Telecommunications (Competition Provisions) Appeal Board

Appeal No. 4

PCCW - HKT Telephone Ltd v The Telecommunications Authority

Date of appeal	:	28 June 2002
Appellant	:	PCCW - HKT Telephone Ltd
Nature of appeal	:	Against the Decision of the Telecommunications Authority (TA) dated 14 June 2002 whereby the TA disapproved the Appellant's application dated 16 May 2002 made in accordance with General Condition 21 of the Fixed Telecommunications Network Services Licence granted by the TA to the Appellant proposing a revision to its published tariff concerning a promotion to be offered to residents moving into 14 specified newly built housing estates.
Hearings	:	Hearing on the appeal held on 21, 22, 24 to 27 March 2003.
Outcome of appeal	:	The Judgement of the Appeal Board dated 15 August 2003 was published on 3 October 2003. Appeal was allowed and the TA's decision was quashed.

Appeal No. 4 of 2002, by Notice of Appeal filed on 28th June 2002
IN THE MATTER OF THE TELECOMMUNICATIONS ORDINANCE (CAP. 106)

AND

IN THE MATTER OF AN APPEAL TO THE TELECOMMUNICATIONS (COMPETITION PROVISIONS) APPEAL BOARD PURSUANT TO SECTION 32N OF THE TELECOMMUNICATIONS ORDINANCE (CAP. 106)

BETWEEN

PCCW-HKT TELEPHONE LIMITED **Appellant**

and

THE TELECOMMUNICATIONS AUTHORITY **Respondent**

JUDGMENT

BACKGROUND

1. The Appellant in the present proceedings by a Notice of Appeal dated 28th June 2002 has appealed under Section 32N of the Telecommunication Ordinance (Cap. 106) ("the Ordinance") against a decision by the Telecommunication Authority ("TA") contained in their letter dated 14th June 2002 ("the Decision"), which disapproved the application made by the Appellant in their letter dated 16th May 2002 ("the Application") for a special tariff revision, so as to permit them to offer for a limited period a lower tariff than their published tariff, as agreed by the TA, to residents upon 14 newly-completed or soon-to-be-completed estates, comprising some 20,000 households, in respect of Residential Direct Exchange Lines ("RDEL"), namely services connected to telephones in residential units built

upon the estates. The special tariff was to be called "Buy Four Get One Free" ("B4G1F"), and was to last for 10 months, after which time the pre-existing higher tariff would apply .

RDEL Services

2. The Appellant holds a Fixed Telecommunication Network Service ("FTNS") licence. So too do three other more recent entrants into that market, namely Hutchison Global Communication Ltd. ("HGC"), Wharf New T&T Ltd. ("NWT&T") and New World Telephone Ltd. ("NWT"), who all commenced operations between September 1995 and February 1997. In May 2002 Hong Kong Broadband Networks Ltd. ("HKBN") commenced operation. There are in addition four smaller FTNS licence holders ("2N providers" i.e. 2nd network providers) who may soon commence operations.

3. Both parties agreed as a fact before us that the Appellant is the *"dominant"* provider in the entire RDEL market in Hong Kong SAR, which market was also agreed as a fact by both parties to be the relevant *"market"* for the purposes of this appeal. The *"market"*, it is important to note, is the entire RDEL market in the Hong Kong SAR and not merely the potential customers on the 14 estates.

4. The Appellant's licence had been issued on 29th June 1995, and subsequently amended, but by virtue of section 7 O of the Ordinance, though the licence pre-dated some of the material sections of the Ordinance, it is

> *"deemed to be a licence granted under this Ordinance, and the other provisions of this Ordinance ..... shall apply accordingly."*

Consequently the Appellant is bound by the various provisions of the Ordinance, including in particular sections 7K, 7L and 7N thereof.

General Conditions of the Licence

5. (a) The Application was made pursuant to General Condition 21 of the Appellant's FTNS Licence, which, so far as material, provides that :

"21 (1) The licencee may propose any revision to the tariffs that it has published by submitting details of the proposed revision to the Authority in writing….

(2) … the licencee may only proceed to publish the revised tariffs ***after the Authority has given its approval in writing****.*

(3) The Authority ***will not approve*** *the revision where –*

(a) he considers that the ***proposed revision is in contravention of General Condition 15, 16 or 20(4)*** *or ……*

(b) ……."

(our emphasis)

(b) General Condition 15, 16 and 20(4) provide, so far as material, as follows :

"Anti-competitive conduct

15. (1) (a) A licensee shall not engage in any conduct which, in the opinion of the Authority, has the ***purpose or effect*** *of preventing or* ***substantially restricting competition*** *in the operation of the Service or in any market for the provision or acquisition of a telecommunications installation, service or apparatus.*

(b) Conduct which the Authority may consider has the relevant purpose or effect referred to in subparagraph (a) includes, but is not limited to –

(i) collusive agreements ….

(ii) to (iv) ……

(2) *In particular, but without limiting the generality of the conduct referred to in paragraph (1), a licensee shall not –*

(a) *enter into any agreement, arrangement or understanding, whether legally enforceable or not, which has or is likely to have* ***the purpose or effect*** *of preventing or* ***substantially restricting competition*** *in any market for the provision or acquisition of any telecommunications installations, services or apparatus;*

(b) to (c) ……..

(c) <u>*Abuse of position*</u>

16. (1) Where the licensee is, in the opinion of the Authority, ***in a dominant position*** *with respect to a market for the relevant telecommunications services, it shall not abuse its position.*

(2) A licensee is a dominant position when, in the opinion of the Authority, ***it is able to act without significant competitive restraint*** *from its competitors and customers. In considering whether a licensee is dominant, the Authority will take into account the market share of the licensee, …….(etc.)*

(3) (a) A licensee which is in a dominant position within the meaning in paragraph (1) shall be taken to have abused its position if, in the opinion of the Authority, it has engaged in conduct which has the ***purpose of preventing or substantially restricting competition*** *in a market for the provision or acquisition of telecommunications installations, services or apparatus.*

(b) Conduct which the Authority may consider to fall within the conduct referred to in subparagraph (a) includes, but is not limited to –

(i) predatory pricing;

(ii) price discrimination;

(iii) ……

(iv) tying arrangements;

(v) discrimination in supply of services ***to competitors***.

