

Complaints about Arrangements for the Provision of Telephone and Internet Access Services at Banyan Garden Estate

Complaints against:	Hutchison Multimedia Services Limited (“Hutchison Multimedia”), Hutchison Global Communications Limited (“HGCL”) and PowerCom Network Hong Kong Limited (“PowerCom”).
Issue:	The complainants alleged that the arrangements for the provision of Internet access and residential telephone services at Banyan Garden are unfair and anti-competitive.
Relevant Instruments:	Section 7K(3)(c) of the Telecommunications Ordinance (Cap. 106) (“the Ordinance”)
Case Opened:	November 2003
Case Closed:	July 2004
Decision:	No breach of section 7K(3)(c) of the Ordinance
Outcome:	Case closed
Case Reference:	T261/03

Executive Summary

The Telecommunications Authority (“TA”) has received complaints involving allegations that Hutchison Multimedia, HGCL and PowerCom had each received an unfair advantage from related entities, who had appointed them as telecommunications service providers at Banyan Garden estate. The TA has concluded, however, that no breach of the relevant provision of the Ordinance can be established on the known facts of this matter.

2. In considering these complaints under section 7K(3)(c) of the Ordinance, the TA determined that the above operators did receive advantages from “associated persons” and that the effect of this was arguably to place their competitors at a significant disadvantage. However, he did not conclude that the advantages gained could be considered “unfair” as required under section 7K(3)(c) and therefore has not found that a breach of this prohibition has occurred in this instance.

3. The complaints made to the TA centred on the effects of two service supply agreements by which all residents of Banyan Garden pay for telephone and Internet access services in their monthly management fees, whether or not they use the services provided. Residents complained that this imposition restricted their freedom to purchase similar services from alternative suppliers. Competitors complained that residents were unlikely to purchase their service offerings if they were already required

to pay for the “imposed” services.

4. After receiving submissions from the above licensees and other parties involved in or affected by the arrangements in question, including a number of other telecommunications operators, the TA formed the view that competitors of Hutchison Multimedia, HGCL and PowerCom have been rendered unable to compete on a level playing field in providing services to Banyan Garden residents because:

- i. These competitors were deprived of the opportunity of competing to supply services to residents via a more open tender process that may otherwise have been conducted by Citybase Property Management Limited (“Citybase”), which is the property manager of the Banyan Garden estate and an associated person in relation to each of the above-named telecommunications licensees; and
- ii. The subject arrangements effectively raise the price of competitors’ services *vis a vis* the prices of Hutchison Multimedia and HGCL service offerings, and, in any event, residents are unlikely to subscribe to “duplicate” services unless they have specific needs and are willing to pay above-market prices to satisfy those needs.

5. However, the TA also formed the view that while Hutchison Multimedia, HGCL and PowerCom did enjoy advantages during the process leading up to the signing of the relevant supply agreements and continue to enjoy advantages as a result of these events, it cannot be concluded that these advantages were unfair within the meaning of section 7K(3)(c). This is primarily because these operators had no apparent knowledge that they were being advantaged, and had either acted competitively for the right to be selected or were recommended by an unrelated third party.

6. The TA did not find any evidence that Hutchison Multimedia, HGCL or PowerCom had sought the advantages in question or received them in the knowledge that they were advantages. Although the conferment of the advantages had arguably placed other operators at a significant disadvantage, any regulatory action in this particular case should, in the TA’s opinion, be targeting the person conferring the advantages rather than the operators. However, the TA has no jurisdiction under the Ordinance over the conduct of non-telecommunications licensees.

7. Accordingly, while he acknowledges the complainants’ concerns about the economic disincentives for residents of Banyan Garden to subscribe to alternative service suppliers because of the existence of present contractual arrangements, he does not conclude that the conduct complained of constitutes a breach of section 7K(3)(c) of the Ordinance.

8. The above assessment is based on the facts in this particular case. The TA’s conclusions would likely be different had he found evidence that Hutchison Multimedia, HGCL or PowerCom had engaged in conduct to facilitate the receipt of their advantage. This is also the first case of its kind in which the TA has expressed a view. He therefore does not consider it reasonable that a telecommunications licensee should, without the benefit of the TA’s views, have undertaken the initiative upon receipt of an offer for a

contract from its affiliated entity to check with that entity whether the selection process is a sufficiently open one, so that no unfair advantage would be conferred upon it in the selection process.

9. However, in the future, in view of the special obligations under section 7K(3)(c), the TA considers that a telecommunications licensee should act to put its associated entities, who may be seeking to involve it in a process leading to it being selected as a service provider, on notice of the obligations that section 7K(3)(c) places on its telecommunications business. They should also support their associates in adopting open and competitive selection procedures.

10. Notwithstanding his conclusion that a breach of the above prohibition cannot be established on the available facts of this matter, HGCL and Citybase offered to implement a number of actions to allay the concerns expressed by the TA during his meetings with them. The TA acknowledges the actions proposed, but considers them unlikely, in themselves, to attenuate significantly the competitive impact of the arrangements complained of.

11. In relation to whether section 19B of the Ordinance applies in this case, the TA has concluded that he does not have legal standing to pursue this issue. A breach of section 19B would have the effect of voiding any contractual terms that unreasonably restrict the right of residents to have access to the telecommunications services of their choice. While unable to take direct action himself under this provision, the TA has described in this case summary what he considers to be relevant considerations when assessing whether or not there may exist a breach of this prohibition.

12. The TA's decision in this case has not involved any assessment of the pros and cons of Citybase's decision to bundle telecommunications services with other services paid for by estate residents via their monthly management fees. These arrangements, which do not involve Hutchison Multimedia, HGCL or PowerCom other than as suppliers of the ingredient wholesale services, concern the conduct of a non-licensee and are therefore outside the jurisdiction of the TA's legislated powers. Accordingly, the TA's finding of no breach of section 7K(3)(c) in this matter should not be read as either condoning or condemning Citybase's arrangements with Banyan Garden residents.

The Complaints

13. In October 2003, the Office of the Telecommunications Authority (“OFTA”) began receiving complaints from various sources concerning the supply of broadband Internet access and basic telephone services within Banyan Garden estate. These complaints centred on residents’ alleged lack of choice or involvement in selecting their preferred service provider, and on the effects of these arrangements on alternative service providers.

