Anti-competitive Behaviour and Competition Law
反競爭行為與公平競爭法

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Outline 大綱

- (I) Approaches to competition analysis
- (II) Forms of anti-competitive behaviour
- (III) International experience
- (IV) Hong Kong's past policy towards competition
- (V) Recent developments

(I) Approaches to competition analysis

- **The basic approaches to competition policy (Boner and Krueger, 1991) encompass three key aspects: (1) Performance (表現) ; (2) Structure (結構); and (3) Conduct (行為).**
- 一般的競爭法會從三個角度去審察反競爭現象。
- 第一就是看企業的表現，比如它賺多少利潤？如果利潤以至回報率絕對地或相對地都很高，就可能反映出某些反競爭問題。不過，這個規則本質上很有侷限；因為若將之推至極端，“大就是醜惡，小就是美麗”，“賺大錢就有問題”一類標準，無疑是太表面化了。

(I) Approaches to competition analysis

- 另一個就是結構規則，主要就是市場佔有率的問題。就是市場有幾個運作者，如果最大的運作者的市場佔有率超過70%，就已經是近乎壟斷了。如果兩間公司的市場佔有率加起來超過50%，就算是寡頭壟斷。
- 不過，這個準則可以作為啟動調查指標，但不能作為最終的判定標準，因為兩家寡頭壟斷的企業現實上也或者會鬥得你死我活。反過來，市場佔有率太低的企業一般都可獲豁免。

(I) Approaches to competition analysis

- 第三個準則是比較現代的，亦是國際一般的焦點，就是所謂的“行為規則”，即看企業本身或者企業之間有無違反公平競爭的行為。2008年香港政府制訂的公平競爭法諮詢文件，也明確表示是要採用“行為規則”。

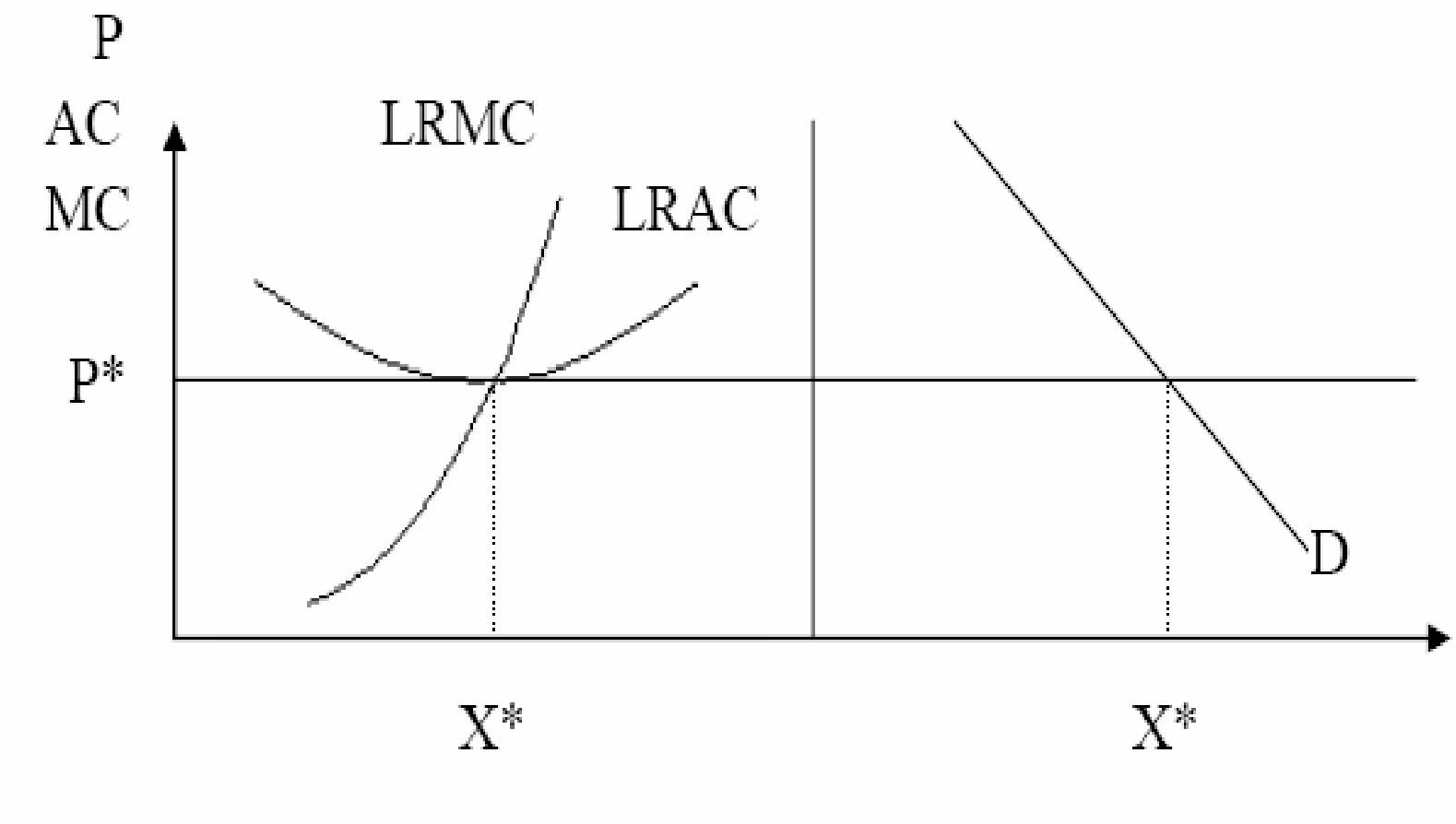
(II) Forms of anti-competitive behaviour