(our emphasis)

(d) <u>Tariffs</u>

20. (1) The licensee shall publish and charge no more than the tariffs for the service provided under this licence .....

(2) and (3) ……..

(4) The licensee shall not offer any discount to its published tariffs .... (other than a discount calculated in accordance with a formula or methodology approved by the Authority.....) if, in the opinion of the Authority; the licencee is in a dominant position in any market ....."

(our emphasis)

<u>Confidentiality</u>

6. (a) Certain parts of the evidence before us, in particular figures as to past and future market penetration, and profitability figures and percentages, were agreed by both parties to be commercially sensitive and the Board made an order protecting the confidentiality of some of the evidence under Section 32 O (1)(d)(vii) of the Ordinance (see paragraph 7(b) at page 7 below). It was agreed by both parties that it was right that the Board should not reveal such figures publicly in its judgment. Agreeing as we do, we shall accordingly in this judgment,

where appropriate use general terms to indicate the nature of such matters, and by means of a footnote refer to the exact figures which we accept and find in a document confidential to the parties and released only to them, which can of course, should an appeal eventuate from our decision, be available for the Court of Appeal to consider.

(b) Accordingly we make an order pursuant to our powers in section 32 O(1)(d)(vii) of the Ordinance (see paragraph 7(b) at page 7 below), that each party is prohibited from publishing or otherwise disclosing the figures and statements contained in the confidential document provided to the parties with our judgment, which were all figures and statements received on a confidential basis in evidence before the Board; that prohibition is relaxed in so far as the same may be published or disclosed if necessary on a "need to know" basis to employees and officers of the parties, or to legal or other advisors, all of whom shall in turn retain the said confidentiality, or so far as publication or disclosure may be permitted or ordered by the Court of Appeal in the event of an appeal.

Jurisdiction of the Board

7. (a) Section 32 N of the Ordinance so far as material provides that :

"(1) Any person aggrieved by –

(a) an opinion, determination, direction or decision of the Authority ***relating to*** *–*

(i) sections 7K, 7L, 7M or 7N; or

(ii) any licence condition ***relating to*** *any such section; or*

(b) any sanction or remedy imposed ***or to be imposed*** *by the Authority in consequence of the breach of any such sections or any such licence condition;*

*may appeal to the Board against the opinion ....[*etc*.]…. decision ....., as the case may be, to the extent to which it relates to any such section or any such licence condition, as the case may be"*

(b) Section 32 O of the Ordinance so far as material provides that :

"(1) In the hearing of an appeal

(a) …….

(b) every question before the Appeal Board shall be determined by the opinion of the majority of the members hearing the appeal except any question of law which shall be determined by the Chairman ..... and in the case of an equality of votes the Chairman …… shall have a casting vote;

(c) ……..

(d) ….. the Appeal Board may –

(i) subject to subsection 2, receive and consider any material, whether by way of oral evidence, written statements, documents or otherwise, and whether or not it would be admissible in a court of law.

(ii) to (vi)…….

(vii) make an order prohibiting a person from publishing or otherwise disclosing any material the Appeal Board receives;

(viii) ……

.

(2) Subsection (1)(d)(i) ***shall not entitle a person to require*** *the Appeal Board to receive and consider any material* ***which had not been submitted to or made available to the Authority*** *at any time* ***before*** *the opinion……* ***decision*** *..... referred to in section 32 N(1)* ***was ….. made*** *……*

(3) *…….*

(4) *After hearing an appeal, the Appeal Board shall determine the appeal by* ***upholding varying or quashing*** *the appeal subject matter and* ***may make such consequential orders*** *as may be necessary.*

(5) to (7) ……..”

(our emphasis)

8. (a) We have borne in mind the provision of section 32 O (1)(b) but in fact the Board's decisions on the facts as set out herein have been unanimous. So far as matters of law are concerned, as indicated to the parties during the hearing and without any objection being made by them, the Chairman has discussed matters of law with the two distinguished lawyers coincidentally sitting on this Board who had of course heard the legal submissions made, but it is he alone who has *"determined"* and made such decisions.

(b) The appeal has proceeded by way of re-hearing as is envisaged in section 32 O (1)(d)(i) (*"receive and consider any material ……"*). It is to be noted that section 32 O(2) disenables any party *"to require"* the Board to *"receive and consider"* material which was <u>not</u> before the TA at the time of the Decision; but the obverse of this is that the Board accordingly is entitled to consider such fresh or other evidence if in its judgment it considers it right in the circumstances of the case so to do, as appears to be the legislative intention of Part VC of the Ordinance. During submissions each party agreed and submitted that the Board was entitled, if it considered it right to do so, to consider the fresh evidence tendered on each side on this appeal, and arguments based thereon.

9. (a) In this appeal it is to be noted in particular that the basis advanced by the TA to resist the appeal are significantly different in certain important respects to those upon which the Decision of the TA was based. The reasons the TA has advanced before us essentially are that they submit that B4G1F on the facts of this case constitute breaches of Sections 7K and/or 7L and/or 7N of the Ordinance, and that the Board should not by allowing the appeal in effect permit the Appellant to act contrary to the Ordinance, whether or not that might be contrary to their Licence. As the Respondent submitted in Proposition 2 of its Propositions in Closing :

> *"Section 7N is the ultimate determinant …… If B4G1F were not caught by 7N, then it would not fall foul of GC15/16 : if B4G1F were caught by 7N, it could not be approved under GC21".*

But the TA's Decision was taken under General Conditions 15 and 16 where the TA's *'Conclusion'* was that

> *"……. the proposed promotion …… has the purpose or effect of preventing or substantially restricting competition…. contrary to General Conditions 15 and 16….."*

It should be noted however that important wording in the above Sections of the Ordinance (*"conduct .... which has the …… effect of .... substantially restricting competition"*) was specifically addressed, albeit in a different context, in the Decision of the TA and formed part of the reasoning for the refusal of the Application, under two Conditions dealing with matters other than *"non-discrimination"*, which is the subject matter of Section 7N.