14. Banyan Garden is a recently completed development consisting of 2,528 residential units located in Cheung Sha Wan in Hong Kong. Banyan Garden was developed by the Cheung Kong Group of companies, and Citybase, a wholly owned subsidiary of Cheung Kong (Holdings) Limited (“CKH”), was appointed to manage the property.

15. In September 2003, Citybase entered into an agreement with Hutchison Multimedia and PowerCom for the supply of broadband Internet access services to all Banyan Garden units (“the IAS Agreement”). It also entered into an agreement with HGCL for the supply of residential direct exchange line telephone services to all Banyan Garden units (“the RDEL Agreement”). Under both agreements, unit owners are required to pay for the supply of the above services by way of a contribution included in their monthly management fee payments.

16. Some Banyan Garden residents complained that they were not consulted as to the choice of suppliers under the above agreements and that they must pay for their services whether or not they actually use them. They allege that the imposition of these services is unfair.

17. Competitors of Hutchison Multimedia, HGCL and PowerCom complained that because residents must make non-refundable payments for these services in their management fees, the effective price of using an alternative service provider is increased by the amount of these payments. In practice, it is alleged that these payments act as a barrier to consumers selecting the services of alternative telecommunications operators.

TA investigations

18. After undertaking a preliminary analysis of the complaints received, OFTA staff identified two potentially relevant prohibitions in the Ordinance. The first prohibition is contained in section 7K(3)(c), which – with the general prohibition in 7K(1) and as far as relevant - states:

- (1) A licensee shall not engage in conduct which, in the opinion of the [Telecommunications] Authority, has the purpose or effect of preventing or substantially restricting competition in a telecommunications market. ...
- (3) Without limiting the general nature of subsection (1), a licensee engages in conduct prescribed under that subsection if he – ...
 - (c) gives an undue preference to, or receives an unfair advantage from, an associated person if, in the opinion of the Authority, a competitor could be placed at a significant disadvantage, or competition would be prevented or substantially restricted.

19. The second potentially relevant prohibition is section 19B, which states:

- (a) A term in a lease agreement, deed of mutual covenant or commercial contract that, in all the circumstances of the case, unreasonably restricts the right of a resident or occupier, or deprives a resident or occupier of the right, to have access to the public telecommunications services of his choice is void on and after the day on which this section comes into operation to the extent only that it imposes such a restriction.
- (b) Subsection (1) shall apply to any agreement, deed or contract entered into before, on or after the day on which this section comes into operation.

20. The TA's considered view is that he would not have the *locus standi* to seek the Court's declaration that any of the terms of the deed of mutual covenants is void under section 19B. Rather, as the law is currently drafted, only an individual who is affected by the arrangement may go to court and seek a declaration of nullity pursuant to section 19B. Accordingly, the TA has focused his investigations on the prohibition set out under section 7K(3)(c).

21. Nevertheless, the TA considers that to the extent that it may be of potential assistance to anyone affected by the arrangements in question that may be considering private action under section 19B, he should offer his observations as to what he believes are likely to be relevant issues under this prohibition. Further discussion of these issues is provided in the latter part of this case summary.

22. In relation to the interpretation of section 7K(3)(c), there are two parts to this prohibition, each with two alternative limbs. First, it is necessary to prove that a licensee either gave an undue preference to or received an unfair advantage from an associated person (the first part). If either of these requirements can be satisfied, it is then necessary to demonstrate that the relevant preference or advantage could place a competitor of the licensee at a significant disadvantage, or prevent or substantially restrict competition (the second part).

23. In this matter, the TA considers the relevant evidentiary questions are whether Hutchison Multimedia, HGCL and/or PowerCom received an unfair advantage from Citybase (an associated person) and whether such an advantage could place their competitors at a significant disadvantage.

24. Unlike other anti-competitive prohibitions in the Ordinance, this interpretation of section 7K(3)(c) does not require proof that particular conduct has the actual purpose or effect of preventing or substantially restricting competition in a telecommunications market. In the TA's opinion, this reflects a policy position that certain arrangements between telecommunications licensees and associated parties require special rules to ensure that competitive processes are not subverted or circumvented through non-arm's length transactions.

25. Direct support for this policy interpretation and for the application of section 7K(3)(c) in the present matter is evident from LegCo Paper CB(01)883/99-00(01) titled "The Administration's Response to the Cable & Wireless HKT (CWHKT)'s Submissions on the Legal and Constitutional Issues Arising from the Telecommunication (Amendment) Bill 1999." That paper was prepared at the time that section 7K and other provisions of the Ordinance were being introduced via the Telecommunications (Amendment) Bill 2000. In it, the Administration specifically stated:

"... CWHKT argues that section 7K does not apply to non-licensees and the TA is therefore powerless to address e.g. property companies affiliated with certain holders of FTNS or PMRS licences that frequently deny, delay or restrict building access to other licensees wishing to install or maintain their telecommunications equipment and blockwiring. This is a misconception. In

fact, anti-competitive practice in collaboration with affiliated companies has been taken into account by section 7K. For example, the licensee is considered to have engaged in anti-competitive practices if it gives preference to, or receives an unfair advantage from, an associated person, which as defined in the Bill, includes affiliated companies.”

26. OFTA staff undertook broad investigations based on complaints received from residents of Banyan Garden and from telecommunications operators. Information was also sought directly from Citybase, Hutchison Multimedia, HGCL and PowerCom regarding the relevant contractual arrangements between them, and the events and circumstances leading up to the execution of the IAS Agreement and the RDEL Agreement.

27. During the course of this investigation, the TA was made aware of other estates in which similar arrangements to those considered here exist. While this information was of obvious interest, it was not directly relevant to the complaints received regarding the arrangements at Banyan Garden, which for present purposes need to be assessed on their own merits. It is the TA's intention to use the present case to outline his analytical approach to these kinds of arrangements generally and his ultimate views on their legality.

28. The key evidentiary issues that have been considered by the TA and subjected to investigation by OFTA staff as summarised here are these:

- (a) Whether Hutchison Multimedia, HGCL and/or PowerCom as licensees under the Ordinance received from an “associated person” an “unfair advantage”: and
- (a) If so, whether such an advantage could place a competitor at a “significant disadvantage.”

