

**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**

This guide sets out the procedures adopted by the Office of Communications Authority (“OFCA”) for handling complaints under the Telecommunications Ordinance (Cap. 106) in relation to section 7K: Anti-competitive practices, section 7L: Abuse of a dominant position, and section 7N: Non-discrimination (the “Competition Provisions”)¹. This guide aims to give the general public and the industry an understanding of the process and the relevant time frames involved in handling complaints in relation to the Competition Provisions.

2. The Communications Authority (“CA”) may also initiate an enquiry under the Competition Provisions of its own volition. In conducting such self-initiated enquiries, OFCA will follow the process and time frames set out in this guide to the extent that they are relevant. The process and time frames may not however apply to the handling of cases concerning cartels or collusive conduct, where the circumstances may require a departure from this guide.

Administrative Priority

3. OFCA does not have the resources to investigate all the complaints it receives. In order to ensure that OFCA’s resources are used effectively, the CA has the administrative discretion under the Telecommunications Ordinance to decide whether or not to pursue, or not to pursue further a case under the Competition Provisions, having weighed the likely benefits of pursuing it against the likely resources involved and the other options available to the CA. In the circumstances, the CA may decide not to pursue, or not to pursue further, complaints received by OFCA, or enquiries the CA has initiated, on the ground of administrative priority without taking a view on the merits of the case. Appendix A gives a non-exhaustive

¹ For the substantive provisions please access the Department of Justice’s Bilingual Laws Information System (www.legislation.gov.hk). See also the Guidelines to Assist Licensees to Comply with the Competition Provisions under the Telecommunications Ordinance issued on 30 December 2010 (http://tel_archives.ofca.gov.hk/en/report-paper-guide/guidance-notes/gn_201026.pdf)

list of the considerations that, where it is considered appropriate, the CA will take into account in deciding whether or not to pursue, or not to pursue further a case on the basis of administrative priority.

4. The procedures set out in this guide as to how cases in relation to the Competition Provisions are handled are thus subject to this overriding consideration of administrative priority. The CA may take into account the consideration of administrative priority at any stage of processing a complaint, or after initiating an enquiry of its own volition.

5. Where the CA decides not to pursue, or not to pursue further a case on the basis of administrative priority, the CA will, where appropriate, notify the complainant, the subject of complaint and other relevant parties² of its decision in writing and the considerations that it has taken into account in reaching the decision. A decision by the CA not to pursue a case on the basis of administrative priority does not represent or imply any view of the CA about the merits of the case.

Lodging a Complaint

6. Issues arising out of complaints in relation to the Competition Provisions are generally complex in nature and may not be immediately apparent. Further, the processing of complaints may involve not only the factual determination of the conduct being complained of, but also the economic assessment of the impact the alleged conduct has, or might be expected to have, on the competitive process in the market. As such, processing of complaints about anti-competitive behaviour often results in extensive, resource-intensive enquiries which impose significant costs not only on OFCA, but also on the subject of complaint and other industry participants who may be required by the CA to supply information. A complainant is thus generally required to articulate its complaint with sufficient details to enable OFCA to assess whether the complaint raises a genuine competition issue within the scope of the Competition Provisions, so that OFCA may proceed to conduct an initial enquiry (see paragraphs 17 to 20 below).

7. To facilitate processing of the complaint, we therefore expect a complainant, especially where the complainant is an experienced and well-resourced

² Such parties generally include persons who have provided information to OFCA in the course of OFCA processing a complaint or conducting a self-initiated enquiry.

industry participant, to make a sufficiently detailed and well-reasoned complaint submission with arguments and evidence clearly presented. The conduct complained of and the particular Competition Provision(s) which the complainant considers has been breached must be specified, with factual and economic evidence in support of why it considers the relevant Competition Provision(s) has been breached. A general allegation that conduct is anti-competitive is most unlikely to be considered adequate.

8. In preparing its complaint, a complainant should refer to the Information Checklist in Appendix B, which sets out the information required for OFCA's processing of the complaint. Where a complainant is considered not to have the requisite knowledge or resources in preparing a complaint submission in accordance with the Information Checklist, OFCA is prepared to offer assistance as appropriate.

9. Whilst an inadequate complaint submission may result in OFCA not being able to pursue the complaint, the CA may take the view that the complaint nonetheless raises an issue which merits further examination and initiate an enquiry of its own volition.