(b) We have considered whether in these circumstances the Board is entitled to, or should in the circumstances, consider such new evidence, reasons and arguments advanced by either party. We have concluded that we are entitled to, and indeed should on the facts of

this case, adjudicate on the basis of all the documents and evidence placed before us, including such new evidence and matters, reasoning and arguments. The factual basis of the Decision and of matters arising in this appeal are essentially the same; it is only the legal route to resist the Appellant's application which is different, and under each route the important wording is similar.

(c) In the General Conditions and in the Ordinance the words *"in the opinion of the Authority"* appear, but as the Appeal is a re-hearing it is plain that when deciding whether to *"uphold, vary or quash"* the Decision, it is the opinion of the Board, not of the TA, which matters.

Relevant Sections of the Ordinance

10. (a) Section 7K of the Ordinance, so far as material, provides as follows :

"Anti-competitive practices

*(1) A licensee shall not engage in conduct which, in the opinion of the Authority, has the **purpose or effect** of preventing or **substantially restricting competition** in a telecommunications market.*

(2) The Authority in considering whether conduct has the purpose or effect prescribed under subsection (1) is to have regard to relevant matters including, but not limited to –

(a) agreements to fix the price in a telecommunications market;

(b) ..... preventing or restricting ..... supply ..... to competitors;

(c) agreements .....to share any ..... market ..... on agreed ..... lines;

(d) the conditions of relevant licences.

(3) Without limiting the general nature of subsection (1), a licensee engages in conduct prescribed under that subsection if he –

(a) enters into an agreement, arrangement or understanding that has the purpose or effect prescribed by that subsection;

(b) ..... (mandatory bolt-ons of other equipment)*;*

(c) ..... (undue preference to or from associated persons)*"*

(b) Section 7L , so far as material, provides as follows :

"<u>*Abuse of position*</u>

(1) A licensee in a dominant position in a telecommunications market shall not abuse its position.

(2) A licensee is in a dominant position when, in the opinion of the Authority, ***it is able to act without significant competitive restraint*** *from its competitors and customers.*

(3) In considering whether a licensee is dominant, the Authority shall take into account relevant matters including, but not limited to –

(a) to (e) ……. (market share; pricing power; barriers to entry by other; degree of product differentiation and sales promotion).

(4) A licensee who is in dominant position is deemed to have abused its position if, in the opinion of the Authority, the licensee has engaged in conduct which has ***the purpose or effect*** *of preventing or* ***substantially restricting competition*** *in a telecommunications market.*

(5) The Authority may consider conduct to fall within the conduct referred to in subsection (4) as including, but not limited to -

(a) predatory pricing;

(b) price discrimination, except to the extent that the discrimination only makes reasonable allowance for differences in the costs or likely costs of supplying telecommunications networks, systems, installations, customer equipment or services;"

(c) Section 7N, so far as material, provides as follows :

"Non-discrimination

(1) Subject to subsection (4) and without prejudice to the operation of section 7K, a licensee ***who is in a dominant position in*** *a telecommunications market shall* ***not discriminate*** *between persons who acquire the services in the market* ***on charges*** *or the conditions of supply.*

(2) Subject to subsection (4) – exclusive licencee not to discriminate between lawful acquirers and users for public service and others not providing a public service.

(3) Discrimination includes discrimination relating to –

(a) ***charges****, except to the extent that the discrimination only makes reasonable allowance for difference in the cost or likely cost of supplying the service;*

(b) performance characteristics; and

(c) other terms or conditions of supply.

(4) The prohibitions in subsections (1) and (2) apply only where in the opinion of the Authority such discrimination has the ***purpose or effect*** *of preventing or* ***substantially restricting*** *competition in a telecommunications market."*

(our emphasis)

Comparison of Licence and Ordinance

Anti-competitive Practices

11. (a) Condition 15 of the Licence (paragraph 5(b) at page 4 above) and section 7K of the Ordinance (para 10(a) at page 11 above) cover the same subject matter, anti-competitive conduct, which is defined in almost identical words and which, the Board considers so far as relevant to this case, has the same legal effect, namely that :

> *"A licencee shall not engage in any conduct which, in the opinion of the Authority, has the* ***purpose or effect*** *of preventing or* ***substantially restricting*** *competition in a telecommunications market."*

Examples then are given of relevant matters to be considered by the TA when forming its opinion, and these differ to some extent in the Licence and in the Ordinance; other matters if considered relevant by the TA can also be considered.

Abuse of Position

(b) Condition 16 of the Licence (paragraph 5(c) at page 4 above) and section 7L of the Ordinance (paragraph 10(b) at page 12 above) again cover the same subject matter, abuse of position, in almost identical words which, the Board considers, have the same legal effect, namely that :

> *"A licencee in a dominant position in a telecommunication market shall not abuse its position."*

The definition of what is a dominant position is to the same effect in both the Licence and the Ordinance, namely that the licencee *"is able to act without significant competitive restraint from its competitors and customers"*. So too the Licence and the Ordinance contain a similar but not identical provision, namely that a dominant licencee in the words of General Condition 16 *"is taken to have abused its*

position if …… it has engaged in conduct which has ***the purpose*** *of preventing or substantially restricting competition in a market".*

(c) However the deeming provision in section 7L(4) of the Ordinance is wider by reason of the additional wording *"has the purpose* ***or effect*** *of preventing or substantially restricting competition"*. In both Licence and Ordinance, conduct which the Authority *"may"*, but not must, consider an abuse of position is similar, including *"predatory pricing", "price discrimination"*, and other matters not relevant to this case.

