

**DECISION OF  
THE COMMUNICATIONS AUTHORITY**

**ALLEGED MISLEADING OR DECEPTIVE REPRESENTATIONS  
BY HUTCHISON TELEPHONE COMPANY LIMITED  
IN RELATION TO THE PROMOTION OF  
ITS MOBILE SERVICES**

<b>Licensee concerned:</b>	Hutchison Telephone Company Limited (“HTCL”)
<b>Issue:</b>	The representations made by a telesales representative of HTCL about HTCL’s mobile services were alleged to be misleading or deceptive
<b>Relevant Instruments:</b>	Section 7M of the Telecommunications Ordinance (“TO”) (Cap. 106)
<b>Decision:</b>	No breach of section 7M of the TO
<b>Sanction:</b>	Case closed
<b>Case Reference:</b>	7M/2/59-13

**THE COMPLAINT**

On 31 December 2012, the Office of the Communications Authority (“OFCA”) received a consumer complaint alleging that HTCL had engaged in deceptive representations in offering to her mobile services.

2. According to the complainant, her mobile service contract with HTCL was to expire on 26 November 2012. About a week before contract expiry, she called HTCL’s hotline with the intention of terminating the mobile services provided by HTCL upon expiry of the contract. A telesales representative of HTCL (the “Salesperson”) subsequently returned her call and

in turn offered to let her continue to use HTCL's mobile services for three months at no charge,<sup>1</sup> when she could take her time to consider whether to continue to use HTCL's services and subscribe to a service plan that the Salesperson offered to her. The complainant claimed that the Salesperson represented to her that, during the three-month period, which began on 27 November 2012, she would be entitled to 100 minutes of local calls per month at no charge (the "Retention Offer"). The complainant's understanding was that during the three-month period under the Retention Offer, she could only make local calls, and no Internet access would be available to her. The complainant accepted the Retention Offer. Subsequently, she found that she was charged for mobile data usage between December 2012 and January 2013.

3. According to the complainant, her sister was the actual user of the mobile services provided by HTCL. The complainant acknowledged that her sister might have inadvertently touched the Internet button on the mobile phone. However, as the complainant had been informed that no Internet would be available to her under the Retention Offer, the complainant considered that HTCL had engaged in deceptive conduct in providing data services to her under the Retention Offer and in charging her for data usage.

## **THE INITIAL ENQUIRY**

4. Upon receipt of the complaint, OFCA initially focused on handling the billing issue in relation to the complaint. On 18 June 2013, OFCA requested HTCL to provide a copy of the voice recording of the telephone conversation between the complainant and the Salesperson (the "Telephone Conversation"). On 28 June 2013, HTCL provided OFCA with the voice recording of the Telephone Conversation. Having examined the contents of the Telephone Conversation, OFCA decided to conduct an initial enquiry on whether there

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<sup>1</sup> According to the initial complaint from the complainant, it would appear that the complainant had initiated the call to the Salesperson. However, having regard to the voice recording of the telephone conversation between the complainant and the Salesperson provided by HTCL (see paragraph 6), it became apparent that the complainant initially made a call to HTCL's hotline stating her intention to terminate services. Subsequently, the Salesperson returned her call, the content of which formed the subject matter of the complaint.

was any misleading or deceptive conduct of telecommunications licensee involved.

5. On 29 August 2013, OFCA requested HTCL to provide the relevant mobile data usage records of the complainant during the time when the Retention Offer was effective, which HTCL provided on 3 September 2013. Separately, OFCA arranged to take witness statements from the complainant and her sister on 25 September 2013 and 7 October 2013 respectively.<sup>2</sup> Having regard to the information collected, OFCA wrote to HTCL on 27 November 2013, requesting it to provide further information including the detailed terms and conditions of the Retention Offer, and its internal guidelines or sales script for the promotion of the Retention Offer. HTCL responded to OFCA's request on 23 December 2013.

### **The Telephone Conversation**

6. According to the voice recording of the Telephone Conversation, the complainant indicated to the Salesperson that she would like to terminate her existing mobile services with HTCL upon expiry of the contract. The Salesperson in turn tried to promote to her a voice and unlimited data service plan at a monthly fee of \$59 (the "New Offer"), and offered her the Retention Offer to enable her to consider whether to accept the New Offer. Eventually, the complainant accepted the Retention Offer. Before the Telephone Conversation ended, the Salesperson advised the complainant that during the three-month period under the Retention Offer, there would be no Internet access, and [she] could only make outgoing and receive incoming calls (exact wording in Chinese 「無得上網，齋打得出、打得入」), and in response to the complainant's question of whether the plan only allowed her to make outgoing calls, the Salesperson reiterated that the plan allowed her to make outgoing and receive incoming calls but did not have Internet access (exact wording in Chinese 「齋打出、打得入，就無上網」).

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<sup>2</sup> The complainant did not give consent to OFCA to disclose her witness statement to HTCL until 28 January 2014. The complainant's sister refused to give consent to OFCA to disclose her witness statement to HTCL.

