

**DECISION OF THE
COMMUNICATIONS AUTHORITY**

**ALLEGED MISLEADING OR DECEPTIVE REPRESENTATIONS
BY HUTCHISON GLOBAL COMMUNICATIONS LIMITED
IN RELATION TO THE PROMOTION OF ITS
RESIDENTIAL BROADBAND SERVICE**

Licensee concerned:	Hutchison Global Communications Limited (“HGC”)
Issue:	The representations made by HGC’s salesperson in the course of promoting its residential broadband service were alleged to be misleading or deceptive
Relevant Instruments:	Section 7M of the Telecommunications Ordinance (Cap. 106) (“TO”)
Decision:	No Breach of Section 7M of the TO
Sanction:	Case Closed
Case Reference:	7M/2/50-13

THE COMPLAINT

On 26 July 2013, the Office of the Communications Authority (“OFCA”) received a consumer complaint alleging that the representations made by a salesperson of HGC in promoting to the complainant the residential broadband service of HGC were misleading or deceptive.

2. According to the complainant, on 3 May 2012, two sales representatives (one male and the other female) of HGC entered her premises to promote to her HGC’s 1GB residential broadband service. The complainant alleged that the male sales representative (the “Salesperson”) verbally promised

to offer her, being an existing customer of HGC, a waiver of service charges for four months for signing up a 1GB residential broadband service plan, and a waiver of the termination fee on her existing 100MB residential broadband service plan if she changed her residential broadband service plan from 100MB to 1GB. The complainant further alleged that the Salesperson then wrote and signed at the back of a HGC form in Chinese: “本人 [name of the Salesperson][承諾]負責[name of the complainant] 1/13 – 4/13 家居寬頻之月費，即每月 188 x 4 個月”) (English translation being “I [name of the Salesperson] promise to be responsible for the residential broadband monthly charges of [name of the complainant] for 1/13 – 4/13, that is, 188 per month x 4 months”) (the “Statement”). Based on the Salesperson’s representations, the complainant decided to sign up a new 1GB residential broadband service plan for 24 months (the “service contract”)¹ and paid the service charges for the first three months from September to November 2012 under the new service plan.²

3. In about January or February 2013, a staff of HGC notified the complainant of the outstanding service charges. The complainant told the staff that the monthly service charges from January to April 2013 were waived by the Salesperson and submitted the Statement to HGC as proof, in saying that she would not be responsible for the payment. The staff then told the complainant that the offer was made by the Salesperson personally, not by HGC, and therefore the complainant should settle the outstanding service charges by herself. The complainant was of the view that the Salesperson had acted for and on behalf of HGC in the course of promoting to her the service plan, and signing with her the service contract, and HGC should honour the Salesperson’s undertaking to waive her service charges for four months. As the complainant did not settle the outstanding charges, HGC terminated the complainant’s broadband service in April 2013. The complainant alleged that the Salesperson

¹ It turned out that the 1GB residential broadband service plan was a standalone new service subscription separate from the existing 100MB residential broadband service plan. The new 1GB service plan contract commenced in September 2012 and run in parallel with the existing 100MB service plan until February 2013, when the latter was terminated and settled in February 2013. The focus of the current complaint was on the four-month service charges waiver of the new 1GB service plan.

² According to HGC, the complainant had not paid the service charges since December 2012. This was probably the reason why HGC notified her of outstanding service charges in about January or February 2013 as mentioned in paragraph 3.

had misled or deceived her into signing the contract by offering a waiver of service charges for four months, and that HGC should be held responsible for the misconduct of the Salesperson.

THE INITIAL ENQUIRY

4. On 25 September 2013, OFCA invited the complainant to attend an interview to give a statement on this case.

5. On 3 October 2013, OFCA wrote to HGC inviting it to comment on the complainant's allegations and requesting it to provide the voice recordings of the quality control ("QC") call between the complainant and the staff of HGC in relation to the confirmation of the service contract for the 1GB residential broadband service. HGC provided its comments to OFCA on 28 October 2013 as follows -

No mentioning of four-month waiver in the QC call

- (a) Subsequent to the signing of the service contract between HGC and the complainant, HGC made a QC call to the complainant to confirm the relevant terms and conditions of the service contract. HGC was of the view that the applicable terms and conditions of the service contract were reiterated and confirmed in the QC call with no mentioning of the waiver of service charges for four months as evidenced by the voice recording provided by HGC.

