# DECISION OF THE COMMUNICATIONS AUTHORITY

# ALLEGED ANTI-COMPETITIVE CONDUCT ON THE PART OF APPLE ASIA LIMITED AND THREE MOBILE NETWORK OPERATORS IN RELATION TO PREVENTING IPHONE 5 HANDSETS AND CERTAIN OTHER APPLE DEVICES FROM CONNECTING TO CERTAIN FOURTH GENERATION/LONG TERM EVOLUTION NETWORKS IN HONG KONG

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| **Licensees Concerned:** | Apple Asia Limited ("Apple Asia"), SmarTone Mobile Communications Limited ("SmarTone"), Hutchison Telephone Company Limited ("HTCL") and CSL Limited ("CSL") |
| **Issue:** | Hong Kong Telecommunications (HKT) Limited ("HKT") alleged that the conduct on the part of Apple[1], acting either unilaterally or jointly with SmarTone, HTCL and CSL in what HKT described as "SIM locking" iPhone 5 handsets and certain other Apple devices to prevent these devices from connecting to the fourth generation ("4G")/Long Term Evolution Networks ("LTE") networks in Hong Kong other than those operated by SmarTone, HTCL and CSL was anti-competitive. |
| **Relevant Instruments:** | Sections 7K and 7L of the Telecommunications Ordinance (Cap. 106) ("TO") |
| **Decision:** | No reasonable grounds for suspecting that there may be a breach of section 7K or 7L of the TO on the part of the licensees concerned. |
| **Outcome:** | Initial enquiry is closed without proceeding to investigation into the complaint |

[1] Here "Apple" refers to both Apple Inc. and Apple Asia. In HKT's first letter of complaint of 28 September 2012, HKT's main target of complaint was Apple Asia, but HKT also referred to Apple Inc. by claiming that section 7K(3)(c), a subsection of section 7K under the Telecommunications Ordinance (Cap. 106), applied via Apple Asia and Apple Inc.

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| **Case Reference:** | 7KN/1/8-12 |

## THE COMPLAINT

HKT lodged a competition complaint with the Office of the Communications Authority ("OFCA") vide a letter of 28 September 2012, and followed up with a series of subsequent correspondence, against Apple[2] and SmarTone, HTCL and CSL[3] (the three mobile network operators, or the "three MNOs") in relation to their alleged unilateral and/or joint conduct of "SIM locking" iPhone 5, iPad (4th generation), iPad mini,[4&5] iPhone 5s and iPhone 5c devices (collectively referred to as the "Apple Devices"), which prevented the Apple Devices from connecting to 4G/LTE networks in Hong Kong other than those operated by the three MNOs (the "Restriction"). HKT alleged that such conduct had contravened the competition provisions[6] of the TO and the statement entitled "Way Forward of SIM Lock" (the "SIM Lock Statement") issued by the former Telecommunications Authority ("TA") in February 1997[7].

## PROCEDURAL HISTORY

### Initial Handling of the Complaint

2. HKT submitted its initial complaint to OFCA towards end September 2012, a week after the launch in Hong Kong of iPhone 5 handsets which were

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[2] See footnote 1.

[3] On 14 May 2014, HKT Limited, which wholly owns HKT, completed the acquisition of CSL New World Mobility Limited, which wholly owns CSL. On 15 May 2014, the unified carrier licence held by CSL for providing mobile network services was transferred to HKT. For the CA's decision to give conditional consent to the acquisition by HKT of CSL under section 7P, the merger and acquisition provision under the TO, see http://www.coms-auth.hk/filemanager/statement/en/upload/270/decision_20140502_e.pdf.

[4] In this decision, reference to iPad models is limited to those models with cellular connectivity.

[5] Subsequently, in or about late January 2013, iPad (4th generation) and iPad mini were found to be able to connect to all the 4G/LTE networks in Hong Kong.

[6] HKT specifically referred to sections 7K and 7L of the TO.

[7] The SIM Lock Statement is available at http://tel_archives.ofca.gov.hk/en/tas/mobile/ta970220.html.

equipped with connectivity to 4G/LTE networks operating at the 1800 MHz frequency band. HKT alleged that Apple Asia[8], either unilaterally or jointly with SmarTone[9], infringed the SIM Lock Statement, section 7K (more specifically sections 7K(1), 7K(2)(b), 7K(3)(b) and 7K(3)(c)), and perhaps section 7L of the TO, by preventing the iPhone 5 handsets from connecting to HKT's 4G/LTE network operating on the 1800 MHz frequency band. It urged the Communications Authority ("CA") to issue an immediate direction under section 36B of the TO directing Apple Asia and SmarTone to refrain from making the provision of iPhone 5 handset conditional upon the person acquiring the iPhone 5 handset "*also acquiring any telecommunications service, either from [SmarTone] or another person*" and/or "*not acquiring any telecommunications service from any other licensee*." HKT also stated its intention of bringing an action for damages under section 39A of the TO[10] in respect of the loss or damage it had suffered due to the alleged breach. The complaint was sent to OFCA by facsimile, mail and email on 28 September 2012. In its covering email to OFCA enclosing the complaint submissions, HKT claimed that the matter was urgent and requested a meeting with OFCA as soon as possible to discuss its complaint.

3. As HKT's complaint was lodged under sections 7K and 7L of the TO, OFCA followed "A Guide on How Complaints Relating to Anti-competitive Practices, Abuse of Dominant Position and Discriminatory Practices Prohibited under Sections 7K, 7L and 7N of the Telecommunications Ordinance are Handled by the Office of the Communications Authority" issued by OFCA on 1 April 2012[11] (the "Procedural Guide") to process HKT's complaint. Under the Procedural Guide, as a preliminary step of processing the complaint, OFCA had to

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[8] In this letter, HKT's main target of complaint was Apple Asia, though HKT also referred to Apple Inc. by claiming that section 7K(3)(c), a subsection of the competition provision section 7K under the TO, applied via Apple Asia and Apple Inc.

[9] As of 28 September 2012, SmarTone was the only MNO whose 4G/LTE network operating on the 1800 MHz frequency band could be connected to the iPhone 5 handsets. SmarTone was also an authorised reseller of iPhone 5 handsets.

[10] Section 39A of the TO provides that "*[a] person sustaining loss or damage from a breach of section 7K, 7L, 7M or 7N, or in breach of a licence condition, determination or direction relating to that section, may bring an action for damages, an injunction or other appropriate remedy, order or relief against the person who is in breach*".

[11] http://www.coms-auth.hk/filemanager/common/policies_regulations/competition/complaint_handle_7KLNe.pdf. The Procedural Guide was first issued on 14 March 2012 by the former Telecommunications Authority following consultation with the telecommunications industry. The CA adopted the Procedural Guide on 1 April 2012.

study whether the complaint submissions contained the requisite information to enable it to proceed further.[12]

4. In response to HKT's request conveyed by email on 29 September 2012, OFCA met with HKT on 4 October 2012 to discuss its complaint. At the meeting, HKT recited the facts on which it relied in lodging its complaint, and the law which in its view should be applied, while OFCA raised a potential jurisdiction issue in relation to whether the CA had jurisdiction over Apple Asia under section 7K, 7L or 36B of the TO in relation to the alleged conduct, assuming that Apple Asia was the party that supplied iPhone 5 handsets to SmarTone.[13]

5. Meanwhile, in parallel with OFCA's processing of HKT's complaint pursuant to the Procedural Guide, and out of concern about the lack of transparent information provided to consumers in respect of the Restriction, OFCA wrote to Apple Asia on 9 October 2012 seeking information on the objective of Apple[14] in implementing the Restriction, the mechanism of imposing the Restriction, the

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[12] Paragraphs 6 to 28 of the Procedural Guide set out the various stages by which a competition complaint is processed by OFCA. In brief, OFCA will first check whether the complaint submission contains the requisite information as set out in an information checklist appendiced to the Procedural Guide. If the complaint submission is found not to have contained the requisite information, OFCA will contact the complainant for supply of the information required. After all the requisite information is supplied, OFCA will examine the complaint and consider whether the matter being complained of is within the scope of the competition provisions of the TO. If the matter is within the scope, the case will proceed to the initial enquiry phase, when OFCA will collect further information considered necessary to enable the CA to decide whether to commence an investigation on the basis that there are reasonable grounds for the CA to suspect that there may be an infringement of the relevant competition provisions. If the CA considers that no such reasonable ground is established, the case will be closed. However, if reasonable grounds are established, the CA may decide to commence an investigation into the complaint, when the parties will be invited to make formal submissions on the complaint and comment on each other's submissions, before the CA decides whether a breach is established.

[13] Apple Asia was holding a Radio Dealers Licence (Unrestricted). However, Apple Asia's dealing in the course of trade in radiocommunications apparatus does not require a licence under the TO, as such dealing is exempted from licensing. See Telecommunications (Telecommunications Apparatus) (Exemption from Licensing) Order: http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/3205BE03AC932047482575EE003AD145?OpenDocument&bt=0. Under its Radio Dealers Licence (Unrestricted), Apple Asia is authorized to import into or export from Hong Kong radiocommunications transmitting apparatus pursuant to section 9 of the TO. Section 9 of the TO provides that "*save under and in accordance with a permit granted by the Authority, no person shall import into Hong Kong or export therefrom any radiocommunications transmitting apparatus* ***unless he is the holder of a licence authorizing him to deal in the course of trade or business in such apparatus***" (emphasis added). The potential jurisdiction issue that OFCA identified was whether the CA had jurisdiction under sections 7K, 7L and 36B of the TO, which catch "licensees" under the TO, over Apple Asia (assuming it was the party that supplied iPhone 5 handsets to SmarTone), when Apple Asia's supply of handsets to SmarTone or other retailers in Hong Kong was exempted from licensing under the TO.

[14] At the time of writing to Apple Asia in October 2012, OFCA made no distinction between Apple Inc. as the manufacturer of the Apple Devices and Apple Asia as its local representative in Hong Kong and referred to either one of them as "Apple" in the correspondence.

information being provided to the general public about the Restriction, and whether Apple was planning to enable more 4G/LTE networks in Hong Kong to be connected to the iPhone 5 handsets.

