

**SUBMISSION FROM THE CATHAY GROUP AIRLINES
TO THE HONG KONG COMPETITION COMMISSION
REGARDING THE DRAFT GUIDELINES**

- 1 Cathay Pacific Airways Limited and Hong Kong Dragon Airlines Limited (together, the “**Cathay Group Airlines**”) welcome the opportunity to provide comments on the Draft Guidelines jointly issued by the Hong Kong Competition Commission (the “**Commission**”) and the Communications Authority (the “**Authority**”) on 9 October 2014. We appreciate the Commission’s and the Authority’s continuing efforts to engage stakeholders in the community and we hope that our concerns and comments raised in this submission will be duly addressed by and reflected into the finalised Guidelines to be submitted to Hong Kong’s Legislative Council.
- 2 On 19 August 2014, Cathay Group Airlines presented specific proposals in response to the Commission’s invitation of May 2014 for submissions regarding its draft guidelines. Our submission was centred upon two areas of concerns. Firstly, misconceptions that might see commercial success equated to dominance and the fact that infringement under the second conduct rule should only arise in exceptional circumstances. Secondly, the need for legal certainty in respect of the treatment of inter-airline cooperation agreements under the first conduct rule. This submission concentrates on the second point.
- 3 In this submission, we provide our comments on the *Draft Guideline on Application for a Decision under Sections 9 and 24 (Exclusions and exemptions) and Section 15 Block Exemption Order – 2014 [CCCAD2014006E]* (the “**Draft Exclusion Guideline**”) and on the *Draft Guideline on the First Conduct Rule – 2014 [CCCAD2014001E]* (the “**Draft Guideline on the First Conduct Rule**”). In sum, there is a need for the Commission to:
 - (a) adopt a clear policy that parties can rely on relevant foreign precedent when reviewing compliance with the first conduct rule (under section 6 of the Competition Ordinance) and the availability of causes for exclusion (under Schedule 1 to the Ordinance); and
 - (b) expressly confirm the legitimacy of agreements that have already been formally reviewed and granted exclusions or exemptions by other competition authorities.

Reliance on relevant foreign precedent to assess compliance with the first conduct rule and the availability of causes for exclusion

- 4 At the outset, we commend the Commission’s clear position that the benefit of exclusions under Schedule 1 to the Ordinance shall be available without the need for a prior decision by the Commission or confirmation by the courts. Particularly in the context of exclusions applicable to conduct or agreements enhancing overall economic efficiency, we welcome the automatic application of exclusions on the basis of efficiencies under section 1 of Schedule 1 to the Ordinance. This provides the business community with legal certainty from the outset about the availability of the exclusions, consistent with the wishes of the legislator.
- 5 The Draft Guideline on the First Conduct Rule and the Draft Exclusion Guideline fail to bring sufficient legal certainty as regards the exact scope of the exclusions under Schedule 1. Absent clear precisions guiding a self-assessed compliance with the conditions enabling an exclusion, undertakings are subject to an unduly onerous burden of ensuring that their activities fall strictly within the boundaries of the law. This uncertainty is especially pronounced in the context of conduct or agreements that are prevalent in the marketplace and generally recognised to be efficiency enhancing. Airline joint operating services and codeshare arrangements are a good example. In their current form, the Guidelines do provide some valuable insights on the availability of an overall economic efficiency “defence” and the Cathay Group Airlines do appreciate guidance provided by the hypothetical example specifically with respect to the air transport industry. Still, their practical application remains uncertain, not least because of value judgments and policy considerations, but also due to inherent misgivings regarding the consideration of economic efficiencies. For example, the weight to be attributed to cost and qualitative efficiencies, how they will be measured and the extent to which they are capable of counteracting potential restrictive effects, are questions that only the Commission is in a

position to answer. Without a more clear-cut definition of their contours and detailed instructions regarding their interpretation, the exclusions, designed to be available from the outset, are devoid of any practical significance.