Remedial action taken

- (b) According to HGC, the 1GB residential broadband service of the complainant was disconnected on 6 April 2013 as a result of overdue payment. HGC had advised the complainant to reconnect the service and would waive the service charges for four months as a gesture of goodwill. However, it was rejected by the complainant as the complainant had already signed up a broadband

service with another operator. HGC considered that the case was closed.

- (c) HGC said that it had put in place a Salesmen’s Code of Conduct (the “Code”) for compliance by all frontline sales staff since 2010 and the Code was updated from time to time. Upon receipt of the complaint, HGC conducted a sales briefing on 25 October 2013 and issued a reminder to its staff that non-compliance with the Code including but not limited to personal offer was strictly prohibited, and the staff concerned would be subject to immediate disciplinary actions as serious as summary dismissal in the event of breach.

Salesperson was acting in breach of the Code

- (d) HGC submitted that the Salesperson resigned in August 2012, and the identity of the female staff who was alleged to have entered, together with the Salesperson, into the premises of the complainant for promoting the 1GB residential broadband services was unknown to HGC. HGC stated that according to the Code, all frontline sales staff were strictly forbidden to release any incorrect information and make any personal offer to customers. HGC asserted that this complaint case was entirely due to the personal misconduct of the Salesperson acting in breach of the Code and outside the scope of his employment. Further, HGC submitted that it had received three other similar complaint cases against the Salesperson in relation to his personal offer to customers without HGC’s knowledge and approval.

THE INVESTIGATION

6. Having considered the complainant’s allegation, HGC’s comments on the complaint, and the voice recording of the QC call between the complainant and the HCG’s staff, OFCA considered that there were reasonable

grounds for the Communications Authority (“CA”) to suspect that there might be a breach of section 7M of the TO by HGC. 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.”

7. OFCA commenced an investigation into the complaint on 17 February 2014. HGC was requested to provide further information in relation to the complaint and to make representations that it wished the CA to take into account in deciding on the matter.

HGC’s Representations

8. HGC submitted its representations on 10 March 2014 which were summarised below –

- (a) HGC said that the complainant acknowledged her understanding of the service plan, the contract details and the applicable terms and conditions upon enquiry by HGC’s staff in the QC call. HGC’s QC staff had also confirmed with the complainant that the 1GB residential broadband service plan she had subscribed to would be effected based upon the offers and entitlements mentioned in such QC call and the complainant expressed her understanding of this. In any event, the service charges waiver for four months was not mentioned in such QC call.
- (b) HGC reiterated that the complaint was due entirely to the personal misconduct of the Salesperson acting outside and in breach of his duties.

- (c) HGC said that it had received three other complaints similar to the present case against the Salesperson in May, September and December 2012. HGC had verbally warned the Salesperson subsequent to the receipt of the first complaint in May 2012. The Salesperson resigned in August 2012 and the other two complaint cases were lodged with HGC after his resignation.
- (d) HGC submitted that the 1GB residential broadband service was disconnected on 6 April 2013 as a result of overdue payment. Nevertheless, it had waived all charges imposed on the complainant in relation to the service and refunded to the complainant the service charges covering September to November 2012 that the complainant paid to the Salesperson when the service contract was signed on 3 May 2012.
- (e) HGC submitted that enhancement of preventive measures against sales misconduct were introduced, whereby the script of the QC call was further revised to verify with the subscribers whether or not details of the subscription they have taken out are the same as those provided by the direct sales staff.

OFCA'S ASSESSMENT

9. OFCA has considered the available evidence and taken into account the representations made by HGC. In accordance with the "Guidelines on Misleading or Deceptive Conduct in Hong Kong Telecommunications Market" (the "Section 7M Guidelines") issued by the CA, the relevant test that would be used for assessment of a breach of section 7M is whether a "reasonable person" would be misled or deceived by the licensee's conduct after taking into account all of the circumstances of the conduct. A "reasonable

person” is an ordinary member of the target audience at whom the conduct is directed.³

Representations of the Salesperson

The Salesperson’s Handwritten Statement on HGC Installation Form

10. The complainant claimed that the Salesperson had misled or deceived her into signing the service contract by offering a waiver of service charges for four months from January 2013 to April 2013. The most important piece of evidence to support the complainant’s claim was the Statement alleged to be written and signed by the Salesperson at the back of a HGC form for service installation arrangement (“HGC Installation Form”). However, the complainant’s signature was not found on the HGC Installation Form that she provided. Upon the request of OFCA, HGC had provided its copy of HGC Installation Form which was signed by the complainant. The Statement did not appear at the back of the Form as kept by HGC.