Non-discrimination

(d) Save for the provisions in the Licence of Condition 20 (paragraph 5(d) at page 5 above), there is no mirror image of Section 7N of the Ordinance in the Licence, nor express mention of anti-discrimination. But the essential provision in the Section (*"effect of …… substantially restricting competition"*) was addressed on other grounds in the Decision.

Burden of Proof

12. (a) It is against the background outlined above that the Board has considered upon whom lies the burden of proof. Neither the TA nor the Board can refuse an application for a tariff revision, in this case B4G1F, for no, or no proper, reason, because the various rules of natural justice and fairness apply to any such public law decision.

(b) In these circumstances the Board rules that the burden of proving breaches of the Ordinance rests upon the TA. Indeed leading counsel for the TA, Mr. Richard Fowler Q.C. and Mr. Anselmo Reyes S.C., so accepted in proposition 9 of their written Propositions in Closing,

as too did leading counsel for the Appellant, Mr. Peter Roth Q.C., in paragraph 1 of his Closing Submission.

(c) The standard of proof the Board holds to be the civil standard, namely upon the balance of probabilities. It will be for a later Board to consider if another standard is applicable in any case when the question arising is of an infringement of a section of the Ordinance such that penalties or criminal sanctions are applicable.

(d) So far as the balance of probabilities is concerned the Board has in mind the approach laid down in **AG v. Tsui Kwok-leung** (1991) 1 HKLR 40 at 45 where Kempster JA, with whom the rest of the Court of Appeal agreed, said :

> *"Generally in civil proceedings .... it remains good law that the civil standard of proof obtains albeit when considering, for example, an allegation of fraud, a higher degree of probability will be required than when considering an allegation of negligence. The degree of probability, falling short of satisfaction beyond all reasonable doubt, must be commensurate with the occasion. In cases of great gravity .... the civil standard may well approximate to the criminal...."*

In **ADS v. Brothers** 2000 1 HKLRD 568 at 574-5, in the Court of Final Appeal, Lord Hoffman laid down the same test though in a fraud case, namely that *"the more inherently improbable the act in question, the more compelling will be the evidence needed to satisfy the Court on a preponderance of probability"*. The Board has borne this approach in mind when making its findings.

(e) In this case the TA expressly submits that it does not rely upon any allegation that B4G1F would *"prevent"* competition, nor did the TA argue that the (subjective) *"purpose"* of what the Appellant proposed

was intended to restrict competition (Respondent's Closing Propositions 6 and 7, and oral Closing Submissions) and indeed the evidence confirmed, in our view, that this was a wise concession to make, for there was no evidence led sufficient to establish that such was the Appellant's subjective *"purpose"*. They argued rather only that its (objective) *"effect"* was a forbidden effect under the Ordinance. In these circumstances, the Board has applied the ordinary civil standard of *"more probable than not"* to the various findings we make.

Section 7N

13. We have set out at paragraph 10(c) at page 12 above the provisions of Section 7N, and in paragraph 10(b) at page 11 above the provisions of Section 7L.

14. (a) The Board accept and hold that the Appellant is in *"a dominant position in a telecommunication market"*, and that the *"market"* in question in this case is the entire RDEL market in Hong Kong SAR (see paragraph 3 at page 2 above);

(b) As such it is forbidden under Section 7N(1) to *"**discriminate** between persons ..... in the market ..... **on charges** ....."*. It is clear that B4G1F is (i) a charge, and (ii) that when the entire RDEL market is considered B4G1F is a direct discriminatory charge (as argued by Dr. Helen Jenkins : paragraph 27) because only those on the 14 estates have the opportunity to accept the lower B4G1F charges; and we hold accordingly that B4G1F constitutes a contravention, *prima facie*, of Section 7N(1).

(c) There is no evidence before us, nor did the Appellant suggest, that such discrimination as we find *prima facie* proved as described above,

was justifiable on the grounds of the *"cost or likely cost of supplying the service"*. Accordingly we hold that the *prima facie* discrimination referred to above is not justifiable pursuant to Section 7N(3)(a) (paragraph 10(c) at page 12 above).

15. (a) Subsection (1) is however expressly made subject to subsection (4), so that Section 7N will only be contravened if B4G1F *"has the purpose or* ***effect*** *of preventing or* ***substantially restricting competition****"*;

(b) The TA does not seek to argue that the Appellant's *"purpose"* was to prevent or restrict competition (see paragraph 12(e) at page 16 above);

(c) Accordingly we agree with the submission of leading counsel for the TA, Mr. Richard Fowler Q.C. and Mr. Anselmo Reyes S.C., as they suggest in proposition 7 of their Respondent's Propositions in Closing, that *"accordingly the only issue is whether B4G1F would have <u>the effect of substantially restricting</u> competition"* (their emphasis). That issue has two components : (i) does B4G1F restrict competition at all; (ii) if so, does it do so *"substantially"* ? Upon this issue will depend whether or not there is a breach of Section 7N.

16. It would however follow, if the TA were to succeed in proving an effect which substantially restricts competition, that there will not only be a breach of Section 7N but also the deeming provision in Section 7L(4) (paragraph 10(b) at page 11 above) which deems such competition – conduct the effect of which *"substantially restricts competition"* - to be an abuse of its position by a dominant licencee. So too there would be a breach of Section K(1) (paragraph 10(a) at page 10 above) which forbids conduct which *"has ... the effect of …... substantially restricting competition"*. It is in all these senses

that we accept that the essential issue in this case is whether or not the TA succeeds in proving in respect of any of the said sections that the Appellant's B4G1F promotion would have *"the effect"* of *"substantially restricting competition"* in the RDEL market.