6. Further to the meeting between HKT and OFCA on 4 October 2012, HKT wrote again to OFCA on 19 October 2012, expanding its complaint submissions on a number of legal issues underlying its complaint, particularly in relation to the jurisdiction of the CA over Apple Asia under the competition provisions and section 36B of the TO.

7. Whilst OFCA was studying HKT's complaint submissions, HKT sent OFCA a further letter on 2 November 2012, enclosing copies of letters to HKT from Apple Inc. (via its solicitors) and from SmarTone, in which Apple Inc. denied infringing any aspect of the TO including the competition provisions, and SmarTone denied any contravention of the SIM Lock Statement and the competition provisions of the TO. SmarTone declined to entertain any discussion with HKT, citing commercial confidentiality.

8. Also on 2 November 2012, Apple Inc. responded to OFCA's letter of 9 October 2012 through its solicitors, Morrison & Foerster[15], stating that Apple's objective in imposing the Restriction was to ensure a high quality experience for iPhone 5 users when utilizing iPhone 5 handsets with 4G/LTE networks and services that had undergone testing by Apple. Apple denied that the Restriction had anything to do with the "programming of SIM cards and network platforms". It informed OFCA that information about which 4G/LTE networks were supported by the iPhone 5 handsets was available on Apple's website. It further said that it would be increasing the number of 4G/LTE networks that would be supported by iPhone 5 handsets in due course, though it had no fixed timetable for doing so.

9. On 9 November 2012, HKT wrote further to OFCA extending its complaint to cover a similar restriction affecting the new models of iPad equipped with connectivity to 4G/LTE networks operating on the 1800 MHz frequency band, namely iPad (4th generation) and iPad mini (collectively referred to as "iPad Devices"), that had just been released in Hong Kong. The iPad Devices were only

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[15] Morrison & Foerster stated in the letter that it acted for Apple Inc. They then went on to make references to "Apple" in the letter without making a distinction between Apple Inc. and Apple Asia.

able to support the 4G/LTE networks of SmarTone and HTCL operating on the 1800 MHz frequency band. HKT alleged that Apple, SmarTone and HTCL had violated the SIM Lock Statement, section 7K (more specifically sections 7K(1), 7K(2)(b) and 7K(3)(b)) and perhaps section 7L of the TO. HKT reiterated its request for an immediate direction under section 36B of the TO directing the parties to stop the alleged contravention in relation to the iPad Devices.

10. In an email to OFCA on 13 November 2012, HKT further extended the scope of its complaint to cover CSL and HTCL as by then iPhone 5 handsets had been enabled to work on their 4G/LTE networks operating on the 1800 MHz frequency band.

11. On 29 November 2012, having noted from Apple's website that whilst the 4G/LTE networks of the three MNOs were supported by the iPhone 5 handsets, only the 4G/LTE networks of SmarTone and HTCL were supported by the iPad Devices, OFCA wrote again to Apple Asia requesting further information about the application of the Restriction to the iPad Devices, the criteria that Apple used to decide whether to support a 4G/LTE network, and why CSL's 4G/LTE network was supported by the iPhone 5 handsets but not by the iPad Devices.

12. On 12 December 2012, in view of the novelty and complexity of the issues involved, OFCA arranged to discuss the implications of the Restriction imposed on the Apple Devices at the meeting of the Telecommunications Regulatory Affairs Advisory Committee (TRAAC) [16] to solicit views from members of the TRAAC on the potential effects of the Restriction in relation to the Apple Devices as well as similar practices in the mobile terminal equipment market from the perspective of the industry, mobile equipment manufacturers or traders, and consumers, and on what suggested role or action that the industry or Government should take in respect of such practices. After members of the TRAAC had expressed their views, OFCA's then Deputy Director-General (Telecommunications), Mr Y K Ha, who chaired the meeting, concluded the discussion by saying that OFCA had not arrived at any view on the matter and

[16] The TRAAC advises the Director-General of Communications on all economic and technical regulatory issues related to the development of telecommunications in Hong Kong. OFCA is the convenor and chair of the TRAAC. The members include industry members, including the MNOs namely HKT, SmarTone, HTCL, CSL and China Mobile Hong Kong Company Limited.

would be open-minded on the way forward, and would approach individual operators for further discussion.

13. On 14 December 2012, HKT's Managing Director Engineering, Mr Peter Lam, who represented the HKT group of companies at the meeting of the TRAAC, followed up on the matter by sending OFCA a letter urging it not to allow Apple (as he saw it) to usurp the CA's power of type approving customer premises equipment by deciding unilaterally which 4G/LTE networks iPhone 5 users could connect to. On the same day, HKT's Group Managing Director, Mr Alex Arena, wrote to the Chairman of the CA claiming that Apple Asia had usurped the CA's type approval power and that such conduct was in breach of the SIM Lock Statement and section 7K of the TO.

14. On 20 December 2012, HKT wrote to OFCA again asking for a report on its discussion with Apple and seeking confirmation that OFCA would be taking steps to issue an urgent interim direction.

15. On 28 December 2012, OFCA wrote to the three MNOs with a view to ascertaining Apple Asia's role, if any, in the supply of the Apple Devices to them. The three MNOs were provided with an outline of HKT's competition complaint, and were requested to identify the actual entity within the Apple group with which they entered into agreements for the supply of the Apple Devices, and to provide copies of the relevant supply agreements. In response, all the three MNOs denied any involvement in imposing the Restriction on the Apple Devices and, after obtaining assurances from OFCA that the supply agreements would be treated as commercially confidential, provided redacted copies of their supply agreements with Apple Asia.

16. On 2 January 2013, HKT wrote to OFCA reiterating its request for an immediate direction under section 36B of the TO in relation to the Restriction.

17. On 11 January 2013, Apple Asia responded to OFCA's letter of 29 November 2012 through its solicitors, Morrison & Foerster[17], stating that the verification and optimization process of enabling the operation of the iPad Devices

[17] In the letter, Morrison & Foerster referred to Apple Asia Limited as their client. They then went on to make references to "Apple" in the letter without making a distinction between Apple Inc. and Apple Asia.

with 4G/LTE networks was similar to that for the iPhone 5 handsets. As the characteristics of each device platform differed (e.g. voice), the testing and rollout of the support of additional 4G/LTE networks was undertaken on a per-device platform basis. Accordingly, support for a 4G/LTE network on one device platform did not automatically result in support for all device platforms. Apple also denied that the Restriction imposed on the iPad Devices had anything to do with the "programming of SIM cards and network platforms of mobile network operators". It informed OFCA that information about which 4G/LTE networks were supported by the iPad Devices was also available on Apple's website and the information would be updated from time to time.

18. On 16 January 2013, HKT through its solicitors, Clifford Chance, wrote to OFCA expressing concern that OFCA had taken no decision on HKT's request for an urgent interim direction in over three and a half months. They asked OFCA for a clear statement of how it intended to deal with HKT's request by 28 January 2013.

19. On 28 January 2013, OFCA wrote to HKT informing it that in accordance with the Procedural Guide, OFCA considered that the information provided by HKT was inadequate to enable OFCA to assess whether the complaint raised a genuine competition issue warranting the opening of an initial enquiry on the matter, let alone assess whether it would be justified to issue an immediate direction under section 36B of the TO. With reference to the Procedural Guide, OFCA outlined the kind of information that HKT should provide and told HKT that it was looking forward to receiving a full competition complaint submission from HKT by 25 February 2013.

20. In the light of the information obtained about the Restriction from Apple through its solicitors over the past weeks, and in the interest of consumers, OFCA issued a consumer alert on 28 January 2013 to enhance the public's awareness of the Restriction before their purchasing 4G/LTE mobile equipment or subscribing to 4G/LTE services.[18] It also issued a circular letter on the same day to

[18] The consumer alert concerning the purchase of 4G mobile devices, with updates incorporated following its first issue at end January 2013, was posted to OFCA's website on 20 February 2014. http://www.ofca.gov.hk/en/consumer_focus/education_corner/alerts/general_mobile/consumer_alert_on_the_purchase_of_4g_mobile_device/index.html.

MNOs and mobile virtual network operators drawing their attention to the publication of the consumer alert and urging them to make sure that their relevant staff were well apprised of the issues raised in the consumer alert.[19]

21. On 30 January 2013, OFCA wrote to Clifford Chance in reply to their letter of 16 January 2013, denying that OFCA had been slow to deal with HKT's complaint. OFCA explained that it had processed the complaint following the Procedural Guide and conducted preliminary enquiries to identify the parties and the precise nature of the conduct that was being called in question so that it could be determined whether the CA would have jurisdiction[20] to deal with the complaint. Because of the insufficiency of the information that HKT had provided, OFCA said that it was not able to assess whether a genuine competition concern within the scope of the competition provisions of the TO had been raised, such that it was justifiable for OFCA to conduct an initial enquiry into the matter. OFCA nonetheless pointed to the need for protecting consumer interests in relation to the Restriction imposed on the Apple Devices and advised HKT of the measures that it had taken to protect consumers, including issuing the consumer alert of 28 January 2013 and the circular letter of 28 January 2013 as mentioned in paragraph 20 above.

22. Around late January 2013, OFCA noted that the Restriction imposed on the iPad Devices had been removed, and since then, the iPad Devices were able to connect to any 4G/LTE network in Hong Kong including that of HKT.[21]

**HKT's Initiation of Legal Proceedings**

23. On 14 February 2013, HKT lodged an appeal (Appeal No. 31) with the Telecommunications (Competition Provisions) Appeal Board (the "Appeal Board") against "*the opinion, determination, direction or decision of the [CA] contained in or evidenced by its letters dated 28 January 2013 to [HKT] and 30 January 2013 to [Clifford Chance]*" and asked the Appeal Board to direct the CA

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[19] http://www.coms-auth.hk/filemanager/common/circular_letter/circular_letter_20130128_e.pdf.

[20] See footnote 13.

