競爭事務委員會
COMPETITION COMMISSION

Keynote speech by

Mr Brent Snyder, Chief Executive Officer, Competition Commission

at MLex and Baker McKenzie Conference

"Competition Law in Asia: Hot Topics and Future Trends"

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It is a pleasure to be here today. Thank you to MLex, Baker & McKenzie and the Chinese University of Hong Kong for the invitation to speak.

We are here to mark the second anniversary of the Hong Kong Competition Ordinance. It is hard to believe that two years has already passed since it came into full effect.

I was already familiar with the Hong Kong Competition Commission when I was approached last spring about interviewing for the CEO position. I had been running into people from the Commission at various conferences for the past few years. I recall being on a panel discussion with Tim Lear, the Commission's initial Executive Director for Operations, at a conference in 2014.

I was impressed at the time with how quickly the Commission had managed to move beyond mere logistical preparation to substantive competition law work. That initial impression was reconfirmed over time. While I was at the US Department of Justice, Antitrust Division, we had opportunities to share our experience with the Commission on policy issues and also to collaborate with it in other ways. We could see that the organization was quickly climbing the learning curve.

Little did I know at the time that I would be the beneficiary of the good preparation and work that has gone into the Commission. I consider myself to be very fortunate to inherit what Chairperson Anna Wu, the Commission Board, Stan Wong, Rose Webb, the men and women on the staff of the Commission, and others started building.

Looking back at the last two years, much has been accomplished in our mission to promote and safeguard competition. I categorize our work into three inter-related substantive baskets – enforcement, policy, and outreach. I will briefly touch on our work in these areas before spending a few minutes on what I expect to be points of emphasis moving forward.

Enforcement efforts, of course, are fundamental to the work of any competition agency. They protect consumers from abuses of competition. They send a deterrent message. And resulting litigation and decisions are important for defining and filling out the law, which educate the business community regarding the lines that must not be crossed.

Since December 2015, the Commission has received more than 2500 complaints and queries from the public. More than 160 of those complaints were elevated to initial assessments. More than 10% of initial assessments, in turn, became full investigations. Those investigations, so far, have resulted in two cases being filed with the Competition Tribunal. One is a bid rigging case, and the other is a price fixing and market sharing case.

Both of the Commission's cases are slated for trial next year. They will serve an important role in beginning to develop precedent that will guide conduct of the business community as well as our future enforcement efforts. Add to those cases the fact that the Commission also completed its first block exemption order related to a complicated industry, and I think that the enforcement results from the Commission's first two years exceed reasonable expectations.

From a policy perspective, the work of the Commission has been multi-faceted. The Commission developed guidelines for various substantive aspects of our work, conducted market studies into two business sectors of long-standing public concern, issued advisory bulletins, and advised the government on matters of competition policy. It also engaged with many trade and industry associations regarding issues of concern under the Ordinance, which resulted in numerous changes to their practices and codes of conduct.

Finally, the Commission's outreach efforts have won awards and are considered a model in the international enforcement community. Those efforts have been nearly nonstop for the past two years, reaching millions of people in the private business sector, universities, high schools, and the general public to raise awareness of the Competition Ordinance, problematic conduct, and competition generally. The most high profile examples of this work have been our television and internet campaigns on various topics.

So, looking back, there is much of which to be proud of. But our work is just beginning and much remains to be accomplished. So, I would like to spend a few minutes talking about the Commission's future work and challenges.

The goal of antitrust laws is to bring the benefits of competition to consumers. Competition can make a difference in the lives of individual consumers on the street, and I want the work of the Commission to make that kind of difference for the people of Hong Kong.

That being the case, it should not come as a surprise that the pursuit of cartels will continue to be central to our enforcement efforts. No conduct is more calculated to deprive consumers of the benefits of competition than the unholy trinity of price fixing, bid-rigging, and market sharing.

Consumers understand that. The majority of the complaints we receive relate to the Ordinance's First Conduct Rule, which prohibits cartels. And it did not take

me long to learn that Hong Kong's residents are deeply suspicious that important market sectors are rigged against them.

Our initial work suggests those suspicions are not unfounded. One such market sector – residential building renovation and maintenance – was the subject of our second filed case, and I do not believe our work in that sector is done.

But even if cartels are Public Enemy Number One for competition enforcers, they are not the sole enemy we face. Large firms who use their market power, rather than vigorous competition, to erect barriers to entry or squeeze out competitors cannot be ignored, and we will be active in our work to detect and halt those abuses.

Enforcement is of course important for its own sake. It halts the most harmful competitive abuses. But, enforcement is especially important in Hong Kong at this stage of the Competition Ordinance's life because it will facilitate the development of our law by establishing judicial precedent.

I have joked since arriving in Hong Kong that the Competition Ordinance has more than 170 sections, while the main substance of the Sherman Act, the original competition law of the United States, amounts to about two sentences. Section One and Section Two – and they are not even very well drafted sentences.

What really sets competition law apart in the United States from Hong Kong and most other jurisdictions is that we have had 125 years of interpretation of those sentences by the courts. That interpretation establishes what the law means, its limits, and provides the best guidance to the enforcement, legal and business communities.

At present, our Hong Kong ordinance is largely uninterpreted. It will be our enforcement efforts that will determine when and how it is interpreted by the Competition Tribunal. Our enforcement track record is not nearly so developed that we can yet be overly strategic in the cases we choose to bring. Nonetheless,

it is important for the Commission to look for opportunities to develop jurisprudence related to our entire ordinance in a measured way.