Citybase's Submissions

29. As the common party to both the IAS Agreement and the RDEL Agreement, Citybase was able to provide the TA with copies of both documents. It was also able to explain the events and circumstances leading up to the execution of these agreements.

The IAS Agreement

30. The salient features of the IAS Agreement, which is an agreement dated 30 September 2003 between Citybase, Hutchison Multimedia and PowerCom, are these:

- Hutchison Multimedia, as service provider, is responsible for providing and maintaining broadband Internet access services to all residents of Banyan Garden. PowerCom is responsible for the provision of the equipment to facilitate the relevant services and to represent Hutchison Multimedia as agent in its dealings with Citybase.
- The initial term of the agreement is three (3) years. Hutchison

Multimedia has an option to renew the IAS Agreement on the same terms and conditions for a further term of two (2) years.

- PowerCom, as agent for Hutchison Multimedia, invoices Citybase each month in advance for a fixed monthly fee, which is independent of the actual usage of the Internet access services. Hutchison Multimedia does not charge residents directly.

31. According to Citybase, the selection of Hutchison Multimedia and PowerCom under the IAS Agreement was based on responses to a survey questionnaire sent to PowerCom, Hutchison Multimedia and a number of other broadband Internet access service providers. Citybase characterised this 2-page questionnaire and covering letter dated 18 June 2003, which was distributed to 5 Internet access service providers and which sought information about their services and prices, as a request for proposals. According to Citybase, only HGCL, PowerCom and another operator responded to this letter. Citybase stated that the other 2 operators refused to respond despite “repeated follow-up phone calls.”

32. The covering letter to the above questionnaires consisted of the following single, standard paragraph:

敬啓者：

爲提高服務質素及回應市場需求，本公司現正探討於屋苑內引入寬頻服務之可行性，敬希 貴公司填妥夾附之表格於 7 日內（即 2003 年 6 月 24 日或以前）交回本公司，以便作出研究，本公司特此聲明本信件及有關的表格祇作爲調查研究之用，不會構成任何形式的商業合約或法律責任。如有任何查詢，歡迎致電 XXXX-XXXX。與本人聯絡。

[In English translation:

“Dear Sir,

To enhance service quality and in response to marketing needs, this company is now exploring the feasibility of introducing broadband services into our estates. In order to facilitate our study, I should be grateful if you could complete and return the enclosed form to us within 7 days (i.e. on or before 24 June 2003). Please note that this letter and the related form would be used for our study or research purpose only. It would not constitute any business contractual or legal responsibilities in any form. For any inquiries, please contact me at XXXX-XXXX.”

33. According to Citybase, this documentation was based on the usual form and procedures used by it when engaging contractors to provide services in its managed estates in various areas such as cleaning, landscape maintenance, security/CCTV and SMATV. The request was also described as being a generic request relating to all estates managed by Citybase, not just Banyan Garden. On this basis, Citybase said it was not

necessary to provide additional information to the participants in the survey.

34. Citybase further stated that it was well known by all service providers to be a reputable property management company with many residential estates under management. In addition, it noted that its contact details had been included with its requests and that a deadline for responses had been clearly specified. If there had been any doubt as to the purpose of the letter and its intent, it argued, recipients could be expected to contact it for clarification. Accordingly, Citybase felt justified in interpreting any lack of response to its request as meaning that the service providers in question were not interested in working with it.

35. Citybase provided OFTA staff with a table comparing the responses to its survey questionnaire from PowerCom and one other Internet access service provider. It claimed that these responses were the two most competitive in terms of service features, installation complexity, maintenance commitment and costing information. HGCL's response was not "shortlisted" in this sense, nor was any response received from Hutchison Multimedia. As to the subsequent involvement of Hutchison Multimedia as a party to the IAS Agreement, Citybase explained that this occurred after PowerCom had been selected and subsequently disclosed that Hutchison Multimedia was its business partner for the provision of the relevant services.

36. Apart from the follow-up telephone calls (in which only voice-mail messages were said to be left) which it claimed to have made to the two Internet access service providers that allegedly refused to respond to its survey questionnaire as noted, Citybase stated that it did not have any further communications with any service providers prior to selecting PowerCom.

The RDEL Agreement

37. The RDEL Agreement, which is an agreement dated 27 September 2003 between Citybase and HGCL, has essentially the same terms as the IAS Agreement. The main difference is that there are only two parties involved in the RDEL Agreement, that is, there is no equivalent involvement of an equipment supplier such as PowerCom. As with the IAS Agreement, HGCL sends invoices to and receives a fixed monthly fee from Citybase in advance each month, regardless of the actual usage of RDEL services.

38. According to Citybase, the selection of HGCL as the provider of RDEL services to the residents of Banyan Garden was a decision of the property developer, Gingerbread Investments Limited ("Gingerbread"). It further explained that this selection was based on the recommendation of the consulting engineers of the Banyan Garden project, who recommended HGCL to be the blockwiring co-ordinator and network operator at the estate, and that HGCL be selected as the RDEL service provider "to maximize cost efficiency and minimize administrative inconvenience."

Gingerbread's submissions

39. The TA's inquiries with Gingerbread did not add anything further to Citybase's description of events leading up to the selection of HGCL as the counterparty to the RDEL Agreement. Gingerbread contended, however, that it should not be

considered an associated person with respect to HGCL for the purposes of section 7K(3)(c), even though it is a member of the Cheung Kong Group.

40. Through its solicitors, Gingerbread argued that it did not have control over HGCL and that it was itself not under the same corporate control as HGCL given that it was, in this instance, acting as the estate developer in the interests of all the owners of Banyan Garden and on the professional advice of other experts involved in the development. Moreover, it stated it should be the joint owners of the development, not Gingerbread, whose status as potential “associated persons” with HGCL should be assessed.

HGCL and Hutchison Multimedia submissions

41. In accordance with the TA’s original information requests, HGCL provided copies of the IAS Agreement and the RDEL Agreement. It also answered a number of specific questions prepared by OFTA staff concerning the terms of these agreements.

42. In relation to the IAS Agreement, Hutchison Multimedia claimed that it was informed by PowerCom in or around July 2003 that it had been chosen by Citybase to provide Internet services for Banyan Garden. PowerCom subsequently approached it to discuss how they could co-operate in providing the required services. Hutchison Multimedia did not deal directly with Citybase, but appointed PowerCom to act as its agent to negotiate, liaise and deal with Citybase on all matters concerning the negotiation of the IAS Agreement. Hutchison Multimedia stated that its role under this agreement was to provide service support to PowerCom.