- **Forms of anti-competitive behaviour that are identified in the literature can be classified into the following overlapping categories:**
- **1. Monopoly and cartels (壟斷及卡特爾)**
- **2. Abuse of dominant position (濫用支配地位)**
- **3. Horizontal restrictive practices (橫向限制行為)**
- **4. Vertical restrictive practices (縱向限制行為)**
- **Useful quick references for the *glossary* of various terms in these categories can be found in Directorate-General for Competition, EC (2002) and OECD (1993).**

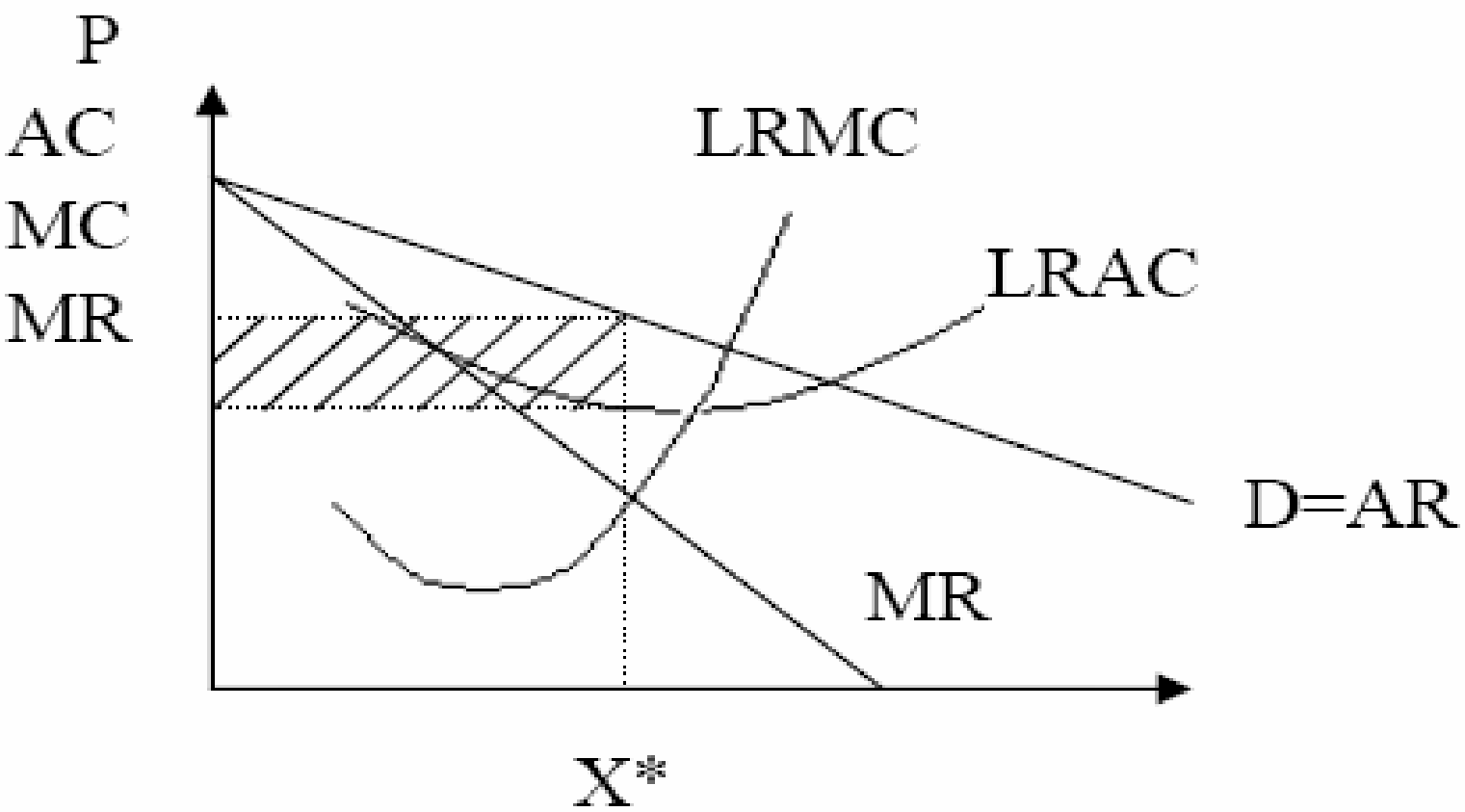
(II) Forms of anti-competitive behaviour