"Substantially Restricting Competition"

17. The same phrase (*"has the purpose or effect of preventing or substantially restricting competition"*) appears, as we point out above, in Sections 7K(1) (anti-competitive practices), 7L(4) (abuse of position), as well as in 7N(4) (non-discrimination). There is no definition in the Ordinance, and in each of the above sections different examples are given of forbidden conduct, not surprisingly in view of the different scope and purpose of each section, though the Board observes that each section, as the examples show, is aimed at different facets of the *genus* anti-competition conduct. For that reason the Board considers and holds that the phrase *"substantially restricting competition"* must in each section be construed in the context of and against the background of the legislative intention of all the sections under discussion taken together , and be construed in the light, inter alia, of the various examples given in those sections. Though the concept and meaning of the phrase is the same in each section, whether or not there is a **substantial** restriction for the purposes of any particular section is essentially a question of fact dependent upon the evidence, and in the light of the particular anti-competition conduct which the individual section in question is forbidding.

18. In **Reg v. Monopolies Commission** (1993) 1 WLR 23 the House of Lords considered the meaning of *"substantial"* in the wording of a statute dealing with monopoly enquiries. Lord Mustill at page 28D pointed out:

> *"..... Otton J ..... after an extensive review of the authorities, in*

which he ***clearly demonstrated that the word "substantial" is*** *(as he aptly put it)* ***like a chameleon, taking its colour from its environment****, concluded……"*

and at page 28H Lord Mustill said :

"I believe that the interpretation .... must proceed by two stages. First a general appreciation of what "substantial" means ***in its present context****. Second a consideration of the elements to be taken into account when deciding whether the requirements of the word ..... are satisfied in the individual case. Approaching the first stage as a matter of common language, no recourse need be made to dictionaries to establish that "substantial" accommodates a wide range of meanings. At one extreme there is "not trifling"; at the other there is "nearly complete" .... In between there are many shades of meaning,* ***drawing colour from their context*** *..... I am glad to adopt, as a means of giving a general indication of where the meaning .... in section 64(3) lies within the range of possible meanings, the expression of Nourse L.J. (1992) 1 WLR 291 at 301G :****'worthy of consideration for the purposes of the Act…..'****"* (our emphasis)

It follows in our judgment that not every restriction will be substantial. If there are several different restrictions, then it is the total effect in combination which must be adjudged as substantial or not in the light of the legislative purpose of the section in question.

Substantially

19. The Board holds that an effect will restrict *"substantially"* for the purpose of the section of the Ordinance in question if it is large enough to be *"worthy of consideration for the purpose"* of the particular section i.e. there is proved a large enough element of anti-competition behaviour, of the type banned under the particular section, as to be sufficient materially and adversely to affect the legislative intention underlying the particular section. Whether or

not in a particular case the effect is *"substantial"* or not is a question of fact. Most actions cause both positive and negative effects : in deciding whether the negative effects are substantial, the negative must be weighed in the balance against the positive effects so as to decide the weight to be given to the anti-competition effect.

20. The Board has noted the meaning given by the TA in paragraph 17 of its Guidelines to the words, which appears to be based on the dictionary definition of *"substantial"*. The Board considers it more appropriate, rather than to take the dictionary meaning, to take the meaning in the context of the section under discussion, as explained above. The effect in question must be at least *"significant"* but need not be *"big"*.

The Cases Cited

21. The Board has had cited to it by the Appellant and by the TA some dozen cases drawn in particular from the European Court but also from some other jurisdictions. They deal primarily with the competition law and policy of the European Community. They are enlightening as to how the European Court of Justice has developed concepts some of which do feature in the relevant provisions of the Ordinance – such as *"abuse of dominance"* in general, and the practice of *"price discrimination"* in particular – and to that extent are helpful to us. But we have to bear in mind that what is said is against the legislative background of the relevant provisions of the Treaty of Rome. Consequently many of the citations though of interest are not necessarily useful in the interpretation of the particular competition provisions of the Ordinance relevant to the present appeal. The wholesale adoption of that case law would not be appropriate without first ensuring that the legal and regulatory framework in question in a particular case were the same in both jurisdictions.

22. Bearing the above in mind, the Board considers that most of the European Community cases cited to us in this case are of limited relevance for the purposes of the present appeal. **Michelin v. Commission** (1983) ECR 3461 contained an illustrative list of factors to be considered in the determination of dominance. However the issue of dominance does not feature in this appeal. While the **Michelin** holding that a dominant undertaking had *"a special duty not to allow its conduct to impair genuine undistorted competition on the common market"* was necessary to explain the concept of abuse, which should then enable a balancing between pro- and anti-competitive effects of conduct under Article 82 of the European Community Treaty, the relevant provisions of the Hong Kong Ordinance enacts that dominant licensee conduct is abusive if it *"has the purpose or effect of preventing or substantially restricting competition in a telecommunications market"*.

23. The case of **Hoffman-La Roche v. Commission** (1979) ECR 461 which does address the issue of discriminatory pricing, is nevertheless also in the Board's opinion not on point. The case deals with secondary line injury under the then Article 86 of the European Community Treaty (now article 82). Under the relevant provisions of the Hong Kong statutory scheme at issue in this appeal, again the focus is on the effect of the conduct on competition in the relevant market *as a whole*, rather than the harm inflicted on trading parties at various levels of trade, which seems to be, by itself, a very important consideration under Article 82.