10. The complaint submission should include a signed declaration, in the form as provided in Appendix B, certifying that due care has been taken by the complainant to ensure that the information contained in the submission is true, correct and complete to the best of his knowledge and belief at the time the complaint is lodged. In case of a corporate complainant, the declaration should be signed by an officer of senior management level who has the authority to act on behalf of the corporation, preferably the Chief Executive Officer.

11. We often need to reveal the information we have obtained, and the source of that information, to the subject of complaint and other relevant parties for their comments on the allegations, in order for us to gain a more complete picture of the matter being complained of. If a complainant has any concern over the disclosure of identity, it may request that its identity be kept confidential with reasons in support. We will consider whether such request for non-disclosure of identity is justified. However, there may be circumstances where it is not possible at all to pursue further action in relation to a complaint if the complainant is unwilling to disclose its identity.

12. If a complainant has any concern over the disclosure of certain

information revealed in the complaint submission or supporting documents on the basis of commercial confidentiality, the complainant is required to submit a non-confidential version of the complaint submission with all the supporting documents, so that a copy of the same can be provided to the subject of complaint or other relevant parties for comments where necessary (see paragraph 34 of the Information Checklist in Appendix B). The complainant should keep to the minimum the amount of information requested to be withheld on confidentiality ground, and explain in what way the information is confidential and should not be disclosed. The approach we will adopt is that only information concerning the business, commercial or financial affairs of the complainant, the disclosure of which may adversely affect the complainant's lawful business, commercial or financial affairs may be withheld from disclosure. Generally speaking, the more historical or dated the information is, even if it concerns the business, commercial or financial affairs of the complainant, the less likely the information will lead to any adverse impact. We will discuss with the complainant if we consider that any of the information which is claimed to be confidential should be disclosed. If the complainant insists on non-disclosure despite our contrary view, this may result in our not being able to further process the complaint.

Acknowledgement of Complaint

13. We will acknowledge receipt of a complaint in writing *within 3 working days*. The acknowledgement of receipt will include the contact information of the case officer handling the complaint to whom enquiries concerning the progress of the case may be made.

14. We will check whether the complaint submission contains the requisite information set out in the Information Checklist. If not, we will contact the complainant requiring it to supply the information required. We will not apply the Information Checklist in a mechanical way and will consider the circumstances surrounding each case to decide whether the complainant has supplied the information required. In particular we will take account of the size and resources available to a complainant in determining what information we would expect to be included in a complaint. If, despite our request, the complainant is still not able to supply the information required, this may result in our not being able to further process the complaint due to insufficiency of information.

15. Upon receipt of all the information required, we will examine the complaint in detail and consider whether the matter being complained of is within the scope of the Competition Provisions. If the matter being complained of is outside the scope of the Competition Provisions, OFCA will not pursue the matter further and will notify the complainant in writing of the same.

16. If 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.

The Initial Enquiry

17. During the initial enquiry phase, we will consider the complaint submission and collect further information which is 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 Provision(s).

18. The information collection process may include inviting the subject of complaint to comment on the complaint allegations, and requesting it to provide such relevant information, documents and data. The subject of complaint will be given sufficient time to respond, according to the complexity of the case and the information sought. Where necessary we may also seek information from other relevant parties, conduct market enquiries or seek further information or clarifications from the complainant.

19. Upon collection of the necessary information required for conducting an initial assessment, the CA will conduct the initial assessment to determine whether there are reasonable grounds for it to suspect that there may be an infringement of the relevant Competition Provision(s).

20. If, on the basis of the information available, the CA considers that there is no reasonable ground for it to suspect that there may be a breach of the relevant Competition Provision(s), we will notify the complainant and the subject of complaint (where the subject of complaint has been informed of the complaint) in writing of the CA's decision that an investigation will not be commenced. The CA may also decide not to further pursue the case on administrative priority grounds without forming a

view about the merits of a case³.

21. If, on the basis of the information available, the CA considers that there are reasonable grounds for it to suspect that there may be a breach of the relevant Competition Provision(s), it may decide to commence an investigation. The complainant, the subject of complaint and other relevant parties will be informed in writing of the CA's decision that an investigation will be commenced. The commencement of investigation in no way represents or implies that a view has been formed by the CA that there is a breach of any of the Competition Provisions.

22. We endeavour to complete the initial assessment and inform the relevant parties of the CA's decision as to whether an investigation will be commenced *within twelve weeks* from receipt of all the necessary information required for conducting the initial assessment. Meeting of this twelve week target is however subject to circumstances such as the complexity of the issues involved, the amount of information at the CA's disposal, and the resources available to the CA.