43. In response to a query concerning whether it was aware of any tendering process undertaken before the awarding of the RDEL Agreement, HGCL said that it did not know whether Citybase had undertaken any tendering exercise before awarding it the RDEL Agreement and the IAS Agreement to Hutchison Multimedia and PowerCom. In a subsequent submission, however, HGCL stated that it had responded to Citybase’s survey letter “upon the logical assumption that there would be opportunities for supplying broadband services to estates managed by Citybase, and our responses would be considered in that connection.”

44. In relation to the RDEL Agreement, HGCL explained the background to its appointment as the blockwiring co-ordinator and network operator at Banyan Garden. This appointment was set out in an offer letter from a firm of architects and engineers dated 6 June 2001. That offer was accepted by HGCL on 12 June 2001 and was followed by its entering into the RDEL Agreement when construction of the estate was completed. HGCL believes that the fact that it was already the blockwiring provider of the estate assisted it to conclude the RDEL Agreement with Citybase.

PowerCom’s submission

45. PowerCom submitted that it understood Citybase’s letter of 18 June 2003 to have had the purpose of surveying the possibility of introducing broadband Internet access services to residential estates on a bulk purchase or entire estate basis. It commented on the extensive information requested in the attached questionnaire, which

included information “down to a detailed level” and required the endorsement of a company chop. For these reasons, PowerCom said it took the questionnaire very seriously and was eager to submit its formal response.

46. PowerCom’s description of events indicated that it had contacted or had been contacted by Citybase in relation to its response to the questionnaire. Via telephone conversations, PowerCom confirmed that there was no specific information available as to which or how many estates would be involved. It submitted that it did not know whether it would be competing with other service providers, but it “naturally assumed” that this would be the case.

47. PowerCom claimed to have structured its response to Citybase’s questionnaire differently from its standard retail package, taking into account potential savings in sales acquisition costs and promotional expenses, increased speed of sales penetration, return on capital and other factors. Its natural expectation at the time was to be able to conduct further discussions with Citybase after submitting its response. If selected, it anticipated that Citybase would request additional clarification and information on its detailed proposal.

48. After submitting its response, PowerCom had follow-up discussions with Citybase. PowerCom was not aware of any shortlisting process Citybase may have undertaken, but was informed in July 2003 following face-to-face discussions with Citybase representatives that it had been chosen as the Internet access service provider for Banyan Garden.

Information from other operators

49. The TA’s inquiries in relation to the impact of the alleged conduct of Hutchison Multimedia, HGCL and PowerCom concerning the IAS Agreement and the RDEL Agreement on other service providers was twofold. First to determine the extent to which the above companies may have received or obtained an undue preference or unfair advantage, and secondly to assess whether any such preference or advantage (if demonstrated) could have placed these other competitors at a significant disadvantage.

50. OFTA staff also sought to verify the information provided by the above parties in relation to the various factual matters previously discussed, including the manner in which the other operators responded to Citybase’s survey letter of 18 June 2003 and related events.

51. None of the other operators contacted by OFTA staff were familiar with the precise terms of the IAS Agreement or the RDEL Agreement. Nor were any of them aware of the process by which Hutchison Multimedia, HGCL and PowerCom were selected to enter into these agreements. This is notwithstanding Citybase’s claim that it had invited three of them to participate in a competitive tendering exercise in relation to the supply of Internet access services.

52. None of these other operators consented to public disclosure of their identities during the investigation process.

Operator A

53. While a significant provider of Internet access services, Operator A was not sent a survey questionnaire by Citybase. Operator A's submissions to OFTA staff focused on the alleged disadvantages it faced or was likely to face in securing subscribers for its services in the Banyan Garden estate as a result of the IAS Agreement.

54. According to Operator A, it has not yet provided telecommunications services in Banyan Garden. It was able to provide, however, data comparing its share of subscribers in estates with similar arrangements to those in Banyan Garden against those estates where no such arrangements exist between the management company and a network operator. The results suggest, on their face, that Operator A has encountered considerable difficulty in recruiting residents who live in estates where such arrangements are in place.

55. For instance, at one such estate, Operator A claims a market penetration below 0.5% of potential subscribers. This compares with a penetration figure of around 20% in a number of other estates, which Operator A claims is typical where there are no agreements between the relevant management company and telecommunications service providers along the lines of the IAS Agreement.

56. Operator A went on to explain that its inability to attract customers in estates such as Banyan Garden is directly linked to the fact that the vast majority of residents do not want to pay extra for an "additional" broadband service, unless they have specific needs, such as requiring faster access speeds.

Operator B

57. Operator B is a well known provider of RDEL services. It was not, however, contacted by Citybase or the developer of Banyan Garden regarding the provision of such services to residents of the estate.

58. Operator B could not provide direct evidence of its difficulties in securing subscribers at Banyan Garden. It admitted that its lack of success at this estate was largely explained by the fact that it had not undertaken any promotional activities in respect to residents there. However, it claimed that this lack of vigour was itself a reflection of the perceived low potential of securing a significant number of customers given the subject arrangements.

59. Like Operator A, Operator B referred to other estates where similar arrangements exist between the property management company and a telecommunications service provider. With reference to such an example, Operator B claimed to have around 2.6% of the residential subscribers in that other estate. It went on to state that at estates where there were no special arrangements in place, its penetration was significantly higher. It argued that the overriding reason for the lower penetration was that prospective customers would not be reimbursed their payments to the existing supplier should they wish to subscribe to a competitor's service.

Operator C

60. Notwithstanding Citybase's claim that Operator C did not respond to its survey letter of 18 June 2003, Operator C has stated to the TA that it did respond with a completed questionnaire based on its standard price and services list. However, it has no written record of this response, partly because it was not considered to be significant correspondence.

61. Operator C stated that it viewed Citybase's letter as a general survey questionnaire. It further stated that this was confirmed by the covering letter which stated that the information requested was for survey and research purposes and would not constitute any form of commercial contract or legal responsibility. Operator C did not consider the letter to be an invitation to "compete" with other service providers to supply services to Citybase-managed estates.