[21] The subsequent models of iPad, namely iPad Air and iPad mini with retina display that were introduced to the market in October/November 2013 were able to support all 4G/LTE networks of Hong Kong.

urgently to issue a direction under section 36B of the TO to Apple Asia to immediately remove the "SIM Lock", and to refrain from importing or selling telephones, telephone operating systems or other telecommunications equipment programmed to restrict their use by network. Although the Restriction on the iPad Devices had by that time been lifted, HKT still maintained its request for an urgent interim direction in respect of both the iPad Devices and the iPhone 5 handsets to ensure that the Restriction on the iPad Devices could not be re-introduced in future.

24. On 20 February 2013, HKT applied to the High Court for leave to apply for judicial review (HCAL 44 of 2013) to challenge the CA's failure or refusal to make a timely decision on its request for an urgent interim direction under section 36B of the TO. This application was subsequently stayed by agreement pending the final outcome of HKT's appeal.

**Suspension of OFCA's Handling of the Initial Complaint between January and July 2013 and the then Appeal Board Chairman's Decision on the Appeal Board's Jurisdiction to Hear HKT's Appeal in June 2013**

25. On 25 February 2013, OFCA's officers met with representatives of Apple and its external counsel to learn more about the technical means by which the Restriction was implemented.

26. Notwithstanding the initiation of legal proceedings by HKT, in relation to OFCA's processing of HKT's complaint, OFCA issued a letter to HKT on 1 March 2013 advising HKT that as OFCA had not received the information requested in its letter of 28 January 2013, pursuant to paragraph 14 of the Procedural Guide, OFCA would not be able to further process HKT's complaint due to insufficiency of information.

27. In response, on 4 March 2013, Clifford Chance wrote to OFCA on behalf of HKT saying that in view of the appeal and judicial review proceedings initiated by HKT, the outcome of which would have a material impact on what further information needed to be provided to OFCA in support of the complaint, HKT proposed to revisit the information request in OFCA's letter of 28 January 2013 after the appeal. Given Clifford Chance's reply, OFCA had no option but to suspend processing of HKT's complaint.

28. The CA moved to strike out HKT's appeal on the ground that OFCA's letters of 28 January and 30 January 2013 did not constitute or contain an appealable decision under section 32N of the TO.[22] This issue was heard as a preliminary question of law on 26 April 2013 by the then Chairman of the Appeal Board sitting alone, who decided on 4 June 2013 that the Appeal Board had no jurisdiction to hear the appeal.[23] HKT was allowed to appeal against this to the Court of Appeal by way of case stated.

**Opening of the Initial Enquiry in August 2013 and its Suspension in February 2014**

29. Due to the initiation by HKT of the legal proceedings and as a result of Clifford Chance's letter of 4 March 2013, OFCA had not been able to further process HKT's complaint during the six-month period between end January 2013 (when OFCA asked for additional information from HKT) and end July 2013 (upon receipt of such information from HKT - see paragraph below).

30. The resumption of OFCA's processing of HKT's complaint was only made possible upon provision by HKT vide Clifford Chance's letter dated 29 July 2013 to Bird & Bird, the CA's solicitors in the appeal and judicial review proceedings, the additional information that OFCA had requested in its letter of 28 January 2013. Clifford Chance expressly stated that the letter of 29 July 2013 was written without prejudice to HKT's position that the information under request was irrelevant to the issues raised in Appeal No. 31 and/or was already within the knowledge of OFCA and the CA, as well as without prejudice to HKT's position in its application to state a case to the Court of Appeal in respect of the then Chairman of the Appeal Board's decision of 4 June 2013.

31. After reviewing the new information provided by HKT, Bird & Bird on instruction of OFCA notified HKT via Clifford Chance on 26 August 2013 that

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[22] Section 32N(1) of the TO provides that "*any person aggrieved by – (a) an opinion, determination, direction or decision of the [CA] relating to – (i) section 7K, 7L, 7M or 7N… may appeal to the Appeal Board against the opinion, determination, direction, decision… as the case may be, to the extent to which it relates to any such section… as the case may be*".

[23] http://www.cedb.gov.hk/ctb/eng/telecom/doc/case_31a.pdf.

OFCA had commenced an initial enquiry into HKT's complaint pursuant to paragraph 16 of the Procedural Guide.[24] During an initial enquiry, OFCA would gather such further information as may be required, to enable the CA to assess whether to commence an investigation into the alleged infringement of the competition provisions of the TO.[25]

32. OFCA accordingly proceeded to invite comments from Apple Asia and the three MNOs on HKT's complaint (providing them with copies of the complaint submissions made by and on behalf of HKT) by letters dated 30 August 2013. In respect of the letter to Apple Asia, OFCA specifically requested Apple Asia to provide information on the detailed mechanism of the Restriction, and identify the entity that was responsible for implementing the Restriction.

33. In the meantime, on 23 September 2013, Clifford Chance wrote on behalf of HKT to Bird & Bird advising OFCA that HKT had tested the newly released iPhone handsets, namely the iPhone 5s and iPhone 5c handsets, which were equipped with connectivity to 4G/LTE networks operating on both the 1800 MHz and 2600 MHz frequency bands. HKT found that both the iPhone 5s and iPhone 5c handsets could not connect to HKT's 4G/LTE networks operating on the 1800 MHz and 2600 MHz frequency bands.

34. On 10 October 2013, Clifford Chance wrote again to Bird & Bird, advising OFCA that HKT had conducted tests on the iPhone 5s and iPhone 5c handsets on the 4G/LTE network of Genius Brand Limited ("Genius Brand")[26] operating on the 2600 MHz frequency band. HKT and HTCL share the 4G/LTE network operated by Genius Brand. According to HKT, the tests it conducted suggested that the iPhone 5c and iPhone 5s handsets could both detect and connect to Genius Brand's 4G/LTE network when an HTCL SIM card was used, but the very same handsets inserted with an HKT SIM card could not. HKT also claimed that users of the iPhone 5 series of handsets who visited Hong Kong from overseas were able to access HKT's 4G/LTE networks when they used roaming service

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[24] Paragraph 16 of the Procedural Guide provides that "*[i]f the matter being complained of is within the scope of the Competition Provisions, the case will proceed to the initial enquiry phase and the complainant will be informed of the same in writing*".

[25] Paragraph 17 of the Procedural Guide.

[26] Genius Brand is a joint venture of the HKT group and the Hutchison group.

through HKT's networks, provided that their 4G/LTE home network was supported by the iPhone 5 series of handsets.

35. The three MNOs responded to OFCA's letters of 30 August 2013 respectively, by reiterating their previous positions that they were not involved in imposing the Restriction, or in breach of the competition provisions of the TO.

36. Apple Asia responded to OFCA's letter of 30 August 2013, and OFCA's subsequent letter of 24 October 2013,[27] by letters dated 27 September 2013 and 21 November 2013 vide its solicitors Morrison & Foerster, and provided copies of redacted supply and dealer agreements with the three MNOs to OFCA, on the basis that the agreements be treated as confidential, and that OFCA gave the parties a reasonable opportunity to make representations to OFCA prior to any proposed disclosure of the agreements.

37. In the letters of 27 September 2013 and 21 November 2013, Apple Asia submitted that the Restriction, which it referred as 4G/LTE enablement for the iPhone 5 series of handsets, was not a "SIM lock". Apple Asia indicated that whether or not 4G/LTE was enabled on these iPhone 5 handsets did not affect whether or not a Hong Kong consumer could use it on a particular carrier's network. According to Apple Asia, iPhone 5 handsets were not SIM-locked and would operate on the networks of all of the local carriers in Hong Kong. It stated that it was Apple Inc. which was solely responsible for determining whether or not to enable 4G/LTE support for iPhone 5 handsets on carriers' 4G/LTE networks in Hong Kong or elsewhere. It alleged that the role of Apple Asia, a wholly-owned subsidiary of Apple Inc. in the 4G/LTE enablement process was limited to assisting with the collection of raw test data in Hong Kong, by deploying two engineers employed by Apple Asia to collect the network data in Hong Kong. Apple Asia denied playing any role in either making the 4G/LTE enablement decision or giving effect to such decision in Hong Kong, and stated that there were no agreements, memoranda or written understandings between Apple Inc. and Apple Asia in relation to the implementation or control of the enablement of 4G/LTE networks in Hong Kong.

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[27] OFCA's letter of 24 October 2013 informed Apple Asia the information provided by HKT via Clifford Chance's letters of 23 September 2013 and 10 October 2013 and asked for its comments.

38. On 26 November 2013, at HKT's invitation, OFCA's officers attended a demonstration session conducted by HKT's staff showing that an iPhone 5 handset inserted with an HKT's SIM card was unable to connect to the 4G/LTE network of HKT.

39. Having regard to the information gathered through OFCA's initial enquiry from Apple Asia and the three MNOs, OFCA considered giving an opportunity to HKT to comment on the submissions made by Apple Asia and the three MNOs. On 30 January 2014, OFCA wrote to Apple Asia and the three MNOs seeking their comments on OFCA's proposal to disclose their submissions to HKT for comments. Whilst the three MNOs did not object to the proposal[28], Apple Asia replied to OFCA on 7 February 2014 requesting that OFCA should continue to maintain the confidentiality of its submissions and the supply and dealer agreements it had provided to OFCA. Apple Asia further advised in its letter that in relation to the proceedings for Appeal No. 31 (see paragraphs 41– 53 below for details), in which Apple Asia was an intervener, it had applied to the Appeal Board for confidential treatment of certain information contained in the Intervener's submissions and of the supply and dealer agreements.

40. OFCA's continued processing of the initial enquiry was suspended at this point in time, viz. in February 2014, despite the fact that the initial enquiry process was near a final stage, in the light of the further development on the front of the appeal proceedings, an account of which is given in the next section.

## Case Stated Hearing before the Court of Appeal and Remittance of Appeal No. 31 to the Appeal Board

41. Whilst OFCA commenced an initial enquiry in August 2013 to look into HKT's complaint, HKT's application to case state the then Appeal Board Chairman's decision of 4 June 2013 (viz. the Appeal Board had no jurisdiction to hear HKT's appeal) continued to progress in parallel.

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[28] CSL and HTCL replied on 7 February 2014 indicating no objection to OFCA's disclosure proposal. SmarTone replied on 21 February 2014 agreeing to disclose a redacted version of its submission.

