Hong Kong then the government would be better off taking action to remove the harmful effects of the government statutory bodies which distort the market and hurt the private sector. We suggest that at the very least there should be a process that would allow for private businesses to force the proposed competition regulator to make an assessment about the damage that a particular statutory

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organization is causing in the market and whether the business being run by the government would be better off being disbanded. Foremost among these are bodies like the Hospital Authority which crowding the private sector out of 85% of the healthcare market. It should also address monopoly licensing bodies like the Medical Council, Jockey Club and Hong Kong Stock Exchange. Finally consideration must be given to reducing the distorting effect which the government has as the biggest landlord in the territory.

Conclusion

The Hong Kong government is fond of indicating to those who disagree with the proposed competition law regime that they simply need to educate themselves better so as to assuage their fears. We think that it is rather the Hong Kong government which needs to educate themselves. The Detailed Proposal simply does not reflect very sophisticated economic or legal thinking. We hope that this submission has given you food for thought and would be pleased to arrange a time to meet further to discuss our criticisms and suggestions in further detail.

By and On Behalf of:

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APPENDIX A

Who are the winners/losers if Hong Kong enacts a cross-sector competition law?

Winners

1 *Lawyers*: law firms clearly stand to benefit as there will be an increase of competition law cases. Businesses will be required to have law firms vet an increasing number of new and existing documentation to ensure it is in compliance with the proposed law. Businesses will be forced to hire more internal counsel to deal with these matters. It is interesting to note that some of the most vehement critics of this type of law include ex-lawyers and judges who specialized in this area, including Robert Bork and Edward Rockefeller[4].

2 *Government regulators, government economists, bureaucrats and competition law academics*: Competition law disputes require the input of academics, government economists and other academics in determining whether particular forms of conduct have infringed the competition law rules. Many of them thus have an interest in ensuring the expansion of competition law and increasing powers for the agency.

3 *Uncompetitive businesses*: Uncompetitive businesses which have seen their market share decline will have the option of alleging that this has been the result of 'unfair' or 'illegitimate' competition or collusion by competitors rather than simply fair but fierce competition. Unscrupulous business people who entered into a contract that ultimately did not suit them and wanted to get out there would be a significant incentive to allege that the contract contained "anti-competitive" provisions and threaten to go to the new competition regulator. The very risk that action could potentially be brought would be enough in many cases for one businessman to force another to agree to terminate a legitimate and legally binding contract where one would otherwise not have done so.

Losers

1 *Hong Kong businesses – large and small*: As indicated above the Detailed Proposal would mean that potentially all agreements could be subject to scrutiny by the new competition regulator and subject to intrusive, costly scrutiny at the very least, and fines and costly litigation at the worst.. Whether you agree or disagree with the new competition law there is no doubt that its introduction will result in greater regulatory risk for businesses in Hong Kong and restrictions and uncertainty on the activities they undertake.

2 *Hong Kong consumers*: Competition laws do not benefit consumers. Some consumers are attracted to these laws because they think they will be a means to drive prices down. However, the way that competition is increased is to lower tariffs and reduce government-imposed barriers to entry into particular industries. Competition laws do nothing to assist this.

3 *Foreign companies*: Competition law investigations are inevitably triggered by an increase in the cost of particular goods and services. This causes political pressure for the government to act and accusations that business is somehow "ripping off" consumers. Inevitably foreign companies are most vulnerable to these complaints and thus are routinely targeted by competition law regulators worldwide.

4 *Hong Kong's Business Reputation*: Hong Kong in an extremely competitive global environment. One of the best attributes we have is that compared to many other countries our government has not been hostile to business. The introduction of criminal penalties for the conduct in the Bill would rightly be viewed with serious concern by global businesses. Given the extra risk many will decide not to invest in Hong Kong resulting in a loss of potential jobs, a reduction in investment, and reduction of new products for consumers in the Hong Kong marketplace.

[4] Rockefeller, Edward S. (2007). The Antitrust Religion. Cato Institute. DC, USA.

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5 *Hong Kong Government's Reputation* In this commentary, we have noted the legal possibility of a constitutional challenge to this law, reminiscent of the LINK REIT and Article 23 battles. Also, a body appointed by government and open to discretionary action will face local and international accusations of political favoritism both for cases it does and the cases it does not choose to prosecute. This is a lose-lose situation. The discretionary powers meant to reassure the business community will be turned instead against the government. Recriminations of unfair treatment in the face of a vague, highly discretionary law will be unavoidable, threatening the reputation of Hong Kong and her government.