62. Operator C also said that it did not expect any "further steps" after submitting its questionnaire, and was not advised of any short-listing process or even the outcome that it had been unsuccessful in its "tender" and that Hutchison Multimedia and PowerCom had been selected.

63. Operator C provided OFTA staff with a tape recording of a conversation between prospective residents of Banyan Garden and two real estate salespersons. This information was provided as evidence to the TA that residents were unable to choose alternative telecommunications services providers without also paying for the services provided by HGCL and PowerCom/Hutchison Multimedia whether they used those services or not. One of the salesperson's stated that over 90% of residents chose not to use any other RDEL or Internet access services providers because of the additional cost of doing so.

Operator D

64. Operator D is a provider of Internet access services, and was one of the operators to which Citybase sent its letter of 18 June 2003 and attached a survey questionnaire. Operator D was apparently the only service provider short-listed with PowerCom for the provision of Internet access services at Banyan Garden.

65. Operator D explained to OFTA that it responded to Citybase's letter because it thought that there might be some business potential given the large number of housing estates under its management. It added, however, that it heard nothing from Citybase concerning the information it had provided and was unaware of any subsequent decisions regarding the appointment of PowerCom/Hutchison Multimedia under the IAS Agreement.

Operator E

66. Operator E was listed by Citybase as one of the five "reputable Internet service providers" to which it sent its letter of 18 June 2003. However, Operator E told OFTA staff that it had no record of having received or responded to either the letter or the attached questionnaire.

67. Operator E stated that, in any event, it did not have any plans to tender for or to join any “bulk purchase of Broadband Internet Access Service” for any particular estate or organisation.

TA’s Findings

68. Based on the results of his investigations as summarised above, the TA has carefully considered each of the key evidentiary issues raised by the complainants in this matter. These issues were summarised in paragraph 28 in the following terms:

- (a) Whether Hutchison Multimedia, HGCL and/or PowerCom as licensees under the Ordinance received from an “associated person” an “unfair advantage”: and
- (b) If so, whether such an advantage could place a competitor at a “significant disadvantage.”

69. The TA has sought to present his findings in the context of the arrangements in question, which concern the provision of telecommunications services within a residential estate. He also acknowledges that this is the first case that he has considered under section 7K(3)(c). As such, his decision and reasoning in this matter should provide important guidance in a developing area of commercial activity involving the provision of advanced telecommunications services to residents in Hong Kong’s residential estates.

70. The TA is also mindful of the broader regulatory context in which the laws at issue here exist. In the absence of a general competition law in Hong Kong, the application of sector specific telecommunications laws outside their designated area would be cause for concern. Accordingly, potential competition issues that may be identified outside the scope of present regulations may suggest that a broader regulatory framework would be beneficial to the economy.

71. The TA has had extensive discussions with HGCL and Citybase regarding the issues identified during his investigations. These discussions have resulted in measures to address some of the perceived problems with existing arrangements even where legal prohibitions are ostensibly ineffective. These measures are discussed further in the final section of this case summary.

72. In this section the TA explains his findings on the evidentiary issues noted above, beginning with whether relevant parties are associated persons.

“Associated persons”

73. HGCL is a Fixed Telecommunications Network Services licensee and was at the relevant time an indirect, wholly-owned subsidiary of Hutchison Whampoa Limited (“HWL”), which in turn is owned to 49.9% of its share capital by CKH. Hutchison Multimedia, which holds a Public Non-exclusive Telephone Services licence, was at the time also an indirect wholly-owned subsidiary of HWL. PowerCom holds a Public

Non-exclusive Telecommunications Services licence and was at the relevant time 81% indirectly owned by CKH. The remaining 19% of the shares in PowerCom were at the relevant time held by CLP Telecommunications Limited.¹

74. Under section 2 of the Ordinance, an “associated person” for the purposes of section 7K includes an “associated corporation,” which in relation to a relevant licensee, means:

- a corporation over which the licensee has control, and
- if a licensee is a corporation, a corporation which has control over the licensee or a corporation which is under the same control as is the licensee.

“Control” is further defined under section 2 to mean (a) having a beneficial interest in or control over the exercise of 15% or more of the voting power at a general meeting of the corporation; or (b) having control over the composition of 15% or more of the directors of the board of the corporation.

75. As CKH is the parent company of Citybase and holds 49.9% voting shares in HWL, which was at the relevant time in turn the parent company of HGCL and Hutchison Multimedia, respectively, based on the above description of related companies, Citybase, HGCL and Hutchison Multimedia are all “associated persons” for the purposes of section 2 of the Ordinance. As CKH holds 81% shares in PowerCom, then Citybase, HGCL, Hutchison Multimedia and PowerCom are all “associated persons” for the purposes of section 2 and, therefore, section 7K of the Ordinance.

76. Likewise, Gingerbread is a wholly owned subsidiary of CKH and therefore it and HGCL are “associated persons” for the purposes of sections 2 and 7K of the Ordinance. The argument that Gingerbread’s role was solely that of the developer of Banyan Garden with obligations to act in the interests of the estate’s owners and under the direction of its own management team, does not affect the legal definition of “control” under the Ordinance. Accordingly, the TA finds that Gingerbread and HGCL are associated persons for the purposes of the present analysis.

Receiving an unfair advantage

77. The concepts of “advantage” and “disadvantage” in section 7K(3)(c) are in a sense opposite sides of the same coin. By it receiving an “advantage,” a licensee’s competitors will by definition be “disadvantaged.” The ultimate issue in terms of legal liability is then whether the advantage can be considered unfair and whether such disadvantage can be considered significant. Before that step, however, it is necessary to carefully assess the nature of the advantages, if any, that may have been received by the subject licensees from their associated persons, namely Gingerbread and Citybase.

¹ Hutchison Whampoa Ltd, Cheung Kong (Holdings) Ltd and CLP Telecommunications Ltd sold all their shares in HGCL and PowerCom, respectively, to Hutchison Global Communications Holding Limited (previously known as Vanda Systems & Communications Holdings Ltd) on 12 March 2004. This change however does not affect the present case as the proposal does not have any retrospective effect on current case which occurred before the transfer of shares.