- 6 In this context, airlines could avail themselves of the possibility of seeking an individual decision from the Commission on the application of causes for exclusion under Schedule 1. This procedure, organised under section 9 of the Ordinance, is however limited to “novel or unresolved questions of wider importance or public interest”. As a newly established competition regime intent on regulating activity affecting Hong Kong markets, many if not all questions relating to an exclusion under the Ordinance could be deemed to relate to novel or unresolved questions. The limited guidance found in the Draft Guideline on the First Conduct Rule on the scope of the exclusion, coupled with a tentative indication of what questions would qualify as “novel or unresolved” in the Draft Exclusion Guideline, leaves business actors misinformed and with no choice but to formally approach the Commission for a decision under section 9 of the Ordinance. Until the Commission has ruled on the application of exclusions, the legal uncertainty will remain and will likely affect all business operators, but particularly airlines. This runs counter to the objectives of the self-assessment regime, which is designed to provide legal certainty from the date the Ordinance enters into force.
- 7 Notwithstanding the above, the Cathay Group Airlines do recognise that the Commission cannot be expected to provide detailed guidance on every possible aspect of the Ordinance’s implementation, or indeed exhaustive instructions that address its application to each specific industry. Nor can the Commission and the Authority be expected to simply “import” into their Guidelines the policy and practice developed by foreign competition authorities, however close their own competition law rules are to those under the Ordinance. The Cathay Group Airlines understand that the Commission and the Authority will define their own views on how the Ordinance should be implemented taking into account the particular features of the Hong Kong economy. However, we would expect that in doing so the Commission will not ignore the substantial body of precedent available, particularly in the European Union and the United Kingdom, where competition authorities have carefully considered economic efficiencies in the context of airline joint operating services and provided detailed guidance in this respect.
- 8 For the above reasons, the Cathay Group Airlines respectfully submit that the Commission and the Authority should clearly signal in their Guidelines that, while they will interpret and implement the Ordinance taking account the particular features of the Hong Kong economy, parties can still expect the rules in Hong Kong to be interpreted in a manner consistent to that adopted by foreign competition authorities with respect to substantive rules similar to those in the Ordinance, particularly concerning agreements having a multijurisdictional effect.
- 9 Further, to achieve greater commercial certainty when an application for an individual decision is made, we would also encourage the Commission to give a clear indication in the Draft Exclusion Guideline that it will endeavour to deliver all decisions concerning applications for exclusions or exemptions within a reasonable period of time. In this regard, we draw reference to the guidance on the UK Competition and Markets Authority’s approach, which provides that the Authority will work towards issuing a short-form opinion within an envisaged time frame of two to three months following receipt of a formal request.

Legitimacy of agreements that have already been formally reviewed and granted exclusions or exemptions by other competition authorities

- 10 The Cathay Group Airlines also submit that the Commission should adopt an express policy that parties to conduct or agreements having a multijurisdictional effect and which have already been formally reviewed by foreign competition authorities whose legislation is consistent with the Ordinance, should be entitled to rely on such foreign decisions when conducting their self-assessment. This statement of policy could be formulated both within the notion of “novel or unresolved questions of wider importance or public interest” under section 9, but also as a general expression of international comity. A convergent regulatory approach would offer increased transparency and certainty to businesses that operate in a multijurisdictional context. It would also alleviate the Commission’s burden, freeing up resources for it to focus only on

exclusion applications relating to issues which are truly unprecedented in Hong Kong and which raise real competition concerns.

- 11 Accordingly, it is submitted that the Exclusion Guideline ought to include the following provisions giving formal recognition to the legitimacy of conduct or agreements that have already been granted exclusions or exemptions by other competition authorities:
- (a) Where another competition authority has, prior to the Ordinance coming into effect, granted approval for an existing joint operating service, the Commission will consider that no approval will be required from the Commission.
 - (b) Where an existing or proposed joint operating service is being considered by another competition authority when the Ordinance comes into effect, the Commission will consider that no approval will be required by the Commission if the service is approved by the other competition authority, and the Commission will not consider the service until the other competition authority has decided whether or not to approve it.
 - (c) After the Ordinance comes into effect, joint operating services which were not being considered at the time the Ordinance came into effect and which raise novel issues will be considered for approval by the Commission.

Cathay Pacific Airways Limited
Hong Kong Dragon Airlines Limited

November 6, 2014