The Investigation

23. If the CA decides to commence an investigation, and depending on the complexity of the case, a roadmap setting out all the key stages of the investigation and the proposed time frames for completing these stages may be developed in consultation with the complainant, the subject of complaint or other relevant parties.

24. We will invite the parties to make formal submissions on the complaint, which will often include submissions of facts, as well as legal and economic arguments with evidence in support of those arguments. The parties may consider it necessary to engage their own economic experts to assist them in preparing the economic evidence, and they will be given sufficient time to make the submissions accordingly.

25. Parties to the investigation may request non-disclosure of commercially sensitive information contained in their submissions. If such is the case, they are required to submit a non-confidential version of their submissions with the supporting documents. Parties should keep to the minimum the amount of information requested to be withheld on confidentiality ground and provide reasons justifying their

³ See paragraphs 3 to 5.

requests. See paragraph 12 for the approach that we will adopt regarding the kind of information that may be withheld from disclosure. There may be circumstances where it is not possible to pursue the investigation at all if certain important information is not disclosed. We will discuss with the relevant party if we consider that any of the information which is claimed to be confidential should be disclosed in order to proceed with the investigation.

26. All parties who make submissions to the CA will be given the opportunity to comment on the other parties' submissions and respond to the arguments raised in those submissions. They will be provided with a copy of the others parties' submissions (or where applicable, a copy of the non-confidential version of the others parties' submissions) and be given sufficient time to respond.

27. Where necessary, the CA may exercise its formal powers under the Telecommunications Ordinance to obtain information from the relevant parties.

28. When all the required information and submissions have been received, the CA will conduct a full assessment to decide whether, on the balance of probabilities, a case of a breach of the relevant Competition Provision(s) is established against the subject of complaint. It should be pointed out however that even after an investigation has been commenced, the CA may, for administrative priority reasons, decide not to pursue the case further without forming any view about the merits of the case⁴.

The Outcome

29. Where a case of breach is not established, the CA will set out its provisional findings in the form of a decision ("Decision") and invite the relevant parties to provide comments within a reasonable period of time. If, after consideration of the comments received, the CA maintains its view that a case of breach is not established, the CA will finalise the Decision accordingly. The subject of complaint and other relevant parties will be informed of the CA's final decision in writing. The Decision will be published on CA's website⁵ for public

⁴ See paragraphs 3 to 5.

⁵ http://www.coms-auth.hk/en/policies_regulations/competition/telecommunications/completed_abuse/index.html

information. If, on the other hand, the CA considers that a breach is established after consideration of the comments received, the procedure will follow that set out in paragraph 30 below.

30. Where a case of breach is established, the CA will set out its provisional findings, with proposed actions or financial penalties if appropriate, in a draft Decision and invite the subject of complaint to make representations within a reasonable period of time depending on the complexity of the case. The CA will also invite other relevant parties to provide comments on the draft Decision. If circumstances so require, further opportunities may be given to the subject of complaint to make representations, or to the subject of complaint or other relevant parties to provide further information or comments, for example if there is a substantive change of the CA's views after considering the representations and comments. The CA will carefully consider all such further representations, information and comments received before reaching a final decision. When the CA is satisfied that no more representations, information or comments is required, the CA will make its final decision and finalise the Decision. The subject of complaint and other relevant parties will be informed of the CA's final decision in writing. The Decision will be published on OFCA's website for public information.

31. Once the Decision is made but before its publication on OFCA's website, the subject of complaint and other relevant parties will be given the opportunity to make representations about non-disclosure of any information contained in the Decision which they consider to be commercially confidential. The CA will consider such representations in deciding the need for making any redactions in the Decision before publication. See paragraph 12 for the approach that the CA will adopt regarding the kind of information that may be withheld from disclosure. The CA will also need to consider whether the disclosure is necessary for the public to understand the reasoning of the Decision.

32. During the investigation process, we will keep the complainant informed of the progress of the investigation. Currently, we strive to complete 80% of investigations, or if investigation is still in progress, report the progress of the investigation to the complainant, *within 4 months* from its commencement. This is to recognise that investigation of cases may sometimes take more time, depending on, for example, the complexity of the case, the amount of information involved, and OFCA's resources.