78. In relation to the IAS Agreement, the TA is of the view there is little doubt that Citybase's letter of 18 June 2003, with its enclosed questionnaire, was not a typical invitation to tender in the commonly understood sense. This is evident not only from the face of the documentation itself, but also from the reaction of some of the service providers to which the letter was sent. The fact that not all eligible service providers were invited by Citybase also casts doubt on the efficacy of the claimed tender process.

79. The TA considers that Citybase's claimed intent in sending its letter of 18 June 2003 appears to be inconsistent with the wording of the letter itself. In particular, as has been highlighted by one operator, it is difficult to accept that Citybase was serious about receiving competitive tenders for a large telecommunications project or projects when it used a single paragraph to describe in vague terms the purpose of its letter and added that the information sought was for its own study or research purposes and would not involve any business, contractual or legal responsibilities.

80. Operator C claimed to have submitted its standard price list, which Citybase has not acknowledged it received. Operator E claims not to have received the letter at all. Operator D did respond to Citybase's letter, but had only a vague expectation that "there might be business potential" in it providing the information requested. While HGCL and PowerCom claim to have been more serious about the opportunity to submit their responses, HGCL submitted to the TA that it was unaware whether the selection of Hutchison Multimedia by Citybase had been the result of a tender process.

81. The attempts by Citybase to seek responses from Operators C and E appear to have been somewhat half-hearted. Neither of these operators claims to have been contacted by Citybase in relation to its letter of 18 June 2003, and Citybase itself states that it made "a few" telephone calls to these operators only to leave voice-mail messages.

82. Whether it was by chance that PowerCom was the most enthusiastic respondent to Citybase's letter is difficult to assess. However, the TA is of the opinion that nothing in the actions of Citybase increased the competitive pressure on PowerCom as one would expect to have been the case had Citybase been seeking to secure the most competitive outcome it could. The fact that Citybase considered the lack of response from other operators to its letter to indicate their disinterest in entering into any commercial arrangements to supply their services to Citybase-managed estates defies commercial sense.

83. The TA considers that there would not be any breach of the fair competition provisions in the Ordinance where licensees compete to supply telecommunications services to residents in a development on a wholesale basis. The competition would have taken place at the wholesale rather than the retail level. As to whether the supply of services to the whole development on wholesale basis would lead to a restriction in choice for residents, this is a matter for consideration under section 19B.

84. In relation to section 7K(3)(c), for this particular case, in the TA's opinion, the ease with which PowerCom was enabled to participate and ultimately succeed in the selection process indicates that it received an advantage over other operators. As the

advantage was received from an associated person (Citybase), PowerCom could have committed a breach of section 7K(3)(c) if the advantage is to be considered “unfair”.

85. However, there is no evidence to indicate that either of PowerCom or Hutchison Multimedia had sought, or were aware or should have been aware of, the advantage that they had been given. To the extent that the conferment of the advantages had placed other operators at a significant disadvantage, any regulatory action in this particular case should therefore, in the TA’s opinion, be targeting the person conferring the advantages rather than the telecommunications licensees.

86. The TA has no jurisdiction under the Ordinance over the conduct of non-telecommunications licensees, even though the conduct may prejudice competition in a telecommunications market. There is no general competition law in Hong Kong and conduct which could be unlawful if engaged in by a telecommunications licensee, would be perfectly legal for a non-licensee.

87. In the present matter, an issue arises as to whether the lawful conduct of a non-licensee (Citybase) should create potential liability for one or more telecommunications licensees under the Ordinance. In the TA’s view, if the conduct of the non-licensee does raise concerns about prejudicing fair competition in a telecommunications market, it is not a matter that can be dealt with under the sector-specific regulation under the existing Telecommunications Ordinance.

88. The TA is of the view that for an advantage to be considered “unfair” within the meaning of section 7K(3)(c), some sort of culpability must be attributed to the licensee in question. In other words, the licensee is entitled to be regarded as innocent in circumstances where it can be shown that it honestly held, upon reasonable grounds, a belief in the existence of facts that the advantage being bestowed upon it by its associated entity was not an “unfair” advantage.

89. Accordingly, determining what is fair or unfair in the present context is ultimately an evidentiary issue, and in this case the TA finds that Hutchison Multimedia and PowerCom are innocent rather than culpable in the circumstances for the following reasons:

- (a) The evidence suggests that PowerCom had genuinely believed itself to be competing to supply its services to Citybase and that Hutchison Multimedia’s subsequent involvement arose naturally out of its pre-existing co-operative relationship with PowerCom;
- (b) It was not apparent to either of PowerCom or Hutchison Multimedia from the circumstances at the time of receipt – or by any other means – that an advantage was being bestowed upon them by their associated entity; and
- (c) There is no evidence to indicate that either of the licensees had sought, or were aware of, or should have been aware of, or turned a blind eye to, the advantage that they received.

90. Had there been evidence that Hutchison Multimedia or PowerCom were knowing parties in an arrangement that was clearly contrary to section 7K(3)(c), then sanctions against them under the Ordinance could be expected. Similarly, if there was active co-ordination of arrangements between a licensee and associated persons within the same corporate group leading to the advantage being conferred, this would be cause for concern. However, the present matter is one in which the TA cannot conclude that any of the businesses involved did anything abnormal or were parties to a co-ordinated arrangement designed to give them an unfair advantage.

91. While the TA has identified instances in which the subject licensees were advantaged *vis a vis* their competitors, he has no evidence to show that this was the result of any contrivance on their part. Moreover, the evidence suggests that they were not aware – nor should they have been – of the advantages that they ultimately enjoyed as a consequence of the actions of Citybase. Accordingly, the TA does not find that Hutchison Multimedia or PowerCom received an unfair advantage within the meaning of section 7K(3)(c).

92. In relation to the RDEL Agreement, the TA notes Citybase's claim that Gingerbread's decision to select HGCL was based on the recommendations of an unrelated third party, namely the consulting engineers of the Banyan Garden project. In the TA's view, even though Gingerbread and HGCL should be considered associated persons, it would be difficult to conclude that any advantage that the latter received – unfair or otherwise – emanated exclusively from the former.

93. However, it is by application of the same reasoning as stated above in relation to the IAS Agreement that the TA has formed the opinion that HGCL did not receive an unfair advantage from Gingerbread. In short, the TA has found no evidence that HGCL was in any way a knowing recipient of any advantage that may have received from Gingerbread. The conduct of Gingerbread, like that of Citybase, is not a matter that the TA can consider further under the existing sector specific regulatory framework.

