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Keynote Speech by

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at British Chamber of Commerce and Freshfields Breakfast Briefing:

The Hong Kong Competition Ordinance 3rd Anniversary

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(Check against delivery)

Good morning. It is a pleasure to be here today. I want to thank Freshfields and the British Chamber of Commerce for organizing this event again this year.

The last time I was here, I had been on the job for only a couple of months, and I gave a general summary of the work of the Commission prior to my arrival. I have since provided updates on our work on a number of occasions, so today I will give a truncated update and then spend some time answering a few questions that I am periodically asked.

Starting with the update, the Commission had a very busy year in 2018 across the entire spectrum of its advocacy, policy, and enforcement work.

Advocacy work in 2018 included about 90 public engagement events, highlighted by our first international conference, the Hong Kong Competition Exchange. We also unveiled at the Competition Exchange our on-line competition resource by the same name that provides competition information and materials for Hong Kong and the international competition community. We also premiered our first micro-movie, A Conspiracy of Love, which can be seen on our website.

We expect a similar pace in 2019, although we will not host another Competition Exchange conference until 2020. Additionally, one of the key points of emphasis in 2019 will be outreach to law firms without competition practices as well as to SMEs to provide some practical competition training and compliance tools. Some law firms and counsel are working with us on this project.

On the policy/advisory front, we saw a marked increase in our engagement with the government and public bodies on a variety of competition issues and regulatory schemes in 2018. In total, we provided competition policy advice on approximately 30 issues and saw a very positive trend of being consulted at earlier stages, when our advice could be taken on board.

We also arranged competition law and policy training by two international experts, Richard Whish and Bill Kovacic, for more than 200 officials from the government, public bodies, and law enforcement. The goal was to strengthen their ability to recognize and assess the competitive impact of their work. We have had and will continue having follow-up sessions on specific issues throughout 2019.

On the enforcement side, we brought our third enforcement action to the Competition Tribunal, which for the first time included individual respondents. We also completed our first application for decision, regarding the Code of Banking Practice, and we received our second application for decision, from the Hong Kong Association of Pharmaceutical Industries.

Finally, we have seen our portfolio of investigations continue to grow and diversify. While much of the work has necessarily proceeded away from the public eye, I anticipate that the public will hear about more than one of those investigations in the coming months. We have also been working to enhance our internal investigative capabilities. As an example, our staff received a week of training from the US Federal Bureau of Investigation last fall. Additionally, we are adding forensic IT tools. In the several searches we have conducted over the last year, we have had to rely exclusively on outside forensic IT vendors and we would like to reduce that reliance.

So, that is a quick recap on our work. Now, I would like to spend the rest of my time talking about some of the things that I get asked by people I meet and try to answer them for you.

Let's start with a couple of things I have been asked about the Commission's ability to investigate business acquisitions and joint ventures in Hong Kong.

1. **The Commission is investigating the Hong Kong Seaport Alliance – does that also mean it can investigate Cathay Pacific's acquisition of Hong Kong Express under the Competition Ordinance?**

The merger rule of the Competition Ordinance is limited only to mergers in the telecom sector. As such, neither the Commission nor the Communications Authority is able to review any mergers outside the telecom sector.

The Commission is able to investigate the Hong Kong Seaport Alliance because it is not a merger of the parties. Instead, it is a joint venture agreement between competitors that can be reviewed under the First Conduct Rule.

By contrast, it has been reported that Cathay Pacific is acquiring 100% of the shares of Hong Kong Express. If so, this constitutes a merger and places the transaction beyond the scope of the Ordinance. That said, the Commission is actively engaging with the government to encourage a competition assessment of the acquisition to the extent permissible within the relevant regulatory ambit and also to offer the Commission's services in that regard.

2. **Does Hong Kong need a merger rule that applies to more than just the telecom sector?**

From the perspective of a competition agency, a cross-sector merger rule is an integral part of a competition law regime. So my answer is yes. For Hong Kong, it is really a matter of when.

It is not uncommon for a jurisdiction to adopt a competition law that does not initially include a merger provision. A number of jurisdictions have added merger provisions later, after the need for one became apparent or the competition enforcement agency had gained sufficient experience

enforcing conduct rules. Because merger investigations are often the most complicated and time and resource intensive investigations that a competition agency undertakes, this is not necessarily an unreasonable approach.