42. On 29 November 2013, a hearing took place before the Court of Appeal in relation to HKT's case stated application. On 17 December 2013, the Court of Appeal handed down judgment overturning the then Appeal Board Chairman's decision that the Appeal Board had no jurisdiction to hear HKT's appeal.[29] The Court of Appeal held that OFCA's letters to HKT dated 28 January and 30 January 2013 amounted to a decision of the CA which truly engaged section 7K of the TO and was an appealable decision over which the Appeal Board had jurisdiction. The Court of Appeal remitted the case to the Appeal Board for reconsideration and indicated that the issue raised in the appeal was a limited one, that is, "*whether the material already presented [by HKT to OFCA before OFCA issued the letter of 28 January 2013] was adequate or inadequate to enable the [CA] to decide whether to make an interim direction*".[30]

43. On 17 December 2013, HKT via its solicitors Clifford Chance wrote to the Appeal Board requesting an urgent hearing of the appeal. On 19 December 2013, the new Chairman of the Appeal Board indicated his intention to hold a hearing in or before mid-January 2014.

44. On 23 December 2013, the CA's solicitors issued a letter to the Chairman of the Appeal Board inviting the Appeal Board to defer conducting a substantive hearing of HKT's request for an interim direction until the question of the Appeal Board's jurisdiction had been finally determined and Apple Asia had been given an opportunity to intervene in the appeal. The CA's solicitors instead suggested that a case management conference be held before any substantive hearing was scheduled. On 31 December 2013, the Chairman of the Appeal Board advised the parties that a substantive hearing of the appeal should be conducted on 16 January 2014.

45. On 9 January 2014, Morrison & Foerster, acting for Apple Asia, issued a letter to the Appeal Board and submitted that OFCA should be afforded the opportunity to consider the information that Apple Asia voluntarily provided to OFCA for its initial enquiry process and complete its assessment of HKT's

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[29] http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=90912&currpage=T

[30] The CA has applied to the Court of Final Appeal to appeal on the judgment of the Court of Appeal, after the Court of Appeal refused to grant leave on 21 March 2014. The hearing of the leave application is fixed on 28 July 2014 before the Appeal Committee.

complaint. In the letter, it was further stated that if the Appeal Board was minded to consider any substantive order for interim relief at the hearing on 16 January 2014, Apple Asia would request the opportunity to be heard and to make appropriate representations to the Appeal Board. Apple Asia's suggestion was opposed by HKT. Morrison & Foerster issued a further letter to the Appeal Board on 13 January 2014 reiterating Apple Asia's request to be heard if the Appeal Board were minded to consider any interim direction against Apple Asia at the hearing on 16 January 2014. On 14 January 2014, the Chairman of the Appeal Board directed that Apple Asia's application to intervene in the appeal proceedings would be heard on 16 January 2014, prior to the commencement of the substantive hearing.

46. In tandem, in the written submissions filed on behalf of the CA to the Appeal Board before the hearing on 16 January 2014, the CA reiterated, yet again, that the most appropriate course for the Appeal Board to take would be to allow OFCA and the CA to complete the initial enquiry and come to a substantive view as to whether a genuine competition issue had arisen against Apple Asia within the scope of the competition provisions of the TO relied upon by HKT and, if so, whether any immediate action by way of an interim direction should be made.

47. Despite the repeated submissions of the CA to the Appeal Board in paragraphs 44 and 46 above, the Appeal Board proceeded to conduct its substantive hearing. In deference to the Appeal Board's decision, OFCA, having consulted the CA, suspended the further processing of the initial enquiry in February 2014, despite that by then, it had progressed to a mature stage, when OFCA was ready to submit its analysis and recommendation to the CA on way forward.

**Substantive Hearings Conducted by the Appeal Board**

48. The hearing before the Appeal Board on 16 January 2014 eventually only dealt with Apple Asia's application to intervene as an interested party. At the end of the hearing, the Appeal Board allowed Apple Asia's application and postponed the substantive hearing to 10 March 2014. The Appeal Board further issued directions to the parties, namely HKT, the CA and Apple Asia, to file evidence and submissions for the hearing on 10 March 2014, and it specifically

invited Apple Asia to make their position clear in relation to the process by which customers of HKT had been prevented from accessing its 4G/LTE network when using the Apple Devices, and information and evidence as to what, if any, agreements or arrangements Apple Inc. and Apple Asia had entered into with the other MNOs. The Appeal Board stated that in the absence of evidence into these two areas, it would consider drawing all necessary adverse inferences on these two areas against Apple Asia and the CA.

49. Pursuant to the Appeal Board's directions made on 16 January 2014, Apple Asia filed its evidence and submissions with the Appeal Board, in which it provided information on the two specific areas as directed,[31] and obtained an order from the Appeal Board to protect the confidentiality of certain information and documents disclosed to the Appeal Board.[32] Before the substantive hearing was to take place on 10 March 2014, SmarTone applied to the Appeal Board to intervene for the purpose of protecting the confidentiality of its agreement with Apple Asia. The Appeal Board rejected SmarTone's application for intervention.[33]

50. On 10 March 2014, the substantive hearing of Appeal No. 31 took place. At the end of the hearing, the Appeal Board requested all parties to file further written submissions by 14 March 2014, which the parties duly obliged, on the construction of section 7K(3)(b) of the TO, upon which HKT relied to claim a "*per se*" breach on the part of Apple Asia.

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[31] The submissions and materials filed by Apple Asia with the Appeal Board encompassed similar materials submitted to OFCA previously, including an explanation of the process of LTE enablement, and the provision of redacted agreements between Apple Asia and the three MNOs.

[32] Apple Asia sought an order from the Appeal Board that the agreements with MNOs be made available only to the Appeal Board and not disclosed to HKT or the public. Apple Asia also asked that certain specific information on the LTE enablement process not be disclosed to the public and only be made available to HKT subject to a protective order limiting the use and disclosure of that information to the Appeal Board proceedings and for making submissions to OFCA in the context of its ongoing inquiry. By letters of 12 February 2014 and 19 February 2014, the Appeal Board directed that all parties to the appeal be provided with information on the LTE enablement process, but the information was not to be divulged at the hearing without leave of the Appeal Board and there be an order prohibiting the publication, disclosure or use by HKT (other than for the purposes of the appeal) of the information save by leave of the Appeal Board. On the agreements with the MNOs, the Appeal Board directed that they be disclosed to the solicitors and counsel for HKT in the redacted form, and that specified staff of HKT be permitted to read and consider those agreements for the purposes only of giving instructions to HKT's lawyers in the appeal.

[33] SmarTone then sought leave from the High Court to apply for judicial review against the Appeal Board's decision. The High Court rejected SmarTone's application.

**Findings of the Appeal Board and the Directions It Issued**

51. On 16 April 2014, the Appeal Board issued its decision ("Appeal Board Decision"),[34] in which a number of findings were made, including that:-

(a) The Restriction was not justified by any genuine concern on the part of Apple Asia or Apple Inc. regarding the performance of HKT's network, nor by any professed need to test and enable that network. The Appeal Board held that Apple Asia's objections to HKT's network on technical grounds were not *bona fide*;

(b) The SIM Lock Statement did not apply to the Restriction on the ground that the Appeal Board did not feel able to take a broad view of the SIM Lock Statement as submitted by HKT;

(c) A breach of section 7K(3)(b) of the TO as submitted by HKT could not be established. The Appeal Board took the view that the provision clearly referred to a similar type of situation as "SIM Lock", which did not apply to the Restriction. The Appeal Board was therefore unable to apply an extended or purposive construction to section 7K(3)(b) to cover the present case; and

(d) The investigation and determination of whether a breach of section 7K(1) had in fact occurred would be a matter for the CA, as the Appeal Board considered itself not in a position to investigate all the regulatory, technical, commercial and economic issues that would be required for it to form a *prima facie* view of the merits of the overall complaint regarding the allegation on the breach of section 7K(1) of the TO.

52. On the basis of its findings, the Appeal Board made the following orders:-

[34] http://www.cedb.gov.hk/ctb/eng/telecom/doc/case_31f.pdf

*(1) The Appeal is allowed to the extent that [the Appeal Board] hold[s] that the Appeal Subject Matter (as defined in the Notice of Appeal) truly engages section 7K [of the TO].*

*(2) The Appeal Board refuses to issue or to direct the [CA] to issue any form of interim relief under section 36B [of the TO].*

*(3) The [CA] is directed to proceed diligently and expeditiously with its enquiries into HKT's complaints described more fully in the Summary of Facts annexed as Appendix 1 to its Notice of Appeal and as further supplemented by the evidence, submissions and correspondence lodged in the course of this Appeal.*

*(4) The [CA] is directed to arrive at a decision, including a decision regarding whether or not to make any interim or final direction under section 36B [of the TO] by 1 July 2014.*

53. On 7 May 2014, the CA, HKT and Apple Asia all submitted requests to the Appeal Board to refer their proposed questions of law arising from the Appeal Board Decision to the Court of Appeal for determination by way of case stated. On 21 May 2014, Apple Asia advised the Appeal Board that it did not intend to proceed with its request for case stated, but would provide its comments on the requests for case stated submitted by HKT and the CA. On 19 June 2014, the Appeal Board proposed a draft case stated and invited the parties to comment on the draft. On 26 June 2014, all parties provided comments on the draft to the Appeal Board.

54. Having suspended the further processing of the initial enquiry into HKT's complaint since February 2014 and with the issue in April 2014 of the Appeal Board's order, directing the CA to proceed with its enquiries expeditiously, OFCA is able to resurrect the initial enquiry into HKT's complaint and completed its analysis and recommendation to the CA. The CA sets out in this document its decision in relation to the initial enquiry that OFCA has conducted on HKT's complaint, taking into account not only the information gathered by OFCA during the initial enquiry process, but also the evidence, submissions and correspondence lodged by the parties in the course of appeal as directed by the Appeal Board.