- **1. Monopoly and cartels（壟斷及卡特爾）**
- **This is the traditional core of attention on anti-competitive behaviour. Perfect competition is the ideal analytical benchmark, whereas a monopolistic firm may be prone to restrict output and raise price, thereby obtaining abnormal profit. It will result in social welfare loss.**
- **In the case of monopoly, whether "natural" (because of pervasive economies of scale) or "artificial" (as a result of man-made barriers, including legal and economic), regulation or introduction of competition/de-regulation may be the policy response.**

Perfect competition: P=MC



Monopoly: P>MC



(II) Forms of anti-competitive behaviour

- **Oligopoly is a market structure with only a few suppliers because of "natural" or "artificial" factors. Oligopolistic firms could engage in heated competition, and the market may become "contestable" (可競逐的).**
- **On the other hand, cartels may be formed by collusion among players with "market power" in an oligopoly. Efficiency and welfare loss would also result. Regulation or competition policy would be possible responses by the authority.**

(II) Forms of anti-competitive behaviour

- **2. Abuse of dominant position**
  (濫用支配地位)
- **When a market is "dominated" by a player with "power" among a number of much smaller suppliers, it is neither monopoly nor oligopoly in the strict sense.**
- **The player may misuse its "dominance" (which could well have been acquired in perfectly fair manner in the first place) by "abusive or improper exploitation" of market power aimed at restricting competition, e.g. predatory pricing (selling at below incremental costs/average variable costs/ "avoidable costs") with the objective of driving out competitors.**

(II) Forms of anti-competitive behaviour

- **In other words, the dominant firm is now exercising its market power in an unfair manner to undermine competition. To sanction against such behaviour is therefore not to "penalise" a victor.**
- **Regulation or competition policy would be a possible response. In the EU, Canada, the term "abuse of dominant position" has been incorporated explicitly in competition legislation.**

(II) Forms of anti-competitive behaviour

- **3. Horizontal restrictive practices (橫向限制行為)**
- **(a) price fixing (操縱價格): an agreement between firms to fix or raise price to restrict competition and earn higher profits;**
- **(b) collusive bidding/bid rigging (串通投標): (i) firms agreeing to submit common bids, thus eliminating price competition; (ii) firms agreeing to submit the lowest bid by rotation and thereby each getting a certain amount of contracts;**
- **{(a) and (b) are regarded as the cardinal offence in the US, Canada, UK and other jurisdictions; and they often result in criminal penalties if proven guilty.}**

(II) Forms of anti-competitive behaviour

- **(c)** market division（分配市場）: in products and locations;
- **(d)**customer allocation/joint boycotts（分配僱客/聯合抵制）;
- **(e)** sales and production quotas(設立銷售限制).

