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19 November 2010

**(VIA FACSIMILE 2978-7569)**

Ms Debbie Siu  
Clerk to Bills Committee on Competition Bill  
Legislative Council Secretariat  
3/Floor, Citibank Tower  
3 Garden Road  
Central, Hong Kong

Dear Ms Siu

**RE: Bills Committee on Competition Bill – Invitation for Submissions**

On behalf of Cathay Pacific Airways Limited (“Cathay Pacific”), and in response to your invitation to give views dated 4 November 2010, I am pleased to provide Cathay Pacific’s views on the Competition Bill (the “Bill”). I will begin by restating what my predecessor, Philip Chen, stated on 5 February 2007 to the Economic Development and Labour Bureau:

“Cathay Pacific Airways is supportive of the Government’s initiative of introducing a competition law in Hong Kong ... The formulation of a Competition Law is a notable milestone for Hong Kong and its structure and method of introduction are of the highest importance. It stands to benefit Hong Kong’s economy and world standing when drafted to address the characteristics of Hong Kong’s economy but, equally, the drafting must be at pains to avoid placing unnecessary burdens on the economy which is itself the lifeblood of Hong Kong’s success.”

Cathay Pacific’s position remains unchanged.

Throughout the consultation process, Cathay Pacific provided comments to the Commerce and Economic Development Bureau, and we appreciate the fact that many of our comments and suggestions have been addressed in the current Bill.<sup>1</sup> However,

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<sup>1</sup> See letters dated, 5 February 2007, 1 August 2008, 16 December 2008, 17 July 2009 and 25 March 2010.



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notwithstanding the extensive effort and exhaustive consultation process, the current Bill lacks sufficient clarity and detail to allow Cathay Pacific to provide its complete views. Many of the essential details are not addressed in the Bill, but instead we expect are likely to appear in guidelines to be issued by a yet-to-be named Competition Commission. While we hope and expect that this Competition Commission may issue guidelines and otherwise provide the necessary direction to those entities subject to the competition law, as enacted, we simply cannot state with any degree of certainty if this will happen. We trust that the guidelines, which we would expect are likely to form much of the substantive regulation and enforcement policy of the Competition Commission, will be drafted with substantial input from all Hong Kong stakeholders. It is for this reason that Cathay Pacific reserves its final views of the Competition Bill until such time as the requisite guidelines are published for comment.

Notwithstanding this reservation, Cathay Pacific can provide the following observations and recommendations:

1. In the Second Conduct Rule, the Bill applies the more restrictive "substantial degree of market power" standard rather than the more mainstream "abuse of dominant position" test. As an initial matter, neither "market" nor "substantial market power" are defined, meaning that the prohibition is at best vague and once again will have to rely on yet unpublished guidelines. Assuming that the Competition Commission adopts definitions of these terms consistent with other mainstream competition regimes, Cathay Pacific is concerned that this more restrictive standard will be particularly intrusive and burdensome. Cathay Pacific also has concern that the more restrictive definition may force businesses to compete unduly and undermine the efficiencies that would naturally tend to arise in places such as Hong Kong, where narrow geography and the relatively small population can unusually produce small localised markets. Moreover, with respect to the aviation industry, where international air services agreements as well as international aviation law and convention limit market participation to "designated carriers," we are concerned that many aviation routes may unwittingly fall within the more restrictive test, subjecting certain carriers to unwarranted increased and inefficient regulatory scrutiny. We also note that with respect to the aviation industry, the notion of narrow geographic markets is inconsistent with the desire of the HKSARG to position Hong Kong "as a leading centre of international and regional aviation."<sup>2</sup> By the Civil Aviation Department's own mission statement, Hong Kong competes with other airports throughout the region and the world. Hong Kong cannot compete as an international aviation hub if Hong Kong's home carrier cannot compete on a level playing field with other flag carriers.

