CATHAY PACIFIC

Cathay Pacific Airways Limited
9/F., Central Tower
Cathay Pacific City, 8 Scenic Road
Hong Kong International Airport
Lantau, Hong Kong
www.cathaypacific.com

8 November 2011

VIA FACSIMILE – 2978 7569

The Honorable Andrew Leung Kwan-yuen, GBS, JP
Chairman
Bills Committee on Competition Bill
c/o Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Sirs,

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 27 October 2011 on the Administration's proposed amendments to the Competition Bill (the "Bill"), I am pleased to provide Cathay Pacific's comments.

At the outset, we want to thank the Administration for heeding our concerns regarding "stand alone" private actions as well as differentiating between hardcore and non-hardcore offences. While we would have preferred a full exemption on vertical agreements, we note that under the current delineation, anti-competitive vertical non-price agreements should be treated as non-hardcore violations of the First Conduct Rule, and that if an offence is suspected, the enterprise will have an opportunity to remediate the issue before the Competition Commission takes enforcement action. We think this a commendable step, provided that the Competition Commission does not abuse its power by arbitrarily issuing violation notices, as that would have a chilling effect on intrabrand competition.

Enterprises have a legitimate need to protect their brands and ensure that their wholesale and retail partners do the same. Cathay Pacific spends millions of dollars promoting and protecting its brand, as well as that of Hong Kong. We have a legitimate need to ensure our travel industry partners – travel agents, wholesalers, tour operations, and other sellers and resellers of our services – do the same. While we expect that many vertical issues may be addressed in forthcoming guidelines, there is

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simply no way of knowing how the Competition Commission will treat such agreements. If the Bill were to exempt vertical non-price agreements from the First Conduct Rule, this would alleviate our concern that we will not be able to adequately protect our brand. Such a limited exemption would still preserve the Competition Commission's ability to investigate and prosecute vertical resale price maintenance agreements.

One of Cathay Pacific's main concerns in the previous iteration of the Bill was the maximum fine being ten percent of global turnover for an unlimited duration of time. Such a fining scheme would have put Hong Kong beyond the outer boundaries of mainstream antitrust enforcement. The Administration has now proposed paring back the maximum fine to ten percent of Hong Kong turnover, for a maximum of three years. While we welcome this proposed reduction, our concern remains that the maximum fine still remains extraordinarily high, and that a fine based on affected turnover would be more appropriate. The current proposal has a disproportionately negative impact on local companies, or those companies that derive a substantial portion of their turnover from Hong Kong. In contrast, companies that realise substantial turnover outside Hong Kong will be placed at an advantage. For example, in a situation in which a local and overseas company each sell the same amount of particular product in Hong Kong and the Competition Commission or Tribunal find an offence, the local company will be subject to a much higher fine than that of the overseas enterprise, as the local company will have unrelated local turnover used in the calculation while the overseas company will have its unrelated turnover shielded from the fine calculation. This can easily be remedied by having the penalty based upon *affected* and not *total* turnover.

We also note that the automatic exemption for statutory bodies remains in place and is not subject to any proposed amendments. We are disappointed that the Administration has not made proposed amendments to allow statutory bodies to make their case for being excluded from competition law coverage rather than making this the default position. We believe that all entities -- private and governmental -- that are engaged in commercial activity should be subject to the competition laws unless they can affirmatively make a case for exemption or immunisation on the individual merits. This is the legal standard for mainstream antitrust regimes. Again, we are not against statutory bodies being exempt provided that they can make the case for immunity. Otherwise, statutory bodies engaged in commercial activities will not be subject to the same rules and limitations as those governing private companies, which in turn distorts competition. Many of our competitors also have contractual relationships with governmental or quasi-governmental entities (the Hong Kong equivalent of statutory bodies), but those governmental entities must either comply with the applicable competition law or affirmatively and transparently make their case for an exemption. We are only asking for similar treatment in Hong Kong.

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Cathay Pacific has consistently supported a fair competition law, and our position remains unchanged. These proposed changes will improve the Bill and ensure more proportional and equitable treatment for all impacted enterprises.

Yours sincerely,

John R Slosar
Chief Executive

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