## THE LEGAL FRAMEWORK

### The Competition Provisions

55. The CA is responsible for enforcing the competition provisions of the TO. HKT's complaint referred to both sections 7K and 7L of the TO, but its main thrust of argument was that Apple Asia, unilaterally or jointly with the three MNOs, was in breach of section 7K of the TO. Section 7K provides:-

> *(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) an action preventing or restricting the supply of goods or services to competitors;*
>
> *(c) agreements between licensees to share any telecommunications market between them on agreed geographic or customer 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) without the prior written authorization of the Authority, makes the provision of or connection to a telecommunications network, system, installation, customer equipment or service conditional upon the person acquiring it also acquiring or not acquiring a specified telecommunications network, system,*

*customer equipment or service, either from the licensee or from another person;*

*(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.*

56. HKT also claimed that Apple Asia was perhaps in breach of section 7L of the TO without elaborating on it. Section 7L of the TO provides:-

*(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) ...*

*(4) ...*

*(5) ...*

**CA's Power to Issue Direction under the TO**

57. HKT requested an urgent interim direction under section 36B of the TO to be issued against Apple Asia and the three MNOs. Section 36B of the TO provides:-

*(1) ... the Authority may issue directions in writing –*

*(a) to a licensee requiring it to take such action as the Authority considers necessary in order for the licensee to –*

*(i) ...*

*(ii) comply with any provision of this Ordinance ...*

## Licensees under the TO

58. The competition provisions and section 36B of the TO referred to in the previous paragraphs confer power on the CA to enforce the provisions against a "licensee" under the TO. In respect of the subjects of complaint in this case, Apple Asia is a licensee under the TO by virtue of its holding a Radio Dealers Licence (Unrestricted) (licence number: RU00126664-RU). SmarTone and HTCL are licensees under the TO by virtue of their holding Unified Carrier Licences (UCL No. 018 and No. 004 respectively) for the provision of public mobile radiocommunications services. CSL previously held UCL No.008, but its UCL licence was transferred to HKT on 15 May 2014, after HKT's parent company completed the acquisition of CSL's parent company on 14 May 2014.[35] Currently, CSL does not hold any licence under the TO.

## SIM Lock Statement

59. HKT complained that Apple Asia and the three MNOs were in breach of the SIM Lock Statement. The SIM Lock Statement was issued by the former TA on 20 February 1997 after conducting a public consultation in September 1996.[36] In paragraph 2 of the consultation paper, the former TA defined what constituted the "SIM Lock" function:-

> *The Subscriber Identity Module (SIM) card is a kind of smart cards which contain the relevant personal information and identity of a GSM/DCS customer. Before a customer can access and use the network to which he/she subscribes, he/she needs to insert the relevant SIM card into the handset and then power it up so that the network operator can verify his/her identity and status. The SIM card was originally designed so that a handset could work with different SIM cards to access the services of different networks. However, the proposed "SIM Lock" function can electronically lock a particular handset or certain types of handsets into a network with the result that*

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[35] See footnote 3.

[36] The former TA issued the "*Consultative Paper on 'SIM Lock'*" on 20 September 1996 which is available at http://tel_archives.ofca.gov.hk/en/report/r-condoc/rp96i201.html.

*a customer will have to buy a new handset in order that he/she will be able to use a new GSM or DCS network.*

60. Paragraph 5 of the SIM Lock Statement set out the decision of the former TA on the way forward on the "SIM Lock" issue as follows:-

(a) *The TA does not restrict operators and dealers to use "SIM Lock" for protection of subsidy of equipment provided that the customers are well informed of the amount of any subsidy, the "SIM Lock" arrangement and the conditions for repayment of the subsidy to unlock the "SIM Lock" at the time of purchase of the equipment;*

(b) *The TA would allow operators and dealers to deploy SIM locked equipment to customers for the purpose of deterring theft and fraud or for the enforcement of the rental or installment contracts with the customers concerned. However, the following conditions governing such deployment of "SIM Lock" will apply –*

- *For anti-theft and anti-fraud applications, operators and dealers should inform the customers clearly about such "SIM Lock" arrangement and also provide them with the necessary procedures and methods of unlocking the equipment by the customers themselves or by the operators and dealers free of charge to the customers;*
- *Where the equipment is rented or paid by installments by the customers, operators and dealers will have to advise the customers concerned about the SIM locking arrangement and provide them with the detailed unlocking procedures if they have already paid up the total equipment cost.*

(c) *If "SIM Lock" is solely used for the purpose of tying customers to networks other than for the purposes stated in (a) and (b), it may adversely affect competition in the mobile industry. Therefore, this practice is forbidden.*

*(d) The European Telecommunications Standards Institute (ETSI) is now developing the specification for the "SIM Lock" feature as part of the GSM/DCS standard. The TA requires that the "SIM Lock" feature to be implemented in Hong Kong must be in conformity with the ETSI specification and standard.*[37]

## THE INITIAL ENQUIRY

61. As mentioned in paragraphs 29 above, HKT declined to provide the additional information requested by OFCA's letter of 28 January 2013 to enable it to assess whether the complaint raised a genuine competition issue warranting the opening of an initial enquiry on the matter. The resumption of OFCA's further processing of HKT's complaint was only made possible when HKT provided on 29 July 2013 the additional information that OFCA had requested in its letter of 28 January 2013. After reviewing the information provided by HKT at end July 2013, OFCA commenced an initial enquiry into HKT's complaint in August 2013. The initial enquiry was however suspended in February 2014 due to the impending substantive hearing of the appeal convened on 10 March 2014 by the Appeal Board.

62. Given that the eventual Appeal Board Decision of 16 April 2014 did not fully deal with HKT's complaint allegations,[38] and in view of the Appeal Board's order directing the CA to proceed with its enquiries into the matter expeditiously, OFCA has immediately resumed processing of the initial enquiry after the Appeal Board had issued its decision in April 2014. In accordance with the procedure laid down in the Procedural Guide and having considered the information collected by OFCA from all the concerned parties and studied further the submissions and evidence filed by Apple Asia and HKT for the hearing of the appeal, OFCA has proceeded to make an assessment in order for the CA to form a

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[37] The ETSI did not develop its European Standard governing SIM lock function. Instead, in around 1999, the ETSI adopted the GSM 02.22 specification on Personalization of Mobile Equipment as the ETSI Technical Specification TS 101 624.

[38] The Appeal Board made findings that the SIM Lock Statement and section 7K(3)(b) of the TO did not apply to the Restriction, thus rejecting HKT's allegations that imposition of the Restriction constituted a *per se* breach of SIM Lock Statement and section 7K(3)(b). The Appeal Board however considered itself not in a position to form a *prima facie* view of the merits of the overall complaint, and referred the matter back to the CA to consider whether a breach of section 7K(1) of the TO had in fact occurred. See paragraphs 51 and 52.

view as to whether there are reasonable grounds for the CA to suspect that there may be a breach of the relevant competition provisions of the TO.[39]

## 4G/LTE Networks in Hong Kong

63. HKT's complaint was that the Apple Devices had been "SIM locked" from connecting to the 4G/LTE networks of HKT. There is a need to define what "the 4G/LTE networks of HKT" means in practical terms for the purpose of OFCA's assessment of HKT's complaint.

64. At present, 4G/LTE networks in Hong Kong are operating on the 1800 MHz and 2600 MHz frequency bands. All the MNOs in Hong Kong currently operate their own 4G/LTE networks on the 1800 MHz frequency band. As for the 2600 MHz frequency band, SmarTone, CSL (before the transfer of its UCL licence to HKT on 15 May 2014) and China Mobile Hong Kong Company Limited ("CMHK") have each been assigned with radio spectrum in the 2600 MHz frequency band for building and operating their own 4G/LTE radio access networks, whereas HKT and HTCL share a 4G/LTE network working on the 2600 MHz frequency band operated by Genius Brand. For the purpose of OFCA's assessment in relation to HKT's complaint, reference to "HKT's 4G/LTE networks" covers therefore both the 1800 MHz 4G/LTE network operated by HKT, and that part of the 2600 MHz 4G/LTE network that is operated by Genius Brand and is used by HKT.

## HKT's Complaint Allegations

*Apple Asia's Conduct Alleged to be Anti-competitive*

65. In terms of the conduct of Apple Asia that HKT alleged to be in breach of the competition provisions of the TO, HKT stated in its initial complaint letter of 28 September 2012 that (emphasis added):-

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[39] If the CA considers that there is no reasonable ground for it to suspect that there may be a breach of the relevant competition provisions, an investigation will not be commenced and the case will be closed. If the CA considers that there are reasonable grounds for it to suspect that there may be a breach of the relevant competition provisions, the CA may decide to commence an investigation, in which relevant parties will be invited to make formal submissions. See in particular paragraphs 20 and 21 of the Procedural Guide.

"***the conduct*** *which requires an immediate direction under Section 36B* ***is the introduction of iPhone 5 handsets into the market by Apple***[40] *and ST [SmarTone]* ***which contain a SIM lock function****...*" (page 2 of the letter)

"***Apple*** *in its iPhone 5 operating system and SIM function arrangements* ***lock (i.e. tie and hard bundle) customers to 4G networks selected by Apple****.*" (page 4 of the letter)

"*The iPhone 5 has had this universal connectivity characteristic* ***disabled by Apple***." (page 4 of the letter)

"***Apple's SIM lock arrangement*** *violates Section 7K of the TO*" (page 6 of the letter)

66. In HKT's Notice of Appeal together with the summary of facts annexed as Appendix 1 lodged with the Appeal Board on 14 February 2013, HKT described Apple Asia's conduct as follows (with emphasis added):-

"***Apple***[41] ***has****, without the prior written authorization of the Authority,* ***made the provision of its customer equipment and service, namely the iPhone 5 and its software, conditional upon the person acquiring it also acquiring or not acquiring a specified telecommunications network from other persons.*** *This is in contravention of section 7K(3)(b) of the Ordinance.*" (paragraph 64 of Appendix 1)

"***Apple's SIM-locking practice breaches both the SIM-lock Statement and section 7K*** *of the Telecommunications Ordinance...*" (paragraph 89 of Appendix 1)

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[40] "Apple" was defined as Apple Asia in the letter.

[41] "Apple" in HKT's Notice of Appeal referred to the company incorporated in Hong Kong and was a licensee under the TO, namely Apple Asia.