I expect that Hong Kong will make the same decision as other jurisdictions and add a general merger rule to the Competition Ordinance at some point in the future. In making that decision, it will have to balance the Commission's experience and resource readiness for that additional mandate against the risk that, in the interim, potentially anticompetitive transactions will proceed without scrutiny under the Ordinance. Unscrutinized transactions have the potential to dramatically reduce competition and harm consumers.

On the experience side, I am happy to report that the Commission is quickly getting up the learning curve, gaining significant experience and taking on more complicated investigations.

Let me now briefly respond to a question related to competition policy.

3. What is the Commission's position on the proposed Franchised Taxi Scheme and legalizing ride-hailing services?

The Commission provided advice on the government's proposed Franchised Taxi Scheme, and we have made that advice publicly available on our website. So I will not detail it here. Suffice it to say, the Commission believes that the proposed scheme raises a number of competition concerns and, more fundamentally, is inadequate to bring about the type of changes to the existing taxi industry that Hong Kong consumers strongly support.

The Commission also advocates for the government to provide opportunities for ride hailing services to operate legally in Hong Kong, subject to appropriate regulations necessary to protect health and safety.

In this regard, I note recent newspaper reports that a number of taxi franchises are developing taxi hailing apps to better serve customers. The Commission welcomes this innovation, which appears to respond to competitive pressure from ride hailing services that are not even legal in Hong Kong. This demonstrates the types of benefits to consumers that could flow from more legalized competition in this sector.

Let's now talk about a couple of questions I have been asked about our enforcement actions to date.

4. Why have your second and third enforcement actions focused on small building decorating contractors rather than Big Tigers?

All of our enforcement actions to date have focused on hard core cartels because they are the worst competitive abuses. That is the case whether the cartelists are big companies or small ones.

Indeed, cartels can result in even small competitors banding together to eliminate competition between them and, in that way, collectively turning themselves into a Big Tiger. That is why cartels are so harmful.

It is also important to recognize that the focus should be on the harm to the victimized consumers rather than the size of the cartelist. In our second and third enforcement actions, the consumers were among the very most vulnerable of Hong Kong's citizens – residents of its public housing estates.

The bottom line is that any Tiger that is big enough to participate in a cartel that hurts Hong Kong's consumers is big enough for the Commission to hunt. I'm pretty sure that nobody who is being killed by a tiger says as their last words, "It could be worse – it could be a BIG tiger eating me."

5. Is the Commission doing anything about Big Tigers in Hong Kong?

The Commission has engaged with large business interests and important market sectors in a number of ways.

The Commission's first enforcement action was against a U.S. software company and some sizeable distributors in Hong Kong, including a subsidiary of a well-known telecommunications company.

The Commission's first block exemption order involved Hong Kong's liner shipping association, and its first application for decision involved many of its leading financial institutions. In both cases, the Commission conducted its analysis without regard to the size or importance of the applicants, and it issued decisions that did not exempt the liner shippers' voluntary discussion agreements or the financial institutions' Code of Banking Practice from the First Conduct Rule as requested.

The Commission is now considering an application from Hong Kong's Association of Pharmaceutical Industries. It involves major players in that sector.

The Commission has active Second Conduct Rule investigations involving some very major businesses operating in Hong Kong, and, as previously announced, it is investigating the Hong Kong Seaport Alliance, which involves its major port operators.

These are just a few examples of the work we are doing that directly involves very significant issues impacting major Hong Kong businesses and market sectors and, thus, consumers.

6. Is the Commission going to take enforcement action against non-cartel conduct that harms competition in Hong Kong?

In appropriate cases -- absolutely. The Commission has a broad and very diverse range of ongoing investigations, some of which I am confident will lead to enforcement outcomes. We currently have investigations under the Second Conduct Rule, as well as investigations of non-SAC (serious anti-competitive) conduct under the First Conduct Rule that involve both

horizontal and vertical agreements. Some of those investigations may present "object" contraventions and others may present "effects" contraventions.

Our portfolio of non-SAC investigations has increased to the point that we have reorganized our Operations Division into two teams, one of which primarily focuses on SAC cartel investigations and the other of which focuses on investigations under the Second Conduct Rule and First Conduct Rule investigations involving an assessment of competitive effects. Both teams have plenty to keep them busy for the foreseeable future, and we keep adding new things!