24. The Board respectfully considers that the other cases cited are similarly not of direct relevance. Unlike the appeal in the present case, **AKZO v. Commission** dealt with predatory pricing at below total average costs intended to eliminate a small competitor from the market. **Compagnie Maritime Belge v. Commission** and **Irish Sugar v. Commission** must be viewed in the light of their own particular fact patterns. In **Compagnie**

Maritime Belge, the company was found to be in a *"near monopoly"* or *"super-dominant"* position, and its conduct targeted **all** routes and schedules on which its competitor was offering competing services. Under these circumstances, no useful analogy can be drawn on the claim of "double benefits" between that case and the present case. **Irish Sugar** was a case that also involved a near monopoly (95% of the Irish sugar market). The market structure and competitive conditions in that case have no resemblance to those in the present case. In both cases, it was found that the **purpose** (rather than, as alleged in this case, the **effect**) of the conduct of the dominant firms was to eliminate competitors. Finally, **Cram and Rheinzink v. Commission** dealt with Article 85 (now Article 81) of the European Community Treaty, which does not address an abuse of dominance issue.

THE BOARD'S FINDINGS OF FACT

25. Having considered all the evidence and argument placed before us by each party, the Board unanimously makes the following additional factual findings which we consider relevant to the issues the Board has to decide.

B4G1F Charges

26. (a) It was accepted in evidence by the experts called by each party, Professor John Kay by the Appellants and Dr. Helen Jenkins by the Respondent, that prices and charges are a most important element governing customer-choice of an RDEL supplier, and hence of competition; in our view it is probably the most important, as indeed the Appellant's customer-surveys show, though there are plainly other relevant factors, in particular a reputation for efficient services, and a recognised brand name. It is significant that a large percentage of changes of providers are motivated to some extent by price[1], though perhaps not solely.

[1] See "Confidential Footnotes"

(b) The published tariff of the Appellant, as agreed by the TA, prior to the Application included an installation charge of $475 and a recurrent monthly charge of $110. The financial effect of B4G1F to the customer during its 10 months run would be that after joining they would not thereafter have to pay the fifth monthly charge of $110, and, if they continued to subscribe, also not the tenth monthly charge, and that the installation charge of $475 would be rebated equally over the 10 months. Thereafter they would revert to paying each month the published tariff charge of $110. In effect over the 10 months B4G1F represented approximately a 20% discount to the monthly charge, or over 40% if the installation charge also is taken into account.

(c) B4G1F was to be run for a year on each of the estates. A customer was entitled to withdraw from it at any time, but would then lose the remaining benefits. Certain 2N promotions contained more restrictive terms in that if they were terminated within a 12 month period certain benefits were lost.

27. The details of the charges offered by the Appellant and three of the 2N providers, each of whom was part of a Group with substantial property interests, are contained in a table set out on page 7 of the Decision. But the figures set out therein were, by agreement of the parties, corrected during the hearing because some of the figures in the original table were mistaken. The correct figures show that the total charges over the period of 10 months, including installation, assuming that B4G1F were approved, would be :

PCCW-HKTC	$880		
HGC	$838	:	in Hutchison/Cheung Kong Group.
WNT&T	$689 - $724	:	in Wharf Holdings Group.
NWT	$728 - $766	:	in New World Development Group.

28. In her evidence Ms. Penny Mok Siu-hing, the Regulatory Affairs Manager of the Appellant, pointed out that *"Janet Wong* (of the Marketing Team) *indicated that in view of the promotions that the 2N providers were offering, she wanted to respond with a new marketing programme to minimise the loss of RDEL customers to the 2N providers (known as 'churn') and to increase the number of PCCW-HKT customers …… and to meet the increasingly effective competition from the 2N providers which PCCW-HKT faced. There was no suggestion that they were seeking a strategy which would force the 2N providers out of the market"*; she then checked the cost assumptions, including the expected positive profit margin[2]. The Board sees no reason in the other evidence to doubt that this was so.

29. (a) In response to a query from the TA prior to the Decision, the Appellant stated in their letter dated 11th June 2002 that in newly-completed estates, as the dominant supplier, it believed that if B4G1F were approved, its take-up rate of new residents would increase on the 14 estates by some 20%; the increased take-up rate would nevertheless be below its overall market share[3] of the approximately 2.1 million total of RDELs in Hong Kong SAR. The arguments before us proceeded on the basis that these figures were probably correct, and it was agreed by both parties for the purpose of the appeal that if B4G1F were allowed to be operated, the Appellant would acquire approximately 20% more of the customers on the 14 estates, than if B4G1F were not allowed.

(b) It follows that the effect of B4G1F would be to reduce the 2N's share of the market of 20,000 households on the 14 estates by approximately 4,400 RDELs, but they would not be excluded from those estates, and would still retain a competitive edge on price. The

[2] See "Confidential Footnotes"
[3] See "Confidential Footnotes"

total of these households represent about 1% of the overall market in question in this case, namely the 2.1 million RDEL services in the Hong Kong SAR.

The Telecommunication Market in Hong Kong

30. (a) Historically the provision of telecommunication services throughout what is geographically Hong Kong SAR was the preserve of a single monopoly provider. The Appellant is the successor or descendant of that original monopolist.

(b) The other RDEL service providers all entered the market in 1995, 1996, 1997 or later. Since entering the market, their joint share of the RDEL market has increased recently at an impressive rate[4], obviously at the expense of the Appellant. Their share is likely to increase further, according to the evidence of the Appellant's research and surveys[5], but the rate of increase is likely to tail off over time (Dr. Helen Jenkins : paragraph 24).

(c) a considerable percentage of those customers who change providers do so when they move address[6]; at other times, there is a customer inertia which tends to inhibit change. This inertia may be overcome by roadshows, door-calls, etc., but in particular, by moving home, especially to new estates where there may well also be a roadshow effect.

(d) special marketing road shows and promotions offered on estates, both existing and new, from time to time by 2N providers have led increasingly to change of providers[7].

[4] See "Confidential Footnotes"
[5] See "Confidential Footnotes"
[6] See "Confidential Footnotes"
[7] See "Confidential Footnotes".