(II) Forms of anti-competitive behaviour

- **4. Vertical restrictive practices**
  (縱向限制行為)
- **(a) resale price maintenance (RPM)(控制轉售價格): a supplier specifying the minimum or maximum price at which a product must be re-sold to customers by downstream firms, hence maintaining profit margins;**
- **(b) tie-in sales/tied selling(搭賣): the sale of one good on the condition that another good is purchased;**
- **(c) bundling/full-line forcing (package tie-in)(捆售): which could be a more extensive offence than (b);**

(II) Forms of anti-competitive behaviour

- **Among the above overlapping categories of anti-competitive behaviour, vertical restrictive practices are more controversial. Critics of competition policies often argue that they are necessary for efficiency considerations, e.g. RPM is essential for viable after-sale maintenance service; while package tie-in is beneficial to consumers etc.**
- **As a result, the OECD coined the term "hard core cartels", which refers to firms engaging in largely horizontal restrictive practices such as price fixing, bid rigging, market and customer division (OECD, 2000).**

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(III) International Experience

- **According to information compiled by UNCTAD (2007), there are over 110 "competition authorities" in the world. Notable examples are:**
  - **The Americas: USA, Canada, Mexico, Argentina, Brazil, Chile, Peru, Venezuela, Jamaica and Costa Rica;**
  - **Asia: Japan, South Korea, Mainland China, Taiwan, Thailand, Indonesia, India, Philippines, Malaysia, Singapore and Sri Lanka;**

(III) International Experience

- Pacific: Australia, New Zealand, and Fiji;
- Europe: all members of EU, Russia and most of eastern Europe;
- Middle East: Israel, Turkey and Jordon;
- Africa: South Africa, Zambia, Algeria, Egypt and Kenya.

- **Hong Kong is not on the list.**

(III) International Experience

- **Coverage** of competition legislation may include:
  - merger and acquisition
  - abuse of dominant position
  - vertical and horizontal restrictions
  - etc.
- **Exemptions**: on the basis of certain public interests, some structures, conduct or performance can be exempted form the competition law, e.g. R&D cartels, networks.
- However, the process of granting exemptions and waivers should be transparent; and they should be regularly reviewed.

(III) International Experience

- **International tendencies**
  - Focusing on anti-competitive conduct
  - Starting from “hard core cartels”: price fixing, bid rigging, collusive restrictions on output and division of markets (mainly horizontal restraints) (OECD, 2000) and refining legislation and enforcement over time
  - Increasing transparency in the implementation of competition laws
  - “Leniency” programmes to alleviate investigation and sanction problems
  - Promoting international cooperation in dealing with multinational cartels

(III) International Experience

- For the links to various competition authorities, visit “Anti-trust and Regulatory Sites List” (http://www.clubi.ie/competition/compframesite/WorldsBiggestAntiTrustSitesList.html).
- There is a wide variety of competition regimes in the world. Tsang and Cameron (2001) highlighted **several stylised models:**
  - **US: the court approach (www.usdoj.gov/atr)**
  - **Australia: the hybrid agency and court approach (www.accc.gov.au)**
  - **Taiwan: the agency approach - 行政院公平交易委員會 (www.ftc.gov.tw)**

(III) International Experience

- An important criterion to distinguish regimes is whether civil and criminal sanctions/penalties are applied against offenders.
- A very quick (perhaps not fully updated) summary:
- **US's court approach**: the FTC/DoJ act according to anti-trust laws to put offenders through courts. Both civil and criminal penalties (fines and fines/imprisonment) could result for infringements.
- **Australia's hybrid approach**: the ACCC has partial autonomy. In most cases implementation is through courts. Offenders are subject to mainly civil penalties with criminal sanctions of fines applying only to individuals.

(III) International Experience

- **Taiwan's agency approach**: the FTC executes the Fair Trade Law; has autonomy on civil sanctions; and prosecutes against criminal infringements through courts.
- In all these models, there are appeals channels, as well as regulators in special sectors which are not fully susceptible to rigorous competition.
- Other variants of competition regimes include the UK model, which has a relatively powerful enforcement agency (OFT) and sanctions cover both civil and criminal penalties (with the latter through courts), as well as the models of the European Union and Singapore, under which the agency imposes only civil fines, and the courts are responsible for appeals.

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(IV) Hong Kong's progress so far

- **Milestones in HK's competition policies**:
  - Various forms of franchise and schemes of control were issued in different years.
  - 1974: the Hong Kong Consumer Council (消費者委員會) was established. It has no investigative or sanctioning power.
  - 1987：The Broadcasting Authority (BA) (廣播事務管理局) was set up.
  - **1992: At HK Government's request, the Consumer Council began competition analysis for various sectors.**
  - 1993: The Telecommunications Authority (TA) (電訊管理局) was set up.