## **Witness Statements from the Complainant and the Complainant's Sister**

7. In her witness statement, the complainant submitted that she recollected that the Salesperson had told her that under the Retention Offer, she could make telephone calls for free for 100 minutes. If the limit was exceeded, a charge would be incurred. As regards the representations 「無得上網，齋打得入、打得入」 and 「齋打出、打得入，就無上網」 made by the Salesperson (the “Representations”), the complainant did not have clear recollection, but she recalled that she had been told that she could only make telephone calls under the Retention Offer. The complainant said that the mobile services provided by HTCL were for her sister's use. After the Telephone Conversation, the complainant told her sister that she could only make telephone calls [using the services provided by HTCL under the Retention Offer]. The complainant said that her sister had rarely made mobile calls, but had used the mobile handset to access Wi-Fi connections at home for listening to the radio.

8. In the witness statement of the complainant's sister, she confirmed that she was the user of the mobile services in question. With reference to the Retention Offer, she recollected that the complainant had told her that during the three-month period, she could make local calls for free, and that the Internet service had been “cut” and therefore it was not possible to access the Internet using the mobile services provided by HTCL. She was therefore surprised when the complainant was charged by HTCL for mobile data usage.

## **Information and Comments Provided by HTCL**

9. According to HTCL, the Telephone Conversation took place on 16 November 2013. HTCL advised that the Retention Offer was for three months covering “100 basic bonus minutes” at \$0 “plan tariff”, with administration fee waived and no local data entitlement covered. HTCL also provided information on the “thereafter local charge” where the airtime consumed by the complainant exceeded 100 minutes, or where there was data usage. For local data, the charge was \$0.05 per KB (kilobyte). HTCL said that its telesales staff were allowed to make the Retention Offer to four types of customers, among which

were those who would need more time to consider the new offer.<sup>3</sup> HTCL submitted that it had not engaged in misleading or deceptive sales conduct and made the following comments on the complainant's allegations –

- (a) according to the voice recording of the Telephone Conversation, there was no instruction from the complainant to HTCL to specifically terminate the mobile data services when the Salesperson discussed the Retention Offer with her;
- (b) at the end of the Telephone Conversation, the Salesperson had reminded the complainant that the Retention Offer only covered 100 minutes of free basic airtime and did not cover any Internet access data. The Salesperson was acting in good faith to inform the complainant of such information without any intention of deceiving the complainant; and
- (c) according to the mobile data usage records submitted to OFCA on 29 August 2013, the complainant had used mobile data. HTCL was entitled to charge the complainant for mobile data usage but as a gesture of goodwill, it had waived the relevant charges.

## **THE INVESTIGATION**

10. Having considered the information provided by the complainant, the complainant's sister and HTCL, as well as comments of HTCL on the complaint, OFCA considered that there were reasonable grounds for the Communications Authority ("CA") to suspect that HTCL had engaged in conduct in breach of section 7M of the TO, which provides that –

*"A licensee shall not engage in conduct which, in the opinion of the Authority, is misleading or deceptive in providing or acquiring*

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<sup>3</sup> The other three types were customers who did not have contract commitments, customers who were temporarily out of town, and customers who requested to keep their numbers for a short period of time.

*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.”*

11. OFCA commenced an investigation into the complaint on 8 January 2014. On 7 February 2014, OFCA provided HTCL with a copy of the complainant’s witness statement, and extracted relevant statements made by the complainant’s sister in her witness statement.<sup>4</sup> HTCL was also asked to provide further information about the case and to make representations that it wished the CA to take into account in deciding on the matter.

### **HTCL’s Representations**

12. On 7 March 2014, HTCL submitted its representations in response to OFCA’s request, with the salient points summarised below –

- (a) during the Telephone Conversation, the Salesperson had provided the complainant with a clear instruction that she must not use her mobile number registered for the mobile services in question to access the Internet, which the complainant and her sister appeared to have ignored or overlooked;
- (b) any reasonable mobile service subscribers and users would realise that, if a mobile number was used to access the Internet, there was the possibility of charges being incurred. A mobile service plan with voice-only entitlement did not mean that access to mobile data service was disabled, it only meant that there was no mobile data entitlement in the plan;
- (c) access to mobile data service was controllable by customers by either shutting the function off on the mobile phone or requesting the mobile operators to suspend or to stop the mobile data service.

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<sup>4</sup> See footnote 2.

HTCL did not receive any instruction from the complainant to stop or suspend her mobile data service;

- (d) the complainant acknowledged in her witness statement that “thereafter local charge” would apply for airtime consumed beyond the 100 minutes free airtime entitlement. There was therefore no doubt on the part of the complainant in respect of the existence of the “thereafter local charge” and the circumstances under which the “thereafter local charge” would apply;
- (e) the complainant’s “old” service plan with HTCL was a voice and unlimited data service plan,<sup>5</sup> and the New Offer that was promoted to the complainant by the Salesperson was also a voice and unlimited data service plan. Cellular data service was not newly added or enabled to the complainant’s mobile services;
- (f) HTCL’s internal guidelines required its telesales staff to follow its sales script and inform customers of all plan entitlements, offer details and thereafter charges of airtime and local data. There was no exception for promotion of the Retention Offer; and
- (g) making reference to the information provided in the complainant’s statement, HTCL considered that the complainant was under the impression that Internet access by her sister using the mobile handset with the subscriber identity module (“SIM”) card for the service number in question installed was made via Wi-Fi connection, which to reasons unknown to HTCL had failed and thus caused data usage and therefore related charges on the service number.