Although the Commission Board is the final decision maker regarding our enforcement action, I do not personally favor bringing cutting edge cases that test the limits of traditional competition enforcement before we have established what the heartland of enforcement looks like for Hong Kong. Furthermore, the important role the judiciary plays in scrutinizing our enforcement efforts and ultimately interpreting the law we are applying is what I am used to in the U.S., and I welcome it here.

Before we leave the topic of enforcement, let me touch on a couple of related points. The first is procedure. Just as the substance of the Competition Ordinance is largely uninterpreted, so are many of the procedural aspects that govern proceedings in the Competition Tribunal. As but one example, the Ordinance and the Competition Tribunal Rules are largely silent regarding whether pre-trial settlements are permissible and, if so, the form and procedure for them.

Settlements are an effective tool used in many jurisdictions to resolve or streamline investigations and trials, thereby preserving judicial, enforcement, and party resources. We will be looking for appropriate opportunities to present these and similar issues to the Competition Tribunal to begin to develop the procedural side of the law.

As for our own procedures to processes permitted by the Competition Ordinance, we will strive to ensure that they are as practical and useful as permissible under the law. This will, of course, work itself out over time and increase the efficiency of our efforts.

The second enforcement point relates to setting transparent and predictable expectations and benefits for those who cooperate in our enforcement efforts. This includes both leniency applicants as well as non-leniency cooperators.

With respect to leniency, we will be taking a fresh look at our leniency policy in the coming months to ensure it is clear and maximizes its value as a tool for detecting, investigating, and holding cartels accountable. We may decide that it is fine in its current form, but we want to utilize the considerable leniency experience of our new management team to make that assessment.

I am also a proponent of the "leniency plus" approach taken in the U.S., whereby a company that is a subject of a cartel investigation can help itself to a better outcome by bringing leniency applications related to other cartels. Because I believe that a carrot like "leniency plus" looks even more enticing when the alternative is a stick, I also favor a "penalty plus" approach. "Penalty plus" results in an enhanced pecuniary penalty for a company that has an opportunity for "leniency plus" credit, does not take advantage of it, and later finds itself the subject of a Commission investigation for a product or service for which it could have received "leniency plus" credit.

The Commission also needs to make clear what it means to cooperate for companies that do not win the race for leniency. I will not try to do so in detail here today. Suffice it to say, a company can benefit in a number of ways by deciding to cooperate rather than litigate.

For instance, a cooperating company will have the opportunity to significantly benefit in the recommendation the Commission makes to the Competition Tribunal with respect to any pecuniary penalty. How great the benefit is will be based on the timing of and order it begins cooperating, the value of the cooperation to the overall investigation, and other factors.

Cooperating companies may also be able to shield some of their responsible officers, directors, and employees who also cooperate from the individual pecuniary sanctions and disqualification available under the Competition Ordinance. However, I also want to make clear that for a company that engaged in a cartel, cooperation will require admitting to the Competition Tribunal the facts establishing the contravention and cooperating against the other cartelists throughout the rest of our investigation and any resulting litigation.

Turning now to our future policy and advocacy efforts, we will continue to prioritize issues and initiatives that will have benefits for Hong Kong consumers. This means engagement with the government, examination of the private sector, and international collaboration.

With respect to our inter-government engagement, we are working with the government to develop tools to assist in analyzing the competitive impact of existing and future legislation and regulations. We are actively considering wider policy training needs in the area of competition.

The Commission also is taking a forward looking and proactive approach to work with other public bodies to do our part in safeguarding government procurement and spending programs. For instance, we will be working together with other bodies to protect the integrity of the upcoming Operation Building Bright 2.0 subsidy program and to quickly pursue those who try to compromise it. We welcome this role and are excited to continue to build our operational coordination with other Hong Kong enforcement agencies.

Similarly, our international engagement is being taken with an eye both toward learning from the greater experience of more mature competition regimes and operational coordination. In this regard, we will host a competition conference in Hong Kong on 1-2 November 2018 to discuss issues of importance for competition in Hong Kong.

We are hopeful for strong international enforcement participation and senior government participation. Our sister agencies on the Mainland have already agreed to participate and provide their reflections on the 10th anniversary of the AML, which occurs next year.

We will continue to use market studies to examine economic sectors that are perceived to be lacking vigorous competition. Where appropriate, the studies will result in recommendations to improve competitive conditions or, potentially, enforcement actions.

It is also important for the Commission to contribute its views on issues that have the potential to affect competition and innovation locally. In doing so, we will prioritize issues of competition policy that most impact local consumers.

Finally, our nonstop efforts to raise awareness of competition and educate about the competition ordinance will continue. Just days ago, we launched our most recent education campaign, on market sharing, and we will have similar campaigns in the future.

I am also a big fan of our outreach and advocacy efforts to virtually all sectors of Hong Kong and its business community. These efforts instill an appreciation of the benefits of competition and educate about the limits of permissible conduct under the ordinance.

In 2018, the Commission will invite students at universities and tertiary schools to participate in an advocacy contest to develop social media campaigns promoting competition and elements of the competition law. I believe our outreach to secondary and tertiary school students is particularly worthwhile because they are our next generation of leaders, business people, and entrepreneurs.

So, I hope you can see from this brief overview that we are undertaking a range of initiatives to fulfill our mandate to ensure that Hong Kong's residents receive the benefit of competition. Although the Commission is still relatively new and small

and gaining experience, we are excited by the opportunity that exists here and the difference we can make for consumers.

Thank you.