11. The discrepancy between the complainant’s copy of the HGC Installation Form with the Statement handwritten at the back and HGC’s copy without the handwritten Statement could be clarified by seeking the representations of the Salesperson and the female staff who was allegedly present in the promotion of the 1GB residential broadband service to the complainant. However, this could not be done since HGC informed OFCA that the Salesperson had left HGC’s employ in August 2012 and the identity of the female staff was unknown to HGC.

12. Although one could not rule out the possibility that the Statement was fabricated, HGC did not challenge or suggest that this was the case and there was no evidence provided by HGC to rebut the complainant’s allegation in this regard. Having considered the representations of the complainant and

³ See paragraphs 2.10 and 2.11 of the Section 7M Guidelines, a copy of which is available at http://tel_archives.ofca.gov.hk/en/report-paper-guide/guidance-notes/gn_20030521.pdf.

HGC, OFCA considers that it is more likely than not that the Statement was indeed made by the Salesperson in his handwriting on a copy of HGC Installation Form which he gave to and was thus kept by the complainant.

13. Further, having regard to the circumstances of the case and the effect of the Statement on the complainant's purchasing decision, OFCA considers that the complainant had been misled or deceived into signing the service contract on the basis of the representations made by the Salesperson in the Statement, which amounts to an offer by the Salesperson himself to shoulder the responsibility for the complainant's service charges for four months (see further analysis below).

Whether the Representations Constitute a Commitment of HGC to Waive the Service Charges

14. OFCA then looks at the issue whether the representations of the Salesperson should be construed as a commitment of HGC, the licensee-employer, to waive the service charges for four months as alleged by the complainant.

The Statement

15. The most important piece of evidence to support the complainant's allegation of being misled or deceived into entering into the service contract was the representations made by the Salesperson in the Statement.

16. In this regard, OFCA notes that nowhere in the Statement was it mentioned that "HGC" would "waive" the service charges of the complainant for four months. The Statement did not expressly say that the complainant would be exempted from her payment obligation to HGC in respect of the period of four months. What the Statement said was that the "Salesperson" would be "personally responsible" for the service charges for four months. The fact that the Statement was written at the back of the HGC Installation Form which was given to and kept by the complainant and was apparently not

returned to HGC for order processing indicated that the Salesperson did not intend to bring this to the attention of HGC, the licensee-employer and tended to support HGC's argument that the Statement only contained a personal offer to pay by the Salesperson.

17. By looking at the content and form of the Statement alone and in the absence of other evidence, OFCA has doubt whether a reasonable person in the circumstances of the complainant would have expected that the promise of the Salesperson on the service charges waiver was made for and on behalf of, or as authorized by HGC.

Memo and Sales Contract Signed by the Complainant

18. OFCA further examined the full set of the service contract provided by HGC, *inter alia*, a customer memorandum ("Memo") and Part B of the sales contract, each of which was signed by the complainant. Clause 7 of the Memo stated that-

“7. 請留意:本公司並不允許營業員作任何形式的私人回贈。
*所有計劃優惠以銷售合約(Part B)為準，不接受所有人手加
添更改。”

(English translation being: “HGC does not allow its sales representative to make any form of personal offer or rebate, and the service plan and charge contained in Part B of the sales contract prevail with no acceptance of any kind of handwritten additions or alterations.”)

These wordings appeared prominently above the name and signature of the complainant. Just beneath the signature of the complainant, there was a printed statement-

“本人已明白以上之銷售條款，並願意接受上述之安排。”

(English translation being: “*I have understood the above terms and conditions of the sales contract and accepted the above arrangement.*”)

The wordings of Clause 7 and the statement above were not in fine prints or were hidden in other parts of the Memo which only consisted of one page. There was no evidence given by the complainant to indicate that she was under pressure to sign the Memo. In light of the above, before signing the Memo, a reasonable person should be alerted to the fact that it is the policy of HGC to not authorize any personal offer from its salesperson to customers.

19. According to the statement given by the complainant, despite the provision of the Statement in handwriting by the Salesperson, the complainant did not feel comfortable about the absence of a service charges waiver for four months in the sales contract. OFCA notes in this regard that Part B of the sales contract explicitly spelled out the monthly charges (less the monthly rebate) to be payable by the complainant for a minimum period of 24 months without any mention of a waiver of service charges for four months by HGC. Nevertheless, the complainant did not pursue this matter further. On the evidence available, there is a strong suggestion that the complainant herself was concerned at times of considering and signing the contract that the Salesperson was not or was likely not authorized by HGC to make an offer as contained in the Statement.