(e) if a 2N provider had an association with the developer of an estate, the penetration by the Appellant of a new estate was appreciably lower[8]; as can be seen (paragraph 27 at page 23 above) several of the 2N providers are in financial groups which include major property developers; this, for various reasons, gives the relevant 2N provider a competitive advantage on such estates as are developed by the property arm of their Group.

(f) As can be seen (see paragraph 27 at page 23 above) the 2N providers compete significantly on price with the Appellant, even if and during any period, B4G1F were to be permitted and in place, and the more so before and thereafter. Before and after the 10 month period, if B4G1F were to apply, when the payment reverted to the tariff rate, the Appellant's price for an equivalent 10 month period thereafter would be $1,100.

(g) The 20,000 households on the 14 estates represent about 1% of the total RDEL market; the extra new subscribers to 2Ns with or without B4G1F in effect would represent only a very small percentage increase in 2N subscribers[9].

(h) The Board was satisfied, bearing in mind, in particular, the evidence of Mr. Chung Chi-yu, that there was no physical bar to access to the 14 new estates by the 2N providers, nor that there was too high a financial hurdle. We accept that in respect of 70% or so of the households on the 14 estates, the use of a PCCW Copper Local Access Loop (LAL) is not needed, and the charge estimated by the

[8] See "Confidential Footnotes".
[9] See "Confidential Footnotes".

TA in its Decision[10] is not payable in those cases, as indeed during the hearing the TA accepted.

(i) Bearing in mind the importance of price as a factor affecting 'churn' (paragraphs 26(a) and 30(d), pages 22 and 26 above), the Board accepts the evidence of Ms. Rita Li Yuk-yi that 'churn' at an increasing rate caused a significant loss of subscribers from the Appellant to the 2Ns in 2001 and 2002[11], and the Board anticipates this trend will continue in the short and medium term.

31. As can be seen from the Decision – and the contrary was not argued before us by the TA – the TA accepted and we hold that B4G1F was not offered by the Appellant at a charge below its long run average incremental cost, and that its pricing was not predatory : see Decision page 5, Analysis.

Price and Competition

32. (a) In the Guidelines issued by the TA in June 1995 *"to assist the interpretation and application of the competition provisions of the FTNS licence"* , the TA, rightly in our judgment, pointed out (paragraphs 42-43) that :

> *"A dominant licencee is not to be discouraged from behaving competitively, competing aggressively……"*

As the European Court of Justice observed in **Compagnie Maritime Belge SA v. Commission** [2000] ECR I-1365 paragraph 117 :

> *"Price competition is the essence of the free and open competition which it is the objective of Community policy to establish ..... It favours more efficient firms and is for the benefit of consumers. Dominant firms not only have the right but should be encouraged to compete on price."*

[10] See "Confidential Footnotes"
[11] See "Confidential Footnotes"

In his evidence, Mr. Au Man-Ho, the Deputy Director General of the T.A. agreed in essence this to be the case (Day 3 p.p. 116, 120) provided, he stressed, that they complied with the licence conditions.

(b) As general statements of principle, special circumstances apart, the Board agrees with the above so far as the RDEL market in Hong Kong SAR is concerned. Competition, on price or on service, is obviously of benefit to the consumers of RDEL services.

But such price competition by a dominant supplier becomes anti-competition when it has the *"purpose or effect of preventing or substantially restricting competition"*; predatory pricing, that is pricing which would not be commercially profitable unless its effect was to change the structure of the market, or such targetted price reductions as in the **Compagnie Maritime Belge v. Commission** case, would be two examples thereof. The dividing line, in the Board's judgment, lies on the one hand between price competition by a dominant supplier at fair prices which is merely intended to gain or retain customers as a response to competition, and on the other hand price competition by a dominant supplier which has the *"purpose or effect of* ***substantially*** *restricting"* the ability of competitors in the market to compete and obtain or hold market share. Loss of market share by reason of the former is the result of a level playing field; in the latter situation, the result of a tilted playing field, as in the two examples given above, is likely to disbenefit consumers in the medium or long term by reducing or eliminating competition with a consequent likely effect thereafter on prices. The legislative intention of the relevant sections of the Ordinance, as it appears to the Board (and as Professor Kay suggests : paragraph 26), is not to favour new entrants to the market, but rather to seek to ensure that *"competition itself"* is not harmed because new entrants suffer substantial and unfair competitive disadvantage by reason of anti-competition conduct by the dominant provider.

Expert Evidence

33. (a) We have carefully considered the evidence of both Professor Kay and Dr. Helen Jenkins, both of whom we consider gave their honest opinions. It is the Board's conclusion that the three criteria suggested by Professor Kay (paragraph 29 et seq.) for weighing whether or not B4G1F has the effect of substantially restricting competition are common sense and helpful against the background of this case, where fair competition by the dominant supplier is not to be prevented, and at the same time a tilting of the playing field to the competitive disadvantage of the 2Ns is not permitted. His criteria are : (1) would the particular offer occur in a normal competitive market ? (2) would some efficient entrants or competitors be excluded from the market, as distinguished from merely losing some market share ? (3) does it give the dominant firm an advantage it would not have in conditions of normal competition, i.e. does it, or does it not, protect competition, as opposed to competitors, and provide a level playing field ?

(b) We agree for the reasons given by Professor Kay (paragraphs 35 et seq) that his tests are not broken by B4G1F. The Board also is of the view that in the present case the effect on competition is to be measured in the entire RDEL market in Hong Kong SAR, and not, as Dr. Helen Jenkins does in some of her comments, by concentrating on the effect in the 14 estates without considering what that effect would have upon the entire RDEL market.

Conclusions

34. There is no doubt that even a 20% or 40% discount in price for consumers, albeit a geographically restricted number of them, is a significant benefit, even though it is time-limited to 10 months.