94. The above assessment is based on the facts in this particular case. The TA's conclusions would likely be different had he found evidence that Hutchison Multimedia, HGCL or PowerCom had engaged in conduct to facilitate the receipt of their advantage. This is also the first case of its kind in which the TA has expressed a view. He therefore does not consider it reasonable that a telecommunications licensee should, without the benefit of the TA's views, have undertaken the initiative upon receipt of an offer for a contract from its affiliated entity to check with that entity whether the selection process is a sufficiently open one, so that no unfair advantage would be conferred upon it in the selection process.

95. However, in the future, in view of the special obligations under section 7K(3)(c), the TA considers that a telecommunications licensee should act to put its associated entities, who may be seeking to involve it in a process leading to it being selected as a service provider, on notice of the obligations that section 7K(3)(c) places on its telecommunications business. They should also support their associates in adopting open and competitive selection procedures.

Significant disadvantage to competitors

96. The second relevant limb of section 7K(3)(c) is concerned with whether a competitor “could be” placed at a significant disadvantage as a result of any undue preference or unfair advantage given or received between a licensee and an associated person. Based on the information available to him, the TA has identified a number of disadvantages that he believes could be and in some cases have been experienced by the competitors of Hutchison Multimedia and PowerCom as a result of the subject conduct.

97. Although this discussion is not required for the TA to conclude the present matter, it is nevertheless useful for businesses in the telecommunications industry and in other sectors for him to explain his approach to analysing this limb of section 7K(3)(c). For this purpose, the TA has focused on the IAS Agreement and the events leading up to its execution.

98. While Citybase characterised its letter of 18 June 2003 to five Internet access service providers as a request for proposals, and even as an invitation to compete in a tendering process, as discussed above its submissions on this point do not seem plausible, at least not for the TA who acknowledges his lack of familiarity with the property management industry. The letter itself provides no indication that the attached questionnaire was anything other than a simple information gathering exercise, something that some recipients may have believed was not worth their time to become involved in. Other operators may also have had concerns about how that information could be used, particularly given the known relationship between Citybase, Hutchison Multimedia and PowerCom.

99. Had the recipients of Citybase’s letter realised its significance in terms of their possibly being invited to enter into one or more agreements with Citybase in the form of the IAS Agreement, they may have been more forthcoming with competitive offers. As it is, the perfunctory nature of the exercise signalled that it was only a preliminary inquiry at best.

100. If, as Citybase claims, this was a request for proposals, it would be arguable that the covering letter had omitted important information and may have even been misleading as to its true purpose and significance. Indeed, the initial response from HGCL and Hutchison Multimedia to OFTA staff indicated that even they were not aware whether or not their selection as service providers under the RDEL Agreement and the IAS Agreement, respectively, had been determined by a tender process.

101. Whereas Hutchison Multimedia and PowerCom succeeded in this selection process, none of the other operators was so fortunate. According to Citybase, one other Internet access service provider was shortlisted with PowerCom. However, that service provider has stated that it was unaware of this achievement and was never advised of the ultimate outcome of the selection process, such as it was. Another operator claimed not to have heard anything more from Citybase after submitting its response.

102. Some of the practical effects of these arrangements on other telecommunications operators have been described. The most obvious is the fact that since residents are unable to get a refund of their payments made to Citybase for the

services provided by Hutchison Multimedia, they may well combine this payment with the cost of acquiring similar services from another operator. In many cases, this assessment will result in them deciding not to purchase from any other service provider, even if they are unhappy with current arrangements.

103. Operator A in particular described its lack of success in securing subscribers at other estates where arrangements similar to those that exist under the IAS Agreement are alleged to exist. The relative newness of the Banyan Garden development is the reason given for its lack of penetration there, although it is also apparent that its expectations of gaining its “normal” penetration levels at this estate are low. Operator B made similar submissions.

104. Having concluded that none of Hutchison Multimedia, HGCL or PowerCom received an unfair advantage from Citybase within the meaning of section 7K(3)(c), it is not necessary for the TA to form a concluded view on whether the advantage that these licences may have received meant that their competitors were significantly disadvantaged. Nevertheless, the observations above serve as a useful record of the circumstances of this particular case, and may assist in assessing future cases under this provision.

105. In the TA’s view, the nature of the selection exercise undertaken by Citybase did and continues to result in a disadvantage to other operators in the telecommunications market. He is also of the opinion that the disadvantages noted could be considered significant. However, these disadvantages are not something that can be addressed directly under section 7K(3)(c) given that other elements of this provision cannot be satisfied on the evidence available.

Section 19B

106. Regarding the apparent loss of choice for residents when Citybase or any other management company contracts for telecommunications services in the way that has occurred in Banyan Garden, this is not something that can be directly addressed under section 7K(3)(c). This issue would seem more appropriately considered under section 19B of the Ordinance.

107. Section 19B(1) provides that a term in a lease agreement, deed of mutual covenant or commercial contract that, in all the circumstances of the case, “unreasonably restricts” the right of a resident or occupier, or deprives a resident or occupier of the right, to have access to the public telecommunications services of his choice is void to the extent only that it imposes such restriction.

108. As noted, the considered view is that the TA would not have the *locus standi* to seek the Court’s declaration that any of the terms of the deed of mutual covenants is void under section 19B. An individual who is affected by the arrangement may go to court and seek a declaration of nullity pursuant to section 19B.

109. Although the TA is not legally empowered to enforce section 19B, the current case offers an opportunity for discussion of the issues that may involve and require examination before establishing a case under section 19B. In the TA’s opinion, for a

person to be regarded as having contravened section 19B, the words 'in all the circumstances of the case' becomes crucial. This is because section 19B does not constitute an absolute prohibition against every term that restricts residents' rights to have access to public telecommunications services of their choice.