I want to take this opportunity to emphasize a point about Second Conduct Rule investigations. In my experience, it is very rare for an abuse of substantial market power investigation to start as a result of a consumer complaint. Consumers rarely are in a position to have knowledge of the types of conduct, such as refusals to deal or exclusive distribution arrangements, which can constitute abuse by a dominant undertaking.

Rather, it is complaints by the businesses that are the victims of those strong-armed exclusionary tactics that lead to investigations. For the Commission to maximize its Second Conduct Rule enforcement, we need businesses who are being excluded or who have knowledge of the conduct to make the Commission aware of it and provide us with information so that we have a basis to begin to investigate.

It is not enough for businesses to complain in the media about perceived abuses by dominant players and then decline to provide information when the Commission follows up. This is something that we expect to make a point of future emphasis in our public advocacy work.

Now I want to talk about some questions I have been asked about our enforcement remedies and outlook.

7. Will the Commission consider accepting commitments as a remedy for serious anticompetitive cartel conduct?

While the ultimate decision on what remedies to accept in a case is for our Commission members to make, I anticipate that it will rarely be the case that the Commission Executives will recommend accepting commitments in the case of cartel conduct.

First, cartels are the very worst competitive abuses and, thus, most deserving of pecuniary penalties. It is important to seek those penalties in order to send an appropriate deterrent message. This is why the Commission has prioritized cartel enforcement from the outset of its work.

Second, accepting a commitment in a cartel case creates a risk of undermining our leniency program. If a company thinks it can resolve an investigation with a commitment if the cartel is detected, it may decide not to come forward to self-report the cartel and seek leniency.

For those reasons, I do not expect to often recommend accepting commitments in cartel cases.

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8. Will the Commission be using its other enforcement remedies, such as infringement notices and warning notices?

The use of an infringement notice in a cartel case raises some of the same issues as using a commitment because an infringement notice involves the Commission offering a commitment to the cartel participant after a full investigation. For that reason, I expect that the Commission Executives making a recommendation to resolve an investigation involving SAC with an infringement notice likely will be very much the exception rather than the rule.

Infringement notices may be an appropriate remedy for resolving Second Conduct Rule cases in some circumstances. Whether we would be willing to accept one will depend on the facts of a given case. The egregiousness and intent of the conduct would be among the factors we would take into account.

The Commission has every intention of issuing warning notices in appropriate cases involving non-SAC conduct under the First Conduct Rule. We currently have investigations where a warning notice will be issued if we conclude that there is a reasonable cause to believe there has been a contravention of the First Conduct Rule.

This raises an important point. Warning notices do not present the Commission with an opportunity to cut corners or conduct less rigorous investigations. We are required to conduct an investigation with the same rigor as one in which we can seek pecuniary penalties because the same standard applies to both – reasonable cause to believe a contravention has occurred. The same applies to infringement notices.

This fact, coupled with the fact that warning notices are likely the only initial remedy available in First Conduct Rule cases requiring an analysis of competitive effects, means that we will only be able to issue warning notices after investigations that probably will be among our longest and most complicated. Those investigations require special care to ensure that our analysis is correct because, otherwise, even a warning notice has the potential to chill legitimate competitive conduct if erroneously issued.

For those reasons, warning notices will not be issued without full investigation and, as a result, may not be issued as frequently as some might expect. Nonetheless, we fully expect to use them.

Finally, it is worth mentioning that the Commission has issued written compliance reminders on several occasions to very small businesses engaged in certain types of conduct, such as very short-lived cartels, that would permit a pecuniary penalty action or infringement notice. The Commission issued compliance reminders after completing investigations that warranted a response but, in the exercise of its discretion, one that was more restrained than the use of its formal remedies.

9. **Is the Commission focused on any particular market sectors?**

The Commission has ongoing projects focused on particular market sectors. These projects, at present, are non-public and are directed at understanding whether and what competitive restraints

may exist in those sectors. They may or may not eventually lead to formal investigations or result in formal studies with conclusions and recommendations. It should be noted that where a study uncovers information or evidence of a suspected contravention, we may decide to delay publication of the study as necessary to protect the integrity of any resulting investigative work.

Finally, we are not focused on particular market sectors to the exclusion of others. We will pursue conduct that raises competitive concerns in whatever sector we find it.

So, that is a quick sampling of the types of things that I get asked about and how the Commission is thinking about them. I hope it is informative. So, keep the questions coming, and maybe we can do this again next year!

Thank you!