35. But we are satisfied nevertheless that there are in the B4G1F offer various anti-competition effects including that :

(a) the offer is targetted at a comparatively small group of consumers at a time, and in a place, when they are more liable than usual to consider changing providers, and where the Appellant is the dominant supplier in the Hong Kong SAR, with whom many of the potential customers are already probably subscribers and hence with an inertia not to change providers;

(b) the effect of B4G1F would be to obtain or retain for the Appellant an extra 22% or so of the households on the 14 estates, whilst at the same time charging its normal higher tariff price, with consequently higher profits, to the rest of their customers elsewhere in the RDEL market in Hong Kong SAR;

(c) the offer, though not contractually, would in practice probably have the effect of locking-in the customers for the 10 months, after which customer inertia might well tend to decrease the impetus to change provider, so that the offer contains some of the undesirable characteristics of a loyalty bonus; and thereafter those customers who did not change would pay the Appellant's normal higher tariff charges;

(d) the above is against a background in which new estates such as those in question, tend to be an important entry-portal for 2N providers to break into the market; the 14 new estates constitute about one third of the new households created annually in Hong Kong SAR; the 4,400 customers on the 14 estates 'lost' to the 2Ns by reason of B4G1F is not insignificant compared with the total 60,000 households completed on all new estates : see Dr. Helen Jenkins paragraph 73; consequently it has some effect on the entry-opportunities into the entire RDEL market of the 2N providers;

(e) B4G1F would not be likely to generate more overall business, and consequently would not have what was described by Dr. Jenkins as countervailing 'welfare benefits'.

Substantial Restriction on Competition ?

36. Being satisfied on the evidence before us that the effect of B4G1F would be to restrict competition to some extent, the critical issue is whether such restrictions, taken together, would be *"substantial"*, so as to outweigh the benefit of lower prices to consumers for a period, and be *"worthy of consideration"* bearing in mind the legislative anti-competition intent of the relevant sections of the Ordinance.

37. We consider that the following evidence, which we accept, in particular bears on this question :

(a) the relevant RDEL market against which anti-competition effects have to be measured is not the 14 estates, but the entire 2.1 million RDEL customers in Hong Kong SAR; the 20,000 households on the 14 estates represent only about 1% thereof, the loss to the 2N providers by reason of B4G1F would only be about 4,400 RDELs; if B4G1F were permitted, the Appellant's share of customers on the 14 estates would be less than its overall market share in Hong Kong SAR, so that there would still be some increased market penetration by the 2Ns;

(b) price being the most important factor affecting customers choice, we consider it important that even during the 10 month period of B4G1F, and the more so thereafter, the prices offered by the 2N providers are below those of the Appellants, two of them by about 15% to 20%;

(c) B4G1F lasts for only 10 months;

(d) we notice too the increasing influence of roadshows, door-calls and the like upon customer choice upon both new and existing estates; this fact is of particular importance when taken with (c) above, and

would give the 2N providers on the 14 estates the opportunity to overcome customer inertia, and so to cause increased competition, when the Appellant's prices increased at the end of the 10 month period;

(e) the fact that the three 2N providers in question in this appeal are each a member of an important property Group would mitigate the effect of B4G1F on any estate built by such a Group;

(f) we note that it was accepted by the TA on this appeal that :

(i) the pricing of B4G1F was not predatory, and that it was such as to permit a profit; the evidence of existing prices charged by the 2N providers (paragraph 27 page 23 above) *prima facie* shows that new entrants or competitors would not be prevented by the B4G1F prices;

(ii) it was not the *"purpose"* of the Appellant to *"prevent or restrict"* competition;

(iii) it was not suggested that B4G1F *"prevented"* competition; it was only argued to be the *"effect"* thereof that restricted it.

38. Taking all the evidence into account, in particular that summarised above, the Board holds unanimously that B4G1F does not have the *"effect of .... **substantially** restricting competition."* Consequently because the restriction would not be *"substantial"* we hold that it would not be in breach of the anti-competition intents of sections 7K, 7L or 7N of the Ordinance.

39. We would add that we do not accept the *"salami slicing"* argument put forward by Dr. Helen Jenkins on behalf of the TA, namely that if B4G1F were to be permitted on the 14 estates, it would be very difficult, if not impossible, for the TA to resist similar applications in future on other new estates so that when this happened there would be a considerable effect on the structure of the market, and hence on competition. We do not agree. It would in our view be the duty of the TA, and if applicable of the Board on

appeal, to decide any such other application against the background of all the facts then prevailing in the case in question. It would not follow necessarily in the light of such facts, whatever they were, that such applications would have to be, or would be allowed. It would depend on what was the evidential position.

DECISION

40. The Board unanimously determines the appeal pursuant to Section 32 O (4) of the Ordinance and makes the following Order nisi:

(a) quashing the Decision of the TA dated 14th June 2002 so as to permit the Appellant to introduce B4G1F upon the 14 estates;

(b) allowing the Application dated 16th May 2002;

(c) making an order nisi that the costs of preparing and conducting this appeal be paid by the Respondent to the Appellant, such costs to be taxed if not agreed; such order nisi to become final 28 days from the date hereof unless either party applies to the Board in writing to vary the same before such date;

(d) certifying that in the opinion of the Board it was suitable to brief leading counsel in view of the importance and complexity of the case;

(e) liberty to apply within 28 days from the date hereof, initially in writing:

(i) to apply to amend the wording of any of the above Orders;

(ii) to apply for any orders consequential to the Board's Decision.

(f) In the absence of any such written application, the above Order Nisi to become Final Orders immediately after the expiry of the said 28 days.

Dated this 15th day of August 2003.

John Griffiths S.C., C.M.G., Q.C.
Chairman

Mr. Larry L.K. Kwok J.P.
Member

Mr. Mattheo Bushehri
Member

Telecommunications (Competition Provisions) Appeal Board