67. In HKT's skeleton argument dated 10 January 2014 submitted to the Appeal Board for the hearing on 16 January 2014, HKT described Apple Asia's conduct as follows (with emphasis added):-

> "*There is no dispute that* ***Apple***[42] ***has*** *since the release of the iPhone 5* ***imposed a SIM lock*** *upon customers buying the iPhone and the iPad. What is alleged and admitted are particulars of the universals contained in section 7K(3)(b).* ***Apple has, without the prior written authorization of the Respondent, made the provision of customer equipment and a telecommunications service,*** *namely certain models of the iPhone and the iPad to the extent of their 4G connectivity,* ***conditional upon the person acquiring it also acquiring a specified telecommunications network or service from another person,*** *originally SmarTone, and later other mobile network operators (but not the Appellant).*" (paragraph 36 of the skeleton argument)

> "***Apple provides 4G connectivity*** *on its iPhones and iPads* ***to consumers conditional upon the consumer acquiring a telecommunications network or service from SmarTone or other approved mobile network operator***." (paragraph 45 of the skeleton argument)

68. In the affidavit of Mr Richard Wayne Midgett II dated 28 February 2014 filed on behalf of HKT for the appeal hearing on 10 March 2014, he described the conduct of "Apple"[43] as follows (with emphasis added):-

> "***Apple were allowing access*** *to the same Genius Brand 4G Network for Hutchison customers…* ***but that they were not allowing access*** *to the Genius Brand 4G Network for HKT customers. It subsequently became apparent… that* ***Apple was also allowing foreign iPhone users who were customers of Apple "approved" overseas operators to roam using HKT's 4G networks in Hong Kong***…" (paragraph 47 of Mr Midgett's affidavit)

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[42] "Apple" was defined as Apple Asia in the skeleton argument.

[43] "Apple" was not defined in the affidavit.

> *"... it appears that* ***Apple has blocked 4G access for HKT customers… and that Apple is allowing customers of network operators it has "approved" to roam on HKT's 4G networks*** *in Hong Kong.*" (paragraph 49 of Mr Midgett's affidavit)

69. In HKT's submissions in reply to the intervener (i.e. Apple Asia) for the appeal hearing on 10 March 2014, HKT described Apple Asia's conduct as follows (with emphasis added):-

> "*In the absence of prior authorization, it is indisputably a breach of s 7K(3)(b) for* ***Apple Asia to make the provision of Apple iPhones with LTE functionality conditional*** *upon the customer also acquiring a specified telecommunications network, or not acquiring the HKT network.*" (paragraph 45 of the submissions)

> "***Apple Asia has sold LTE capable devices in Hong Kong which are disabled*** *so far as HKT's customers are concerned from working on HKT's LTE network.*" (paragraph 53 of the submissions)

> "*The simple fact is that* ***by selling LTE capable devices, Apple Asia is making their sale as LTE capable devices conditional upon*** *customers also acquiring one of the specified telecommunications networks.*" (paragraph 56 of the submissions)

> "*It is in any event sufficient to show that* ***Apple Asia has****, without prior written authorization of the Authority,* ***imports and supplies customer equipments that have LTE connectivity, but only conditional upon*** *the purchasers also acquiring or not acquiring a specified telecommunications network or system.*" (paragraph 59 of the submissions)

*The Restriction Imposed on the Apple Devices*

70. The Restriction imposed on the Apple Devices was described by HKT as a "SIM Lock". Although users of Apple Devices could still access any

local 2G or 3G networks (including those of HKT's), HKT alleged that the Restriction would not allow users of Apple Devices to access any 4G/LTE networks (namely those networks of HKT and CMHK[44]) except those operated by the three MNOs with whom Apple Asia had entered into distribution arrangements at the time. It was on the basis that the three MNOs had distribution arrangements with Apple Asia that HKT alleged that the three MNOs had engaged in anti-competitive conduct jointly with Apple Asia in breach of the competition provisions of the TO. HKT however did not elaborate further on, nor provide evidence in support of, its claim that the three MNOs had engaged in anti-competitive conduct jointly with Apple Asia.

71. HKT argued that the Restriction was a "*SIM locking function*" prohibited by the SIM Lock Statement (that "SIM locking function" as the subject of the SIM Lock Statement would hereafter be referred to as "SIM Lock" as differentiated from the Restriction in question for clarity purpose) and the Restriction had the purpose of tying customers to networks and not for the purposes of anti-theft, anti-fraud or protecting handset subsidies.

72. Further, HKT argued that, by virtue of the Restriction, Apple Asia had, without the prior written authorization of the former TA or the CA, made the provision of its customer equipment and service, namely the Apple Devices, conditional upon the person acquiring it also acquiring or not acquiring a specified telecommunications network or service from another person. This, HKT alleged, contravened section 7K(3)(b) of the TO which, in HKT's view, was a "*per se*" or *"strict liability"* violation in that conduct falling within its scope is deemed to be in contravention of section 7K(1) without requiring proof of any *"anti-competitive purpose or effect"*. Nevertheless, HKT also addressed the issue of the adverse effect the Restriction had on the competition in the relevant market.

73. HKT claimed, as in Clifford Chance's letter dated 29 July 2013, that the Restriction "*has distorted the normal operation of the market and significantly impacted on how customer shares for each of the operators should have developed in a properly functioning competitive market*" (page 15 of the letter). HKT further

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[44] CMHK announced on 22 May 2014 that it would launch iPhone 5s and 5c handsets on 30 May 2014. As of June 2014, the list of supported LTE networks on Apple's website has included CMHK in Hong Kong: http://www.apple.com/iphone/LTE/.

claimed that the Restriction "*raises artificial barriers to switching and thereby restricts or prevents customers in their ability to freely shift to another network and this dampens (i.e. "prevents or substantially restricts") competition between mobile network operators on price and quality of service*" (page 18 of the letter).

74. HKT also claimed in its early correspondence with OFCA that Apple Asia, unilaterally or jointly with the three MNOs, was in breach of the following competition provisions without elaborating on them:-

(a) The Restriction prevented the supply of 4G/LTE services by HKT to a customer using an Apple Device in breach of section 7K(2)(b);

(b) Apple Inc.'s conduct in providing iPhone 5 handsets to Apple Asia (rather than to HKT or other entities with a Radio Dealers Licence (Unrestricted)) could place HKT at a significant disadvantage in breach of section 7K(3)(c); and

(c) Apple Asia was perhaps in breach of section 7L.

**Apple Asia's Responses to HKT's Complaint Allegations**

75. Apple Asia's responses to HKT's complaint allegations, which were provided to OFCA pursuant to OFCA's information requests on 30 August and 24 October 2013, and to the Appeal Board for the appeal hearing on 10 March 2014, are summarised below:-

(a) Apple Asia is a wholly-owned subsidiary of Apple Inc. which is headquartered in Cupertino, California, United States of America. Apple Asia imports iPhone 5 handsets[45] into Hong Kong under supply agreements with another entity in the Apple group of companies incorporated in Singapore. Apple Asia has not entered into any supply agreements with Apple Inc. in relation to iPhone 5 handsets in Hong Kong. Apple Asia supplies iPhone 5 handsets on a wholesale basis to third party resellers in Hong Kong including the three MNOs and

[45] Information in relation to the Restriction on iPhone 5 handsets in this paragraph also applies to iPhone 5s and 5c handsets.

other authorized resellers. Apple Asia also sells iPhone 5 handsets on a retail basis direct to Hong Kong consumers through its three physical Apple Retail Stores in Hong Kong and the online Apple store;

(b) iPhone 5 handsets would operate on all carrier networks in Hong Kong. So far as recognising a particular 4G/LTE network was concerned, whilst iPad Devices had been enabled to operate on all carriers' 4G/LTE networks, enabling 4G/LTE functionality was considerably more complex for iPhone 5 handsets because of voice calling and other communication features that were not necessary for iPad Devices. Accordingly, iPhone 5 handsets must be tested and optimised on each carrier 4G/LTE network before being enabled to recognise and operate on the verified network. This was to ensure that users were able to enjoy a high quality experience when using iPhone 5 handsets;

(c) Apple's 4G/LTE enablement for iPhone 5 handsets was not a "SIM lock". Whether or not 4G/LTE was enabled on iPhone 5 handsets did not affect whether or not a Hong Kong consumer could use it on a particular carrier's network. In Hong Kong, iPhone 5 handsets were not SIM locked and would operate on the networks of all of the local carriers;

(d) Apple Inc. was solely responsible for determining whether or not to enable 4G/LTE connectivity for iPhone 5 handsets on carriers' 4G/LTE networks in Hong Kong or elsewhere. Apple Inc. developed the software that implemented the carrier settings that enable iPhone 5 handsets to recognise a 4G/LTE network and determined the software release schedule. There was no agreement or understanding with a Hong Kong carrier, or any other entity, that restricted Apple Inc.'s freedom to enable 4G/LTE for or otherwise support any other carrier in Hong Kong or elsewhere;

(e) Apple Inc. spent millions of dollars each year on the testing programme with MNOs around the world. Apple Asia confirmed that

the 4G/LTE networks of SmarTone, HTCL and CSL in Hong Kong had been tested;

(f) Apple Asia's role in the enablement process was limited to assisting with the collection of raw test data in Hong Kong, by deploying two engineers employed by Apple Asia to collect the network raw test data in Hong Kong and report to Apple Inc. Apple Asia did not play any role in liaising with the three MNOs to resolve any network issues identified. The decision to enable a 4G/LTE network was made solely by Apple Inc. Apple Asia did not play any role in either making the decision or giving effect to such decision in Hong Kong. There were no agreements, memoranda or written understandings between Apple Inc. and Apple Asia in relation to the implementation or control of the enablement of 4G/LTE networks in Hong Kong;

(g) Regarding HKT's claim that HKT and HTCL shared the 2600 MHz 4G/LTE network operated by Genius Brand, to which the iPhone 5s and iPhone 5c handsets were able to access when inserted with an HTCL SIM card, but not when inserted with an HKT SIM card, Apple Asia explained that HTCL and HKT shared only the radio access element of their 2600 MHz 4G/LTE network, but the backend core and service networks were not shared. For a 4G/LTE network to achieve the requisite functionality and performance with iPhone 5 handsets, both the radio access element and the backend core and service network had to be appropriately configured. The fact that the testing process had been completed in respect of the HTCL's 4G/LTE network did not provide any insight into the configuration or performance of HKT's core and service network; and

(h) Regarding HKT's claim that iPhone 5 handsets used by foreign users with their home 4G/LTE network listed as "supported LTE networks" on Apple's website could access HKT's 4G/LTE networks when they were roaming in Hong Kong but the reverse did not hold (i.e. HKT's customers using iPhone 5 handsets could not access foreign 4G/LTE networks listed as "supported LTE networks" when they were roaming overseas), Apple Asia explained that the configuration for the

LTE enablement for iPhone 5 handsets was set on a per-MNO basis by reference to the home MNO of the subscriber rather than MNO which the subscriber might roam on to overseas. Once 4G/LTE was enabled for a given MNO, the MNO's users' 4G/LTE roaming experience would be determined by the nature of the roaming agreements between the home MNO and its roaming partners. Moreover, users were accustomed to receiving an equal or lesser experience while roaming compared to their experience at home such that a short-term, non-optimised 4G/LTE roaming experience was unlikely to affect a customer's perception of iPhone 5 handsets.