13. HTCL declined to comment on the information provided by the complainant’s sister, claiming that it was not able to do so because there had not

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<sup>5</sup> Namely the service plan that the complainant claimed would expire on 26 November 2012. See paragraph 2 above.

been any direct communication between her and HTCL. HTCL also advised that it had not received any similar complaint on the Retention Offer in the past 12 months.

14. HTCL submitted that there was no reason to suspect a breach of the section 7M of the TO in this case. As a gesture of goodwill, it had waived the relevant charges the complainant had incurred in spite of the fact that HTCL had clear record of mobile usage in this case.

### **OFCA'S ASSESSMENT**

15. Having considered the available evidence and HTCL's representations, OFCA's assessment is set out in paragraphs 16 to 20 below.

16. In forming an opinion as to whether a licensee has engaged in misleading or deceptive conduct, the CA will examine the facts and asks whether a "reasonable person" would be misled or deceived by the licensee's conduct.<sup>6</sup> A licensee's conduct need not be proven to have actually misled or deceived anyone, although evidence that someone has actually been misled or deceived will often be a persuasive factor in considering whether a "reasonable person" would have been misled.<sup>7</sup>

17. OFCA considers that the issue of this case turns on whether the Representations were misleading or deceptive, in terms of whether the Representations would have misled or deceived a reasonable person in the complainant's circumstances. The question to ask is whether a reasonable person would have interpreted the Representations to mean that (a) under the Retention Offer, he or she would not be able to access the Internet at all (i.e. data service would be disabled) ("First Interpretation"), or (b) the \$0 Retention Offer did not cover charges for Internet access (or data usage), which the

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<sup>6</sup> Paragraph 2.10 of the "Guidelines on Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets" ("Section 7M Guidelines") issued on 21 May 2003.

<sup>7</sup> Paragraph 2.15 of the Section 7M Guidelines.



customer could still access, and if she did so, she would be charged on a usage basis (“Second Interpretation”). If, on the balance of probabilities, a reasonable person would likely have adopted the First Interpretation, the Representations would be misleading or deceptive. If, on the other hand, a reasonable person would likely have adopted the Second Interpretation, the Representations would not be misleading or deceptive.

18. OFCA considers that the crux of the matter is the unclear language used by the Salesperson thereby casting ambiguity as to whether the First Interpretation or the Second Interpretation should be applicable. While it is apparent that the complainant has adopted the First Interpretation, taking into account the overall context of the Telephone Conversation, and noting also that the complainant had been a user of HTCL’s voice and data services and was offered in the Telephone Conversation a voice and data service plan for consideration,<sup>8</sup> OFCA considers that, on the balance of probabilities, a reasonable person in the complainant’s circumstances would or would likely have adopted the Second Interpretation, not the First. This is because a reasonable person in the complainant’s circumstances when perceiving ambiguity of meaning in the Representations which cast doubts as to whether data access service would be disabled at all, or whether data access service charges would be covered by the Retention Offer, the reaction of the person would have been to seek clarifications from the Salesperson during the Telephone Conversation as to the exact meaning of the Representations. It is unlikely that a reasonable person would in face of the ambiguity simply take the Representations to mean that the data service would be disabled without seeking clarifications from the Salesperson as in the case of the complainant.

**19. On the basis of the analysis above, by applying the “reasonable person” test, OFCA considers that, on the balance of probabilities, the Representations made by the Salesperson were not misleading or deceptive.**

20. Notwithstanding that the Representations made by the Salesperson

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<sup>8</sup> See paragraph 12(e) above.

are not considered to be misleading or deceptive, OFCA is of the view that the complaint could have been avoided if the Salesperson had used clearer language to communicate the non-inclusion of data service in the Retention Offer to the complainant, by e.g. following the sales script strictly and advising the complainant of the “thereafter charges” for data usage, thereby affirming to her in no ambiguous terms that data service would still be available to her and would be chargeable on a usage basis.

## **THE CA’S ASSESSMENT AND DECISION**

21. After examining the facts of the case, the information/representations provided by the complainant, the complainant’s sister and HTCL, the CA affirms OFCA’s assessment that on the balance of probabilities, the Representations made by the Salesperson were not misleading or deceptive. HTCL is found not in breach of section 7M of the TO.

22. Notwithstanding that a breach under section 7M of the TO is not established, the CA affirms OFCA’s observation that the complaint could have been avoided if the Salesperson had communicated the terms of the Retention Offer to the complainant in a clearer and comprehensive manner. On this basis, the CA advises HTCL to improve its sales practice by ensuring that its telesales staff use clear and unambiguous language to explain the terms of offer to customers and follow HTCL’s sales script strictly, in order to prevent similar incident from happening in future.

**The Communications Authority**  
**August 2014**