33. Where the conduct being complained about is still on-going and is alleged to be continually causing serious damage to the consumers or other industry players, the CA may consider taking urgent action within such time frames as the circumstances warrant to deal with the complaint. As such, the CA retains the discretion not to adhere to the time frames set out in this guide and will determine a time frame which it deems appropriate in the circumstances. Where circumstances require and if it considers it justifiable to do so, the CA may also depart from all or any part of the procedures set out in this guide.

Office of the Communications Authority

1 April 2012

Illustrative Considerations to be taken into account by the CA in deciding whether or not to pursue or not to pursue further a case on the basis of administrative priority

1. The resources required to conduct an enquiry or investigation, including those of OFCA and parties likely to be involved in the process.
2. Whether the alleged conduct or its potential implications is of significant public interest or concern.
3. Whether the alleged conduct is on-going or otherwise a one-off, isolated historical event.
4. Whether the alleged conduct is concerned with a new product, service or technology, or involves a market issue where the relevant areas of law and the implications of regulatory intervention are unclear and/or novel, such that it might be appropriate to take alternative, administrative action such as giving guidance to the sector first.
5. Whether the subject of complaint has promptly and effectively corrected a possible infringement and has implemented measures to prevent its recurrence.
6. Whether the alleged conduct is industry-wide or is likely to become widespread if the CA does not pursue the case.
7. Whether OFCA's action is likely to have a worthwhile educative or deterrent effect.
8. Whether the alleged conduct is, or appears to be, a repeated, intentional or particularly flagrant infringement.
9. Whether the subject of complaint has a history of similar infringement, or a demonstrated record of poor compliance with the relevant statutory

provision.

10. Whether the matters at issue, or closely related questions, are likely to be considered in a current or planned policy or regulatory process.
11. Whether there are alternative means of addressing the matters at issue.

Information Checklist

**Information to be included
in a complaint submission under sections 7K, L and N**

Important: please provide the information requested in this Checklist with appropriate supporting evidence.

Preliminary Information

1. **Complainant:** The business name, legal form (e.g. natural person, sole proprietor, partnership, private or public company, part of a corporate group), contact details (address, telephone, fax number and email address) of the complainant and a brief description of its business nature and its scale. Where the complainant is not a natural person, the contact details (full name, job title, address, telephone, fax number and email address) of the person authorised to discuss the detail of the complaint and whether the complainant is happy to be identified in the investigation, and if not, the reasons thereof.
2. **Subject of Complaint:** The business name, legal form and contact details (address, telephone, fax number and email address) of the entity/licensee being complained of, a brief description of its business nature and its scale and the information of the individuals involved in the case that might assist the CA to understand the case.
3. **Details of relationship between the complainant and the subject of complaint** e.g. whether the complainant is a customer, supplier or competitor of the subject of complaint.
4. **Third Party:** Identity and contact information of any relevant third party (or third parties) (e.g. a customer or supplier of the complainant). Explain the relevance of the third party to the complaint. Whether the third party is available for contact by OFCA and whether its identity can be disclosed,

and if not, the reasons thereof.

5. **Urgency:** How urgent is the complaint.
6. **Legal Basis:** The relevant provisions of sections 7K, 7L and 7N of the Telecommunications Ordinance under which the complaint is lodged and a clear explanation of why the complainant believes that there is a breach of the provision(s).

The Conduct

7. The conduct being complained of.
8. A summary of the events in chronological order with relevant dates, including details of any relevant contact between the complainant and the subject of complaint (e.g. meetings, phone calls, emails) and the individuals involved.
9. Supporting documents e.g. contracts, advertisements, tenders, correspondence, etc.

The Relevant Market

10. What does the complainant consider to be the relevant product/service market? Is there any other alternative market definition?
11. What is (are) the specific product(s) or service(s) in question?
12. Who are the target customers for the relevant product(s) or service(s)? What features are important to the customers? What function does the product(s) or service(s) fulfil? What are the characteristics and intended use of the relevant product(s)/service(s)? Does (Do) the product(s)/service(s) has (have) one or many applications? Does (Do) the product(s)/service(s) shares (share) a common technology or common network facilities with any other product(s)/service(s)?
13. Are there any close substitutes for the product(s) or service(s) in question? Are they interchangeable with other product(s)/service(s)? What are the

actual or potential alternatives?