**Submissions by the Three MNOs**

76. The three MNOs all denied that they had any role in enabling the iPhone 5 handsets to recognise only selected 4G/LTE networks.

**Supply Agreements between Apple Asia and the Three MNOs**

77. Apple Asia and the three MNOs all cooperated with OFCA and provided redacted versions of the agreements entered into between Apple Asia and each of the MNOs in relation to the supply of Apple Devices in Hong Kong. In the copies of the agreements provided to OFCA and to the Appeal Board, no contract terms in relation to imposing the Restriction on Apple Devices have been observed.

**OFCA'S ASSESSMENT**

**HKT's Complaint Allegations**

78. HKT's complaint allegations are set out in paragraphs 65 to 69 above. It would appear that the main thrust of HKT's claim all along was that Apple Asia had imposed the Restriction on the Apple Devices, and the imposition of the Restriction was a *per se* breach of the SIM Lock Statement and section 7K(3)(b) of the TO.[46] It was not until HKT had seen the evidence filed by Apple Asia and filed

[46] This is despite HKT's reference to "*the introduction of iPhone 5 handsets into the market by Apple*" in its initial complaint letter of 28 September 2012, which HKT did not further elaborate on.

its own submissions for the appeal hearing on 10 March 2014 that HKT started to expand its claim to cover Apple Asia's conduct of importing and supplying Apple Devices imposed with the Restriction, though HKT still holds Apple Asia responsible for imposing the Restriction.

79. Also, whilst HKT's complaint was raised with a very broad scope covering the SIM Lock Statement and sections 7K (more specifically sections 7K(1), 7K(2)(b), 7K(3)(b) and 7K(3)(c)) and 7L of the TO, in view of the Appeal Board's findings that the SIM Lock Statement and section 7K(3)(b) of the TO do not apply to the Restriction and these findings are currently the subject of HKT's request for case stated, OFCA's assessment herein would focus on HKT's claims in relation to sections 7K(1), 7K(2)(b), and 7K(3)(c) and section 7L of the TO. Specifically, OFCA's focus would be on whether any conduct pertaining to (a) the imposition of the Restriction; (b) the importation and/or distribution of the Apple Devices imposed with the Restriction; and (c) the making of any agreement, understanding or arrangement in connection with the Restriction with any parties, can be attributable to Apple Asia and if so, whether such conduct would give rise to a competition issue.

**Enforcement against Telecommunications Licensees**

80. HKT's complaint and request for the issue of a direction were directed against Apple Asia and the three MNOs which are all licensees under the TO.[47] From the evidence provided as part of Apple Asia's submissions to OFCA and the Appeal Board however, OFCA notes that the Restriction was claimed to be imposed by Apple Inc., which is not a licensee under the TO, and that neither Apple Asia nor any of the three MNOs could be held accountable.

81. First and foremost, it is important to clarify and emphasize that the CA's enforcement power under the competition provisions and the relevant section 36B provision (i.e. section 36B(1)(a)(ii)) is directed against "a licensee" under the TO. Section 2(1) of the TO defines a licensee as "*the holder of a licensee under this Ordinance*". In this case, Apple Asia and the three MNOs are all licensees[48]

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[47] CSL was a licensee under the TO until 15 May 2014.

[48] See footnote 47.

against which the competition provisions and section 36B(1)(a)(ii) may be enforced. As to Apple Inc., since it is not a holder of any licence under the TO, it is not, on the face of the legislation, subject to either the competition provisions or section 36B of the TO.

82. The definition of "licensee" under the TO cannot be extended from Apple Asia to include its parent company, Apple Inc. The TO does refer to the concept of "associated corporation", which is defined in section 2(1) to mean:-

> *In relation to a licensee…*-
>
> *(b) if the licensee is a corporation –*
>
> *(i) a corporation which has control over the licensee…*

83. On the basis that Apple Asia is wholly-owned (and thus controlled) by Apple Inc., Apple Inc. is an associated corporation for the purpose of the TO.

84. Section 7K(3)(c) provides that a licensee may breach section 7K if it "*gives an undue preference to, or receives an unfair advantage from, an associated person if…*". The TO thus draws a clear distinction between a licensee and an associated person of that licensee. The legislature did not intend the definition of licensee to extend to a parent company of that licensee, as separate provision was made for parent companies to be treated as associated persons. It follows that when applying to the facts of this case, the wording of the TO provides no statutory basis on which it could reasonably be argued that conduct on the part of Apple Inc. can be attributed to Apple Asia by an extended definition of the "licensee".

85. Further, under the common law, the concept of corporate entities normally dictates that parent and subsidiary are treated as separate and conduct of one cannot be automatically attributed to the other.[49]

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[49] In the recent case of *Prest v Petrodel Resources* [2013] UKSC 34, [2013] 2 AC 415, the UK Supreme Court set out the limited circumstances in which separate legal personality of parent and subsidiary can be disregarded, i.e. by "piercing the corporate veil". Those limited circumstances do not apply here. Apple Inc. is not under any existing obligation under the TO as it is not a licensee and therefore there is no question of Apple Inc. deliberately seeking to evade or frustrating its obligation by interposing Apple Asia.

86. On the basis of the above, if HKT's complaint were to be established, it must show that a licensee, be it Apple Asia unilaterally or jointly with any of the three MNOs with whom Apple Asia has entered into distribution agreements, is or are engaging or has or have engaged in conduct in relation to the Restriction, and that conduct is found to have infringed section 7K or section 7L.

87. Similarly, the CA's enforcement powers under section 36B of the TO can only be directed at licensees for the purpose of requiring them to comply with their obligations under the TO. Before considering whether to issue an interim direction under section 36B, the CA would need sufficient information to be able to identify specific conduct by a licensee that is alleged to be in breach of the TO and that there are reasonable grounds to suspect a breach in regard to such conduct.

**The Evidence**

88. Upon reviewing the information made available by the complainant, Apple Asia and the three MNOs, OFCA notes that:-

(a) According to Apple Asia, the decision to enable (or not enable) 4G/LTE connectivity for iPhone 5 handsets on a particular carrier network was made unilaterally by Apple Inc. Apple Inc. had not entered into any agreement or understanding with a Hong Kong carrier, or any other entity, that would restrict its freedom to enable 4G/LTE network or otherwise support any other carrier in Hong Kong. Apple Asia also stated that there were also no agreements, memoranda or written understandings between Apple Inc. and Apple Asia in relation to the implementation of the Restriction in Hong Kong. As far as the Restriction is concerned, there is no evidence available contradicting that Apple Asia's role did not go beyond collecting and forwarding raw test data to Apple Inc. for analysis;

(b) The three MNOs all denied that they had taken any part in imposing or deciding to impose the Restriction. HKT has provided no evidence to support its claim. There is nothing in any of the agreements entered into between Apple Asia and the three MNOs for the supply of Apple Devices that casts doubt on the three MNOs' claim that they had

nothing to do with the Restriction, or on Apple Asia's claim that the decision whether to provide 4G/LTE support for iPhone 5 handsets was one made by Apple Inc. alone;

(c) There is no other evidence available to OFCA that serves to contradict the MNOs' claim that they had nothing to do with the Restriction, or on Apple Asia's claim that the decision whether to provide 4G/LTE support for iPhone 5 handsets was one made by Apple Inc. alone;

(d) There is no evidence available to OFCA indicating that there is any conduct by Apple Asia which affects whether any Apple Devices which it imports and distributes can be used to access 4G/LTE services. The evidence suggests that it is solely a matter for Apple Inc. Apple Asia is only an importer, distributor and seller of Apple Devices imposed with the Restriction, over which it has no control, and in relation to which no agreement, arrangement or understanding with Apple Inc. is established.

89. Overall, the evidence and submissions provided by Apple Asia in relation to how the Restriction was actually imposed and Apple Asia's role in relation thereto revealed that Apple Asia was not responsible for imposing the Restriction on the Apple Devices. Rather, the imposition of the Restriction was the sole decision of its parent company, Apple Inc. Such a finding is consistent with the fact that Apple Asia is a fully owned subsidiary of Apple Inc. and the Restriction was a feature of the concerned products manufactured by Apple Inc. and applied on a global basis. The three MNOs also claimed that they had no part to play with the Restriction, and this claim was supported by Apple Asia's submissions. Further, the supply agreements that the parties provided to OFCA also revealed nothing to the contrary. Indeed, their claim is not contradicted by any other evidence available to OFCA.

90. As such, OFCA will take the evidence as the facts as found, on which OFCA will base its assessment whether there are reasonable grounds for the CA to suspect that there may be an infringement of the relevant competition provisions of the TO on the part of any of the licensees in question, such that further investigation and enforcement action should be considered by the CA.