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<sup>2</sup> See, e.g., Hong Kong Civil Aviation Department Mission, Visions and Values, available at <http://www.cad.gov.hk/english/vision.html>



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2. Cathay Pacific is concerned that the investigative threshold of "reasonable cause to suspect a contravention" is ambiguous at best and provides an unnecessarily low standard at worst. As Cathay Pacific has learned, often the burden of investigation, in terms of legal fees, lost productivity and distraction from our core business, can be more punitive than the sanctions imposed. Moreover, in instances in which Cathay Pacific's conduct has been vindicated, that has often been little consolation given the burden of the underlying investigation that has been endured. Cathay Pacific trusts that the subsequent guidelines will provide safeguards to protect enterprises from unnecessary or otherwise unfounded investigations.
3. While Cathay Pacific is grateful that the drafters considered our position regarding compliance with international obligations and in particular expressly included air services agreements, we note that this exemption is permissive and not mandatory. More specifically, the Bill states that the Chief Executive in Council *may* exempt a specified agreement or class of agreement "in order to avoid a conflict between this Ordinance and an international obligation that directly or indirectly relates to Hong Kong." Cathay Pacific believes this exemption should be automatic and not permissive. Moreover, we believe that an "international obligation that directly or indirectly relates to Hong Kong" is insufficiently defined. In particular, Cathay Pacific flies to 60 destinations in 30 countries, and as such is subject to laws, regulations and requirements around the world. While Cathay Pacific firmly believes that these foreign laws indirectly relate to Hong Kong as they may apply to routes between these countries and Hong Kong, the Bill is unclear as to the reach of this permissive exemption. Cathay Pacific is all too familiar with the perils of attempting to comply with conflicting legal requirements and administrative regimes.
4. Cathay Pacific has previously acknowledged the legitimacy of "follow-on" actions; however, we are concerned that the Bill's allowance of "stand-alone" actions is unwarranted and is a substantial departure from similarly situated jurisdictions. If stand-alone actions are permitted, the Commission runs the risk of turning competition law into a litigation plaything. While that may benefit the legal services industry, it does nothing to promote consumer welfare and indeed would result in increased costs to Cathay Pacific and other companies, costs that would be ultimately borne by consumers.
5. The Bill, by default, exempts all "statutory bodies" from the competition rules. While the Chief Executive in Council, at his discretion, *may* bring a statutory body within the competition rules if it is engaged in "economic activity," this is permissive and not mandatory. Moreover, we note that the term "economic activity" is not defined, leaving uncertainty as to which statutory bodies are subject to the Chief Executive's discretion. This default exemption, which is contrary to the practice of most other competition regimes, stands to place Cathay Pacific at a competitive disadvantage, as one of our Company's key suppliers is the Hong Kong Airport Authority ("HKAA"), a statutory body under Hong Kong's Airport Authority ordinance. The HKAA is entrusted to


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“provide, operate . . . , develop and maintain, at and in the vicinity of Chep Lak Kok, an airport for civil aviation.” As the only provider of airport services in Hong Kong, which of course is Cathay Pacific’s hub, the Company cannot enjoy the protections and rights that many of its competitors realise at their own hubs. Indeed, there are over 500 statutory bodies in Hong Kong, many of which likely engage in “economic activity” assuming the definition of this term involves the provision of goods or commercial services. This default exemption runs the risk of creating a two-tiered economy in Hong Kong: one that enjoys statutory status as well as exemptions from the Bill; the other that must compete with these protected entities without such immunities or protections.

6. Indeed, the Bill applies to all “undertakings,” (which are not “statutory bodies”) which are defined as “any entity . . . engaged in economic activity.” Again this key term “economic activity,” which is the lynchpin of application of the Bill, is not defined.
7. Although the May 2008 Consultation Paper gave the impression that vertical agreements would not be a focus of the Bill, this issue has been left unaddressed in the First Conduct Rule. Cathay Pacific believes that, consistent with the spirit and intent of the Consultation Paper, vertical agreements should not fall within the purview of Bill. Vertical agreements promote intra-brand competition and otherwise protect the integrity and distribution of our services. Moreover, even in jurisdictions that extend application of their respective competition laws to vertical agreements, such jurisdictions generally curtail such application. For those jurisdictions that do not, the resulting enforcement regime does more to protect competitors rather than competition, which is not consistent with the “international best practice” that the May 2008 Consultation Paper laudably sought to achieve.

Cathay Pacific commends the drafters on their efforts, and appreciates the care and diligence that went into the process. However, we believe with additional attention to these points, as well as concurrent publication of the applicable guidelines, the consultative process will be more meaningful and the result would be a much clearer competition law that would better promote consumer welfare and ensure the continued efficiency and vitality of the Hong Kong economy.

Yours sincerely



A N Tyler  
Chief Executive