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Appendix B

List of Statements by Leading Economists Against Competition Laws

"Allegations have been made that some pricing and sale strategies (of large market players) appear to reflect market power, economic theory does not support such allegations. Incumbent firms do not have an exclusive right in deploying such strategies; any new entrant is free to imitate and to further innovate."

Richard Wong
Deputy Vice-Chancellor of the University of Hong Kong

"When the prices went up, the judges said it was monopoly. When the prices went down, they said it was predatory pricing, and when they stayed the same, they said it was tacit collusion."

Ronald Coase
Nobel Prize Winner for Economics 1991

"No one will ever know what new products, processes, machines, and cost-saving mergers failed to come into existence, killed by the Sherman Act [the United States competition law] before they were born. No one can ever compute the price that all of us have paid for that Act which, by inducing less effective use of capital, has kept our standard of living lower than would otherwise have been possible."

Alan Greenspan
Former Chairman of the United States Federal Reserve

"I have gradually come to the conclusion that antitrust laws do far more harm than good and that we would be better off if we didn't have them at all, if we could get rid of them."

Milton Friedman
Nobel Prize Winner in Economics 1976

"The financial demise of a competitor is not the same as getting rid of competition. The courts have long paid lip service to the distinction that economists make between competition — a set of economic conditions — and existing competitors, though it is hard to see how much difference that has made in judicial decisions. Too often, it seems, if you have hurt competitors, then you have hurt competition, as far as the judges are concerned."

Thomas Sowell
Rose and Milton Friedman Senior Fellow
The Hoover Institution
Stanford University

Many people cite Adam Smith, the eighteenth century patron saint of markets, in support of regulatory provisions to ensure competition keeps prices low. Those wishing to use Smith's work selectively to press for a regulatory agenda are often fond of quoting his aphorism:

> *People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.*

But Smith went on to counsel against intervention by the authorities saying:

> *In a free trade an effectual combination cannot be established but by the unanimous consent of every single trader, and it cannot last longer than every single trader continues of the same mind.*

Moreover, in a statement that ventured into general political matters he said:

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It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice.

He realized that monopoly could only persist if empowered to do so by government. He also recognized that a body set up to target agreements between private operators would end up bringing far more harm than good.

Alan Moran
Director of Deregulation Unit
The Centre for Independent Studies

For more than a century, American antitrust laws have been used as a protectionist tool to stifle competition. They have always been used to protect competitors from competition and not to protect consumers, as the American public has been told. The end result has been reduced productivity and diminished international competitiveness. It saddens me to see other countries such as Hong Kong imitating some of our most disastrous economic policies.

Dr. Thomas DiLorenzo
Professor of Economics
Sellinger School of Business and Management
Given the openness of the Hong Kong economy, I am surprised that Hong Kong would be considering a competition law.

Robert W. Crandall
Senior Fellow
Economic Studies
The Brookings Institution

My reaction to the current discussion about competition law in Hong Kong is that it appears to lack any empirical grounding. I don't see any discussion of the efficiency costs of alleged anti-competitive behavior and I don't see any estimates of the welfare gain that the proposed competition law will provide to consumers.

Clifford Winston
Senior Fellow
Economic Studies
The Brookings Institution

No monopoly can survive for long without government regulations to protect it.

Alan Reynolds
Senior Fellow
CATO Institute

Hong Kong gets top rankings for economic freedom in part because it does not have intrusive laws that cause market uncertainty and hinder economic dynamism. Adopting a competition law invariably will hurt Hong Kong's economy and tarnish its global reputation. Lawyers and bureaucrats will benefit, but the people of Hong Kong will enjoy less prosperity if the law is adopted.

Daniel J. Mitchell
Senior Fellow
CATO

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The proposed legislation in Hong Kong government's "Detailed Proposals for a Competition Law" would be disastrous for business, government and the consumer alike. It would have the opposite to the intended effect, because it would open the door to lobbying by vested interests. The consumer would lose out due to a less competitive business environment, as stronger businesses are discouraged from acquiring or driving out of business the weaker ones. But even worse, the government's new role of deciding who is competing "fairly" will expand the opportunities for corruption and encourage the private sector to seek advantages through government action rather than their own efforts. Hong Kong has clearly benefited from government staying out of the business realm, so it is a mystery why it would want to throw away this competitive advantage now.