110. When considering all the relevant surrounding facts and circumstances of a case for the purposes of section 19B, the following factors are likely to be considered:

- (a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the resident's requirements could have been met;
- (b) whether the customer knew or ought reasonably to have known of the existence and extent of the term and whether the implications of the tie-in with the licensee were explained to the residents/occupiers before they contracted on those terms;
- (c) whether the residents received an inducement to agree to the term, or in accepting it he had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
- (d) whether other competing operators have encountered difficulty in gaining access to the concerned building for service provision;
- (e) whether the residents concerned have been restricted in choosing their operators;
- (f) was the contractual arrangement made in the request of the residents concerned;
- (g) whether the collective buying power of the surcharge enables the licensees to provide better value for money than would otherwise be the case;
- (h) whether the pricing was initially competitive but has ceased to be so because the licensee has exercised its right to review/increase tariffs; and
- (i) did the procurement of the contracts comply with the Deed of Mutual Covenant to which the property is related and the mandatory terms incorporated therein pursuant to the 7th Schedule to the Building Management Ordinance (Cap. 344).

111. The above factors are non-exhaustive and are intended merely to highlight the kinds of matters that are likely to be relevant should a section 19B case be brought before the Court. As the TA cannot be the enforcement agent of section 19B, he does not intend to give his views on possible responses to these issues other than to note that the subject arrangements would appear to raise real issues of concern in a number of the areas noted.

112. The TA also notes that apart from compatibility with section 19B and the fair competition provisions in the Ordinance, inclusion of telecommunications services as part of the management services in a building estate is apparently not restricted by any other law, including law governing building management. If for any reason the inclusion of telecommunications services as part of the building management services is considered objectionable, this is an issue that cannot be addressed under the Ordinance.

Conclusion

113. The TA is of the view that competitors of Hutchison Multimedia, HGCL and PowerCom could be, and arguably are, placed at a significant disadvantage because of the existence of the IAS Agreement and the RDEL Agreement. This reflects the view that they have been rendered unable to compete against the above operators on a level playing field because:

- i. These competitors were deprived of the opportunity of competing to supply services to the residents of Banyan Garden via a more open tender process that may otherwise have been conducted by Citybase; and
- ii. The subject arrangements effectively raise the price of competitors' services *vis a vis* the prices of Hutchison Multimedia and HGCL service offerings, and, in any event, residents are unlikely to subscribe to "duplicate" services unless they have specific needs and are willing to pay above-market prices to satisfy those needs.

114. However, the TA is also of the view that there is insufficient evidence to show, on the balance of probabilities, that any unfair advantage was actually received by the subject licensees by an associated person in relation to the above arrangements. While Hutchison Multimedia, HGCL and PowerCom did enjoy advantages during the process leading up to the signing of the IAS Agreement and the RDEL Agreement and continue to enjoy advantages as a result of these events, the TA cannot conclude that these advantages were unfair within the meaning of section 7K(3)(c).

115. Accordingly, while he accepts the complainants' concerns about the economic disincentives for residents of Banyan Garden to subscribe to alternative service suppliers because of the IAS Agreement and the RDEL Agreement, he does not conclude that the conduct complained of constitutes a breach of section 7K(3)(c) of the Ordinance.

116. The TA's decision in this case has not involved any assessment of the pros and cons of Citybase's decision to bundle telecommunications services with other services paid for by estate residents via their monthly management fees. These arrangements, which do not involve Hutchison Multimedia, HGCL or PowerCom other than as suppliers of the ingredient wholesale services, concern the conduct of a non-licensee and are therefore outside the jurisdiction of the TA's legislated powers. Accordingly, the TA's finding of no breach of section 7K(3)(c) in this matter should not be read as either condoning or condemning Citybase's arrangements with Banyan Garden residents.

Agreed measures

117. As previously noted, the TA had extensive discussions with HGCL and Citybase during the course of his investigations. From these discussions the TA gained a clearer understanding of a number of factual issues. At the same time, HGCL and Citybase gained a better understanding of the TA's concerns regarding the competitive impact of the arrangements currently in place at Banyan Garden.

118. During discussions, Citybase, on a goodwill basis, proposed a number of measures that could be implemented in order to address some of the issues identified by the TA. These measures include steps to encourage the prospects of greater competition and freedom of choice in relation to the provision of Internet access and RDEL services at Banyan Garden. They also include the practical actions described in paragraph 122 below that HGCL and ideally other telecommunications operators will take in the future to avoid the kinds of unfair competition issues identified in this case.

119. In relation to refunds for those Banyan Garden residents that wish to "opt out" of using the Internet access service provided by Hutchison Multimedia and PowerCom or the RDEL services of HGCL, the TA has been informed by HGCL and Citybase that it is not legally possible for them to give such refunds directly to residents. In support of this view, Citybase relied upon advice received from its lawyers relating to a number of possible refund scenarios.

120. Citybase has agreed, however, to contribute funds into the Banyan Garden management fund on a goodwill basis, and HGCL has no objection to this, so that the Estate Owners Committee ("EOC") or Incorporated Owners ("IO") of Banyan Garden, when formed, can decide on the manner of utilising this contribution. Neither Citybase nor HGCL can stipulate how these funds are actually used by the EOC or IO. Citybase will promote to all residents of Banyan Garden the benefits of using Internet access and RDEL facilities in the estate, regardless of whether they are provided under existing arrangements at Banyan Garden or otherwise by other service providers.

121. Citybase and HGCL have also confirmed that the Banyan Garden EOC or IO will, when established and at the first available opportunity, be given the right to consider and affirm, or (if necessary) to negotiate with HGCL and PowerCom for the purpose of modifying or supplementing the IAS Agreement and the RDEL Agreement. This provides an opportunity for an owners' representative body to determine the form of the existing arrangements. This was, according to the parties, their intention at the time when these agreements were originally agreed.

122. In addition to these initiatives, the TA has made clear his expectation that Hutchison Multimedia, HGCL and PowerCom will in the future notify persons associated with them of their obligations to comply with section 7K(3)(c) of the Ordinance. As mentioned, such notification is useful for alerting third parties to the competition laws that apply only in the telecommunications sector. It can also be evidence on which businesses subject to these laws can rely in defending allegations of unfair advantage or undue preference in the future.

123. It is the TA's expectation that other telecommunications licensees will also follow the measures described here whenever they deal with associated persons in analogous situations. The TA considers that truly competitive tenders and the active involvement of owners' representative bodies wherever possible, are the best ways of avoiding the kinds of issues identified in the present case. Where necessary, the TA will continue to undertake enforcement action to ensure adherence to the competition law provisions of the Ordinance.