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Mr. Andrew Leung Kwan-yuen
Member
Legislative Council
2/F Shui Hong Industry Building
547-549 Castle Peak Road
Kwai Chung, N.T., Hong Kong

Dear *Andrew*,

Cathay Pacific's view on the Competition Bill

As you are aware, the HKSAR Government is in the process of formulating a Competition Law. The Legislative Council has formed a Bills Committee to scrutinise the Bill.

While Cathay Pacific has consistently supported the concept of a competition law in Hong Kong, we are also of the view that the Bill should take into account the commercial and operational environment of Hong Kong, as well as drawing reference from international best practices.

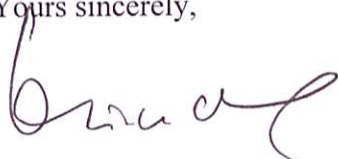
Many of these concerns, such as the meaning of "substantial degree of market power", the exemption of statutory bodies, and compliance with international obligations would have a potential impact on the way corporations conduct their business in Hong Kong.

The Bill as it is currently drafted lacks essential details which would be articulated only after the formation of a Competition Commission. We believe it is of vital importance to ensure a thorough process is put in place for the deliberations of the guidelines to allay fear of insufficient clarity which could open the floodgate of unnecessary legal challenges.

We have put together our concerns in the form of a position paper. We think you as a stakeholder might find it relevant as the public debate deepens on this issue so vital to the business community and the economy as a whole.

We would be most grateful for any feedback you might have. Please feel free to email me at quince_chong@cathaypacific.com or call me on 2747 8556.

Yours sincerely,



Quince Chong
Director Corporate Affairs

Cathay Pacific Airways Position Paper on Competition Law

Basic Position

Cathay Pacific has consistently supported the concept of a competition law in Hong Kong. As early as 2007, our former Chief Executive stated “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.” Our position remains unchanged.

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. 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.

Specific Comments

Notwithstanding our reservations, Cathay Pacific has the following observations and recommendations:

1. In the Second Conduct Rule, which relates to the conduct of single firms, the Bill applies the more restrictive “substantial degree of market power” standard rather than the more mainstream “abuse of dominant position” test. We are concerned that 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 points out that this more restrictive standard of “substantial degree of market power” will be particularly intrusive and burdensome. Cathay Pacific also has concern that this 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.

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.

6. 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,” again 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 “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 engage in “economic activity” assuming the definition of this term means involvements in 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.
7. Indeed, the Bill applies to all “undertakings,” (which are not “statutory bodies”) 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.
8. Although the May 2008 Consultation Paper gave the impression that vertical agreements, or those agreements between suppliers and vendors (rather than between competitors) 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.