

A Guide on How Complaints Relating to Misleading or Deceptive Conduct Prohibited under Section 7M 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 in relation to section 7M of the Telecommunications Ordinance (Cap. 106) (“section 7M”). Section 7M prohibits telecommunications licensees from engaging in misleading or deceptive conduct¹. 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 section 7M.

2. The Communications Authority (“CA”) may also initiate an enquiry under section 7M 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.

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 section 7M, 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, based on administrative priority without taking a view on the merits of the case. The Appendix gives a non-exhaustive 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

¹ Section 7M provides that “A licensee shall not engage in conduct which, in the opinion of the Authority, is misleading or deceptive in providing or acquiring telecommunications networks, systems, installations, customer equipment or services including (but not limited to) promoting, marketing or advertising the network, system, installation, customer equipment or service”. See also the Guidelines on Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets issued on 21 May 2003. (http://tel.archives.ofca.gov.hk/en/report-paper-guide/guidance-notes/gn_20030521.pdf)

section 7M 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.

Acknowledgement of Complaint

6. 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.

The Initial Enquiry

7. Upon receipt of a complaint, we will conduct an initial enquiry. The initial enquiry involves a two-stage analysis process:

- (a) *whether the matter being complained of is within the scope of section 7M*. If the matter being complained of is outside the scope of section 7M, OFCA will not pursue the matter further;
- (b) if the matter being complained of is within the scope of section 7M, the CA will then have to decide, based on the information collected during the initial enquiry phase, *whether there are reasonable grounds for the CA to suspect that there may be a breach of section 7M*, such that an investigation may be commenced.

8. We will examine in detail the information provided by the complainant

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.

and any other relevant information possessed by OFCA or available in the public domain (e.g. advertisements, websites etc). Where necessary we may also conduct market enquiries, request information from other relevant parties or approach the complainant for further information or clarifications on matters raised in the complaint. The complainant may be invited to attend an interview by OFCA staff and give a statement. We may also invite the subject of complaint to comment on the complaint allegations. The purpose of these actions is to obtain information which enables us to understand the complaint and conduct the two-stage analysis as explained in paragraph 7 above.

9. If the matter being complained of is outside the scope of section 7M, OFCA will not pursue the matter further and will notify the complainant and the subject of complaint (where the subject of complaint has been informed of the complaint) in writing of the same.

10. If the matter being complained of is within the scope of section 7M, we will proceed to the second-stage analysis, when the CA will consider whether there are reasonable grounds for it to suspect that there may be a breach of section 7M.

11. 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 section 7M, 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.

12. 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 section 7M, it may decide to commence an investigation. The complainant and the subject of complaint 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 section 7M.

13. We endeavour to complete the two-stage analysis and inform the complainant of the result *within four weeks* from receipt of all the information required for conducting the analysis. Meeting of this four week target is however

³ See paragraphs 3 to 5.

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

14. If the CA decides to commence an investigation, we will consider whether the complainant should be invited to attend an interview by OFCA staff and give a statement, whether market enquiries should be conducted or whether other relevant parties should be requested to provide information, if this has not been done in the initial enquiry phase. We may also make requests for supplementary or more detailed information if circumstances require.

15. In all cases, we will invite the subject of complaint to make representations on the complaint and to provide any information that is relevant and required for the investigation. The subject of complaint will be given sufficient time to respond, according to the complexity of the case and the nature of the information being sought.

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

17. When all the required information and responses have been received, the CA will conduct a full assessment to decide whether, on the balance of probabilities, a case of a breach of section 7M 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

18. Where the CA concludes that a case of breach is not established after assessing all the relevant information available, the CA will inform the complainant and the subject of complaint of his decision in writing. The CA will also set out his findings in the form of a decision ("Decision"), for the purpose of publication on CA's website⁵ for public information.

⁴ See paragraphs 3 to 5.

⁵ <http://www.coms-auth.hk/en/complaints/handle/index.html>

19. 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, usually within a period of two weeks. 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, for example if there is a substantive change of the CA's views after considering the representations. The CA will carefully consider all such further representations and information received before reaching a final decision. When the CA is satisfied that no more representations or information is required, the CA will make its final decision and finalise the Decision. The subject of complaint and the complainant will be informed of the CA's final decision in writing. The Decision will be published on CA's website for public information.

20. Once the Decision is made but before its publication on CA's website, the subject of complaint (and where appropriate, the complainant or other relevant parties) will be given the opportunity to make representations about non-disclosure of any material contained in the Decision which it considers to be commercially confidential. The CA will consider such representations in deciding the need for making any redactions in the Decision before publication. The approach the CA will adopt is that only information concerning the business, commercial or financial affairs of a relevant party, the disclosure of which may adversely affect its lawful business, commercial or financial affairs may be withheld from disclosure in the Decision. Generally speaking, the more historical or dated the information is, even if it concerns the business, commercial or financial affairs of a party, the less likely the information will lead to any adverse impact. The CA will also need to consider whether the disclosure is necessary for the public to understand the reasoning of the Decision.

21. 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 the commencement of the investigation. 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.

22. 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.