(IV) Hong Kong's progress so far

- **11/1996**: After seven sectoral reports, the **Consumer Council** produced a summary document: "Fair Competition: the Key to Hong Kong's Prosperity" **advocating the establishment of a competition law and a competition authority**.
- 1997: Formal response by the Government, and the setting up of the Competition Policy Advisory Group (COMPAG) chaired by the Financial Secretary.
- 5/1998: The SAR Government put forth a "Statement on Competition Policy".
- 2001: The HKSARG set up the Telecommunications (Competition Provisions) Appeal Board "to determine appeals against the Telecommunications Authority in enforcing fair competition in the telecommunications market in Hong Kong".

(IV) Hong Kong's progress so far

- **Hong Kong's policy stance up to the recent years has been regulation complemented by sector specific competition oversight (個別行業的競爭政策).**
- **Why should there be any competition policy at all?**
- Tradable versus non-tradable sectors: different meanings of freedom and competition.
- Possible dominant non-tradable sectors: broadcasting, telecommunications …..

(IV) Hong Kong's progress so far

- However, sector specific competition policy faced serious problems as the HK developed further and sector specific competition policy may become increasingly unfair.
  - (1) technological developments
  - (2) market dynamics
  - (3) changes in the boundaries of markets

(IV) Hong Kong's progress so far

- **(1) Technological developments**：a "divorce" between natural monopoly and economies of scale (e.g. mini-generators) unfolds in many sectors. The implication may be that more competition plus better-informed regulation would be needed.
- **(2) Market dynamics**: conglomerates that transcend traditional boundaries of industries and even nations emerge. Cross-sector "bundling" (e.g. property plus internet service) could spread.
- **(3) Boundaries of sectors**: Both (1) and (2) are re-writing the definitions of sectors and markets. Sector specific approach runs the risk of being outdated.

(IV) Hong Kong's progress so far

- 一個應用於整體經濟、跨越個別行業的競爭法以及其執行機構，就好像一場足球賽的裁判體制，你能想像一場正式的現代足球比賽，是可以沒有球證的嗎？
- 當年我們年紀小，在街邊踢球的時候，是沒有球證的。香港經濟在五六十年代的成長階段，就如同我們小時候在街邊踢球，沒有裁判也沒有很大的關係。反正大家都在掙扎求存，再謀進一步的發展。
- 但是經過七十年代、八十年代香港經濟起飛的過程，金融業迅速發展，很多企業已經發展成跨國經營。外國屬全球500強的集團來港投資亦很多。現時的足球比賽不是說笑的。

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(V) Recent developments

- **In his first Policy Address (2005-06), CE Donald Tsang discussed about a comprehensive (i.e. beyond sector specific oversight) competition law :**
- **"35. A level playing field that allows enterprising people to start and run their own businesses is important for sustaining the vitality and harmony of society. Hong Kong has long been recognised as the world's freest economy. The international community has commented very favourably about the upholding of fair competition in Hong Kong. However, as Hong Kong enterprises grow in strength, with some acquiring world-class status, coupled with an increased presence of multinational enterprises, it is possible that forces capable of cornering the market may emerge in Hong Kong." (emphasis added)**

(V) Recent developments

- **The Competition Policy Review Committee set up by Donald Tsang submitted a report to the HKSAR government in June 2006.**
- **On 6 November 2006, the HKSAR government launched the "Public Consultation on the Way Forward for Hong Kong's Competition Policy".**
- **The consultation document can be downloaded from: http://www.cedb.gov.hk/citb/ehtml/pdf/publication/Booklet_Eng.pdf**
- **http://www.cedb.gov.hk/citb/chtml/pdf/publication/Booklet_Chi.pdf**

(V) Recent developments

- **In May 2008, the HKSARG published a further document: "Detailed Proposals for a Competition Law" (競爭法詳細建議), which was almost a set of draft clauses.**
- **http://www.gov.hk/en/residents/government/consultation/docs/2008/competition_law.pdf**
- **http://www.gov.hk/tc/residents/government/consultation/docs/2008/competition_law.pdf**
- **There was another round of consultation. The results were generally positive; and the government was supposed to start the process of legislation for a Competition Law in Hong Kong.**