Hugo Restall
Editor
Far Eastern Economic Review

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Appendix C

Selected Opinion Page Articles Critical of Hong Kong's Proposed Competition Law

- Dan Ryan "How to Make Hong Kong Uncompetitive" *The Wall Street Journal*
- Dan Ryan "Obstacle Course" *South China Morning Post*
- Yeung Wai-Hong "Hong Kong's Non-Compete Clause" *The Wall Street Journal*
- 施永青 "沒有競爭法 香港仍勝出" *am730*
- 施永青 "自由競爭勝公平競爭" *am730*
- 曾淵滄 "香港不需要競爭法" *大公報*
- 黃健明 "聯手加價與競爭法皆不可取" *信報財經新聞*
- 王弼 "競爭法使中小企得不償失" *信報財經新聞*
- 王弼 "沒有公平的競爭法" *信報財經新聞*
- Andrew Work, Bill Stacey, Simon Lee "The Road to Hell is Paved with Good Intentions: The Guardrails are Antitrust Laws" *Hong Kong Lawyer* http://www.hk-lawyer.com/2005-7/Cover.pdf

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Appendix D

Misleading and Misused Terminology in the Detailed Proposal

"Collusion"

An important distinction needs to be drawn between deals made between the government and private enterprise and deals made between private operators.

There is something clearly improper when the government agrees to privilege or give a particular sweet-heart deal to a private company ahead of others. These types of deals between the government and private enterprises can be properly described as "collusion". However, competition law would do nothing to stop this type of behavior and there is already a government agency to deal with complaints where there is collusion between the government and private sector – it is called the ICAC.

It is simply not correct to say that there is anything improper in an open market about agreements between companies in the private sector with respect to the price they will sell their goods or services. Agreements between private competitors should simply not be described as "collusion" and no moral opprobrium should be attached to such agreements. In an open market there is simply no economic justification for the government, in the name of competition, interfering in contracts between business people.

"Cartel"

It is incorrect in an open market to describe any business or group of companies as a "cartel". A cartel, properly defined, is where one company or more companies has a permanent and exclusive right to sell a particular good or service. The only way this can be achieved on any sort of permanent basis is where government keeps other competitors out through regulation. In Hong Kong, The Hong Kong Jockey Club is one of the only organizations which can correctly be labeled a 'cartel' as, by law, no other competitors are allowed to engage in the gaming business in the territory.

"Predatory Pricing" [5]

Predatory pricing means selling goods below cost with the intention of driving out competitors. It is know fondly by consumers as "cheap stuff on sale". Businesses hate price wars or selling stuff at a loss because they lose money, but even if they are successful in driving out a competitor then there is no guarantee that has soon as they try to recoup the money they have lost by increasing the price again, some new competitor will simply come in to take its place. It is always sad when a small business fails because it is unable to compete but small businesses fail every day of the week and no business has a right to exist. The small businesses that do succeed as are those that have particular niche product or service. The fact that 98% of the Hong Kong economy is employed by the small business sector (one of the highest proportions in the world) means that the absence of a competition regulator is not detrimental to the success and growth of the small business sector.

"Bid Rigging"

Companies and government are perfectly entitled to establish as part of the terms of their tender that there will be no agreements between those tendering for the job. Any breach of these agreements would be subject to contractual penalties (and potentially fines in the case of tenders for government work).

In the absence of any contractual prohibition in the tender or the terms of the auction, then there should be no prohibition on two bidders agreeing with each other what price they will submit. In an open market there

[5] Although not strictly speaking used in the Detailed Proposal it may be included as part of the guidelines issued by the Competition Commission.

will always be the possibility that a new bidder will place a price higher or lower than the price that the two bidders who are working in tandem.

"Price-fixing"

All businesses should be free to state the price at which they will sell their goods and services. The amount they can charge is constrained by what others are charging and by the threat that a new competitor could come in and sell at a lower price.

Simply because one business agrees (either tacitly or formally) with another to sell at the same price does not mean that they will be able to continue to sell at the agreed price permanently. In an open market there will always be the threat that an existing or future competitor will come into the market to sell at a lower cost.

"Market Allocation"

If a business in Hong Kong Island (say a café owner) decided with another business on Lan Tau (another café owner) that each would not open up a café in the others territory then they should be perfectly entitled to do that. In an open market they would not be able to prevent a third party from opening up a new café in either Hong Kong Island or Lan Tau.

"Output Restrictions"

In an open market, the problem with any arrangement between one or more companies to reduce output of particular goods or services is that there is always the potential that a new competitor will emerge to supply a similar or identical product.