14. How would customers react if the price(s) of the product(s)/service(s) were to go up i.e. what other product(s) or service(s) could they possibly switch to? Would they switch to cheaper alternative product(s)/service(s) or would they continue to acquire the more expensive product(s)/service(s) in question? Why?
15. Would there be costs involved by the customers in switching to alternative product(s)/service(s)? Is there any evidence of customers switching between products or services?
16. How easy could other firms switch their existing production capacity to supply the product(s)/service(s) in question or alternative product(s)/service(s) within a reasonably short period of time (e.g. one to two years)? Would it be feasible for them to do so? If an existing supplier were to increase the price of its product(s)/service(s), would there be alternative supplier(s) to provide the same or similar product(s)/service(s) more cheaply? What factor(s) would be relevant in making the decision to start to supply the product(s)/service(s) more cheaply (e.g. is production equipment dedicated or are costly special connections, maintenance, staff training etc required to supply substitutes)? How quickly could there be an alternative source of supply (e.g. would government authorisation materially delay supply?)
17. Are there any legal or regulatory rules governing the supply of the product(s)/service(s) in question and how do they affect their supply?
18. What is the relevant geographical scope of the market for the supply of the relevant product(s) or service(s) e.g. district, regional (e.g. Hong Kong), national (e.g. The People's Republic of China) or international (e.g. Asia-Pacific)? Are there cross-border sales of the product(s)/service(s)?

The Competitive Conditions

19. What is the approximate size of the relevant market(s) in terms of value and volume (e.g. size of revenue, number of subscribers)?

20. Who are the key market participants? What are their approximate market shares (by value and by volume)? How have these evolved over the last 3 to 5 years?
21. Is there any upstream, downstream or horizontal relationship (e.g. legal or otherwise) between the market participants?
22. Who are the main customers of the product(s)/service(s) concerned?
23. What are the approximate relevant turnovers of the subject of complaint and the party/ies (including the complainant) that are alleged to be harmed by the conduct of the subject of complaint?
24. If the complaint concerns abuse of dominant position prohibited under section 7L of the Telecommunications Ordinance or discriminatory practices by a licensee in a dominant position prohibited under section 7N(1) of the Telecommunications Ordinance, please explain the basis on which the subject of complaint is considered to be in a dominant position in the relevant telecommunications market with reference to the list of relevant matters in section 7L(3) of the Telecommunications Ordinance, i.e. market share, pricing and other powers, barriers to entry, degree of product differentiation and sales promotion, etc.
25. How do firms compete in the relevant market(s) e.g. mainly on price, on quality/service? What are the special features of the competitive process e.g. are there formal tendering processes? Are there long-term contracts? Do customers have buyer power?
26. How do the prices charged by different companies differ? Can the complainant provide the price history of the relevant market(s) (e.g. are prices on a downward or upward trend)?
27. Are economies of scale or scope important in the relevant market(s)?
28. Are there any significant first mover advantages in the relevant market(s)?
29. Are there any barriers to entry into this market? What is the history of market entry, market exit and consolidation (i.e. merger or acquisition)?

What are the problems that new entrant(s) would likely encounter? (e.g. Are there significant fixed costs to be incurred? Are there any key elements/processes protected by intellectual property rights such as patents, licences? Is government authorisation required for entry into the market? Is the procurement of essential inputs, such as radio spectrum, required for providing the relevant products or services?)

The Competitive Impacts

30. How does the conduct being complained of affect the business of the complainant (or that of any other parties) e.g. loss of market share, loss of revenue etc?
31. How does the conduct being complained of affect the competitive process in the relevant market?
32. Are consumers adversely affected by the alleged anti-competitive behaviour now and/or in future? If so, how?

The Relief Sought

33. What remedy is sought?

Non-confidential Version of the Complaint Submission

34. If the complainant has any concern over the disclosure of certain information revealed in the complaint submission or supporting documents on the basis of commercial confidentiality, the complainant should provide a non-confidential version of the submission and the supporting documents. The amount of information to be withheld on confidentiality ground should be kept to the minimum and explanation should be given as to in what way the information is considered to be confidential and should be withheld. See paragraph 12 of the guide for the approach that we will adopt regarding the kind of information that may be withheld from disclosure.

DECLARATION

[Note: This declaration is to be signed by the complainant, or if the complainant is not a natural person, an officer of senior management level (e.g. the Chief Executive Officer) of the complainant who has the authority to act on behalf of the complainant.]

1. I declare that to the best of my knowledge and belief, the information given in this complaint to the Communications Authority under sections 7K, 7L and/or 7N of the Telecommunications Ordinance is true, correct and complete at the time this complaint is lodged.
2. I confirm that [name] is authorised to act on behalf of the complainant for the purposes of this complaint.

Signed:

Name: (block letters)

Position: (block letters)

Date:

- END -