(V) Recent developments

第一章 ： 主要條文撮要

I. 立法目的及關鍵詞語定義

II. 競爭事務委員會的委任

III. 競爭事務審裁處的委任

IV. 對反競爭行為的禁止

V. 提出私人訴訟的權利

VI. 有關適用範圍的條文

VII. 豁免及豁除

(V) Recent developments

第三章：行為規則

一般考慮事項

「行為規則」的適用範圍

對反競爭協議的禁止條文

對濫用強大市場力量的禁止條文

行為須具有「目的或效果」

對合併的規管

對進行反競爭行為的懲罰

發出指示的權力

寬免計劃

(V) Recent developments

第五章：中小型企業(中小企)關注的事項

(a) 「低額」模式

(b) 豁免「縱向」協議

(c) 競爭事務審裁處不審理無理取鬧申索的權力

(d) 委任具中小企事務經驗的委員會成員

(e) 可進行代表訴訟

(V) Recent developments

第七章：豁免及豁除

基於經濟效益理由給予豁免

整體豁免

基於公眾利益理由給予豁除

基於公共政策理由給予豁除

不適用於政府和法定機構

(V) Recent developments

- 商務及經濟發展局局長發言 ２００９年２月２８日 **(http://www.cedb.gov.hk/ctb/chi/press/2009/pr28022009a.htm):**
- “記者：競爭法未能在本年度立法，有議員說是金融海嘯的緣故 ？
- 劉吳惠蘭：競爭法已經做了兩輪諮詢，大家其實都有了共識，政府亦承諾會盡 快推出競爭法。法例在提交立法會前，在草擬階段必須考慮諮詢所得的意見，現時在草擬工作上必須處理一些法律上的問題，尤其是競爭法推出後，如何執行法例的問題，一條法律執行的有效性是很重要的，因這才可達至政策的目標。”

(V) Recent developments

- “現時草擬方面特別需要處理兩宗法庭的判例，要處理調查及執行方面、要界定何謂反競爭行為，以及執行競爭法的相關機構的(架構)及法定程序等，所以相當複雜。基於這些法律草擬和法律的問題，因此需要多些時間。政府的目標是盡快將草案提交立法會。
- 記者：時間表？
- 劉吳惠蘭：一俟條例草擬完畢我們便可提交立 法會。這工作要盡快做，但需要時間準備草案文本。我們會盡快去做，大家毋須多解讀，實在沒有其他理由。”

References

- Boner, Roger Alan and Krueger, Reinald (1991) "The Basics of Antitrust Policy: A Review of Ten Nations and the European Communities", ***World Bank Technical Paper*** no.160.
- Directorate-General for Competition (2002), ***Glossary of Terms Used in EU Competition Policy : Antitrust and Control of Concentrations,*** Office for Official Publications of the European Communities.
- Hong Kong Consumer Council (1996), ***Competition Policy: The Key to Hong Kong's Economic Success***.

References

- Motta, Massimo (2004), ***Competition Policy : Theory and Practice,*** Cambridge University Press.
- Neumann, Manfred (2001), ***Competition Policy : History, Theory and Practice,*** Edward Elgar.
- OECD (1993), ***Glossary of Industrial Organisation Economics and Competition Law***, available from the website: http://www.oecd.org/dataoecd/8/61/2376087.pdf.

References

- OECD (1998), ***A Framework for the Design and Implementation of Competition Law and Policy***, available from the website: http://www.oecd.org/document/24/0,2340,en_2649_34685_1916760_1_1_1_1,00.html.
- OECD (2006), "Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendations", ***OECD Report***, available from the website http://www.oecd.org/dataoecd/30/2/36600303.pdf.
- Shenefield, John H. and Stelzer, Irwin M. (1998), ***The Antitrust Laws: A Primer***, Washington DC: AEI Press, 3rd edition.

References

- Tsang Shu-ki (2000a), “Petrol Price Competition Across Geographic Markets in Hong Kong?” article posted as: http://www.hkbu.edu.hk/~sktsang/geogmkt.PDF.
- Tsang Shu-ki (2000b), “Competition and Network Economics: The Examples of Credit Cards and Debit Cards”, article posted as: http://www.hkbu.edu.hk/~sktsang/networks_a_.PDF.
- Tsang Shu-ki and Cameron, Ron (2001), “Alternative Competition Regimes”, article posted as: www.hkbu.edu.hk/~sktsang/Com-regimes_n_.PDF.

References

- 曾澍基，“依據行為準則 判定公平競爭”，**2008年7月**，載於講者網頁 (http://www.hkbu.edu.hk/~sktsang/Competition_law_08.pdf)
- UNCTAD (2007), ***Directory of Competition Authorities***, July (http://www.unctad.org/en/docs/c2clpd56_en.pdf).
- Williams, Mark (2005), ***Competition Policy and Law in China, Hong Kong and Taiwan***, Cambridge University Press.