## Assessment of Each of HKT's Complaint Allegations

*Section 7K(1)*

91. In considering whether there is/has been a breach under section 7K(1), it is necessary to establish that it is a "licensee" which has engaged in conduct which, in the CA's opinion, has the purpose or effect of preventing or substantially restricting competition in a telecommunications market. **As the evidence reveals that the Restriction was solely imposed by Apple Inc. at Apple Inc.'s discretion, OFCA is unable to establish that Apple Asia, and any other licensee under complaint, viz. any of the three MNOs[50], should be held responsible.**

92. On Apple Asia specifically, given OFCA's assessment above, that there is no evidence that the Restriction was imposed by Apple Asia, we should now turn to examine on the facts of the case such other conduct of Apple Asia which *has a relationship* with the Restriction under section 7K(1). Such conduct is confined to Apple Asia (a) importing and distributing the Apple Devices manufactured by Apple Inc. which incorporated the Restriction into all such devices supplied on a global basis; and (b) its collection of raw test data and sending to Apple Inc., for Apple Inc.'s subsequent processing and decision on enablement of connectivity to individual 4G/LTE networks.

93. In regard to the conduct of Apple Asia in importing and distributing the Apple Devices built-in with the Restriction, since the Apple Devices are in compliance with the existing technical specifications and type approval requirements prescribed under the TO, Apple Asia's conduct, in importing and distributing the Apple Devices, is no different from that of any wholesaler or retailer in Hong Kong, in importing and distributing other lawful telecommunications equipment. There is no evidence to suspect Apple Asia to be in breach of the competition provisions. In fact, given the non-existence of Apple Devices without the Restriction built-in, the choice of Apple Asia is limited to

[50] See footnote 47.

either importing and distributing, or not importing and distributing such products with the built-in Restriction.

94. As regard the conduct of Apple Asia in collecting raw test data for onward passing to Apple Inc., according to the information available to OFCA, it appears that Apple Asia has only been carrying out the instructions of its parent company, Apple Inc. and no more, in the collection of the raw test data. The whole testing process is controlled by Apple Inc. which uses the test data and carries out subsequent liaison with MNOs to resolve any network issues identified. The decision to enable the 4G/LTE connectivity to individual networks and the implementation of the software settings to recognise the networks are made by Apple Inc. It does not appear that Apple Asia has played any part in the decision not to have carried out testing and optimization of the Apple Devices on HKT's 4G/LTE networks. OFCA cannot see how such conduct of Apple Asia can be found to be in breach of the competition provisions.

95. As there is no evidence available to OFCA indicating that there is any conduct by Apple Asia which determines whether any Apple Devices which it imports and distributes can be used to access 4G/LTE services, it follows that **Apple Asia's importation, distribution and providing testing support of Apple Devices which contain the Restriction does not give rise to a *prima facie* case under section 7K(1) of the TO.**

96. Further, no agreement, memoranda or understanding with Apple Inc. in relation to the implementation of the Restriction in Hong Kong can be established on the part of Apple Asia or any of the three MNOs. The evidence shows that imposition of the Restriction is the unilateral conduct of Apple Inc. No conduct on the part of Apple Asia or any of the three MNOs is found in breach of section 7K(1) pursuant to section 7K(3)(a) of the TO, which prohibits a licensee from entering into "*an agreement, arrangement or understanding that has the purpose or effect prescribed by [section 7K(1)]*". The fact that the Appeal Board found that Apple Asia's objections to HKT's network on technical grounds were not *bona fide* (see paragraph 51 above) does not affect the analysis that Apple Asia has committed no breach under section 7K(1) by virtue of section 7K(3)(a). Unilateral conduct falls outside the scope of section 7K(3)(a). As evidence shows that the Restriction is attributable to Apple Inc.'s unilateral conduct, section

7K(3)(a) has no application, irrespective of whatever motive Apple Inc. may have for the Restriction. Similarly, Apple Asia's awareness of Apple Inc.'s motive for engaging in unilateral conduct does not, for that reason, transform the unilateral conduct into collusive conduct.

*Section 7K(2)(b), Section 7K(3)(c) and Section 7L*

97. HKT included amongst its heads of complaint in its original letter of complaint dated 28 September 2012 claims of breach of section 7K(2)(b) and section 7K(3)(c), together with a "perhaps" breach of section 7L of the TO, but has not elaborated on these claims any further since.

98. Section 7K(2)(b) refers to a licensee engaging in "*an action preventing or restricting the supply of goods or services to competitors*". In its letter of 28 September 2012, HKT claimed that section 7K(2)(b) applied because "*(t)he iPhone 5 SIM Lock function enables Apple*[51] *and ST [SmarTone] to prevent the supply of 4G LTE service at 1800 MHz by HKT to a customer with an iPhone 5*" (page 7 of HKT's letter dated 28 September 2012). OFCA considers the language of section 7K(2)(b) plainly targets on an action preventing or restricting the supply of goods or services to "competitors", not "customers". In any case, **since no licensee under the TO is found to be responsible for the conduct in relation to the Restriction in question, OFCA considers the complaint under 7K(2)(b) not established.**

99. HKT claimed that section 7K(3)(c) applied because "*Apple Inc.'s conduct in providing iPhone 5 handsets to Apple Asia Limited (rather than to HKT or other entities with a Radio Dealers Licence (Unrestricted) could place HKT at a significant disadvantage*" (page 7 of HKT's letter dated 28 September 2012). For meeting the requirements of section 7K(3)(c), it is necessary to show in the first place that a licensee "*gives undue preference to, or receives an unfair advantage from, an associated person*". HKT had not made out its case in this context. It did not elaborate on how Apple Asia (a licensee) received an unfair advantage from, or was given undue preference by, Apple Inc. (an associated person). The substance of HKT's complaint was that, as a result of the Restriction, the three MNOs were

[51] See footnote 40.

given an undue preference or received an unfair advantage, not Apple Asia. **OFCA does not consider that the elements of section 7K(3)(c) have been met.**

100. Regarding the claim of a "perhaps" breach of section 7L of the TO, OFCA notes that in its subsequent letter of 29 July 2013, HKT defined the relevant market for the purpose of the competition provisions to be "*a market for 4G mobile telephone services through use of Apple mobile handsets*" (page 6 of the letter). HKT claimed that by definition "*Apple must have 100% share in the relevant market*" and "*be in a dominant position in that market*" (page 12 of the letter). Assuming that the "Apple" that HKT referred to as having 100% market power was Apple Asia, its claim under section 7L too should fail because the evidence plainly demonstrates that it was Apple Inc., not Apple Asia, who was engaged in the conduct of imposing the Restriction, which was alleged to have the purpose or effect of preventing or substantially restricting competition in a telecommunications market. **With Apple Asia, the licensee, not involved in the conduct, and Apple Inc., not being a licensee and hence not subject to the competition provisions of the TO responsible for the conduct, there is no basis for the CA to proceed with further consideration of the conduct of Apple Inc. under section 7L.**

*Section 7K(3)(b) and the SIM Lock Statement*

101. In relation to HKT's claim that Apple Asia was in breach of the SIM Lock Statement and section 7K(3)(b) of the TO on a *per se* basis, the Appeal Board has already found that the SIM Lock Statement and section 7K(3)(b) of the TO do not apply to the Restriction and such findings, unless successfully appealed by HKT by way of case stated to the Court of Appeal, are binding on the parties. Accordingly, **HKT's claims against Apple Asia for breach of the SIM Lock Statement and section 7K(3)(b) of the TO are not established given the Appeal Board's findings.** Incidentally, for the analysis given in the paragraphs above that the Restriction is found to be the unilateral conduct of Apple Inc., **OFCA considers that Apple Asia should not in any case be held responsible for Apple Inc.'s conduct under the SIM Lock Statement or section 7K(3)(b) of the TO.**

102. In regard to the SIM Lock Statement, having regard to the background of issuing the regulatory guidance back in 1997, OFCA observes that there are a

number of technical, regulatory and consumer issues arising from the Restriction which had not been contemplated by the former TA at the time of issuing the SIM Lock Statement. Such issues did not come about until the launch of iPhone 5 handsets in September 2012, consequent to which HKT lodged its competition complaint. The above analysis does not find a genuine competition issue to be raised by any conduct of a licensee in connection with the Restriction. The novelty and complexity of the issues involved call for a more thorough discussion with the industry, such as that initiated by OFCA in the TRAAC in December 2012 (see paragraph 12 above) before the CA were to decide whether and if so, what form of regulatory intervention may be appropriate. Whether the SIM Lock Statement should be updated and indeed whether any regulatory guidance should be given by the CA in relation to the Restriction are nonetheless regulatory issues over which the CA would have the sole prerogative to handle, matters that should be distinct and separate from the processing of this competition complaint lodged by HKT.[52]

**OFCA's Conclusion**

103. Overall, OFCA considers that there are no reasonable grounds for suspecting that Apple Asia and any of the three MNOs has infringed any of the competition provisions of the TO. Accordingly, the case should be closed without proceeding to investigation.

104. Since no licensee is suspected of engaging in conduct that would breach the competition provisions of the TO, OFCA considers that there is no justification for the CA to accede to HKT's request for a direction, interim or otherwise, under section 36B of the TO to the concerned licensees to the effect of removing the Restriction in the Apple Devices.

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[52] In paragraph 62 of the Appeal Board Decision, it is commented that *"[t]he Parties to this Appeal, the telecommunications industry and the consumer interest have all been harmed by the failure of the Authority concerned to update its views and comments in the light of the rapidly evolving technology"*. It urged OFCA to address this failure and issue an updated SIM Lock Statement at the earliest possible opportunity. With due respect, OFCA considers that such comments have gone beyond the matter being dealt with by the Appeal Board and an immediate update of the SIM Lock Statement may not be the appropriate course of action by the CA for the reasons given in paragraph 102.

## THE CA'S ASSESSMENT AND DECISION

105. After examining the facts of the case, the information and representations provided by the complainant, Apple Asia and the three MNOs as appropriate during the course of the initial enquiry and the appeal proceedings, **the CA affirms OFCA's assessment that there are no reasonable grounds for suspecting that Apple Asia, SmarTone, HTCL or CSL has infringed any of the competition provisions of the TO. The CA also affirms OFCA's assessment that there is no justification for the CA to accede to HKT's request for a direction, interim or otherwise, under section 36B of the TO. In accordance with the Procedural Guide, the case is closed without proceeding to investigation.** No further action will be pursued against Apple Asia and the three MNOs in relation to any aspect of the matters raised by the complainant in this complaint.

**The Communications Authority**
**June 2014**