QC Call

20. Having listened to the voice recording of the QC call provided by HGC, OFCA affirmed that HGC’s QC staff did clearly state that the complainant was required to pay a monthly service charge for 24 months but did not mention about a waiver of service charges for four months. The complainant did not raise any question, let alone any objection to the service charge (with the charges waiver) as explained by the HGC staff.

21. Having interviewed the complainant and listened to the QC call, it is OFCA’s impression that the complainant belongs to the category of service users who were price-conscious in their purchasing decision. Given that the

service charge over the entire contract duration should be the key consideration underlining the complainant's decision to subscribe to HGC's residential broadband service, it would be reasonable to expect the complainant to at least seek clarification from HGC about the waiver of service charges for four months in the QC call, if her understanding was that HGC would be responsible for the promise made by the Salesperson. This is particularly so given that on the complainant's own admission, at times of considering and signing the contract, she was not completely comfortable with the fact that the Salesperson only provided the Statement in handwriting to her and that the service charges waiver was not reflected in the contract (see paragraph 19 above). Also, since at the time of the QC call⁴, the Salesperson had already left the complainant's premises, she was under no pressure to refrain from asking any question or seeking any clarification from the HGC's QC staff on the service charges waiver. A reasonable person in the circumstances of the complainant should have sought confirmation from HGC about the service charges waiver and in so doing would understand that the promise of the Salesperson was not authorized by the company.

22. Having considered the evidence available and the whole sales and promotion process of HGC, OFCA does not consider that a reasonable person in the circumstances of the complainant should expect or believe that the offer of service charges waiver for four months by the Salesperson was made on behalf of or as authorized by HGC. A reasonable person under the circumstances of the complainant should understand that the offer was a personal commitment of the Salesperson only and should not construe that commitment as representing the same undertaking as HGC, the licensee-employer.

23. As to the issue of whether HGC should be held liable for a personal offer of the Salesperson under the circumstances of the case, it will be further considered below.

⁴ According to the information provided by HGC, the QC call was made after 9 pm at the night of the visit of the Salesperson, who had left the complainant's premises at about 8:30 pm.

Liability of HGC

24. HGC submitted that the Salesperson was acting in breach of the Code which prohibited its frontline sales staff from making personal offer, and that the complaint was due entirely to the personal misconduct of an individual salesperson clearly acting outside and in breach of his duties. Regarding the employer's liability for the conduct of its employee (including its salesperson), OFCA makes reference to the case *I-cable Webserve Limited v The Telecommunications Authority (CACV 329/2008)* which was heard by the Court of Appeal on the case stated by the Telecommunications (Competition Provisions) Appeal Board ("Appeal Board") concerning a breach of section 7M of the TO.⁵ In its judgement of the case, the Court of Appeal set out the following principles concerning the question of licensee-employer liability under section 7M of the TO:

"(i) the licensee-employer is not exempt from liability if the conduct giving rise to a contravention of section 7M was committed by an employee in the course of his employment but contrary to a prohibition issued by the licensee-employer; and

(ii) liability on the licensee-employer's part for conduct on the part of employees acting in the course of their employment can only be excluded by completely effective preventive measures and any ineffective steps taken by the licensee to prevent such conduct may rank only in mitigation of penalty".

In accordance with the above principles set out by the Court of Appeal, HGC should be responsible in general for the conduct of the Salesperson acting in the course of his employment unless completely effective preventive measures are implemented.

⁵ See the Court of Appeal's judgement of 11 June 2009 *i-CABLE WebServe Limited v The Telecommunications Authority (Appeal No. 26)* at http://www.cedb.gov.hk/ctb/eng/telecom/doc/CACV329_2008.pdf and the Appeal Board's decision of 30 June 2009 at http://www.cedb.gov.hk/ctb/eng/telecom/doc/Decision_Case_26.pdf.

25. In the present case, the Salesperson did not make any misrepresentations on the 1GB residential broadband service plan itself for the purpose of misleading or deceiving the complainant into signing the service contract. Instead, he made his own promise to the complainant to shoulder the responsibility for the complainant's service charges for four months as written on the Statement, notwithstanding the clear prohibition on staff making personal offers as stipulated in the Code issued by HGC.

26. On preventive measures taken by HGC, according to HGC, it had since 2010 put in place the Code which was updated from time to time for compliance by all frontline sales staff and any form of personal offer was strictly prohibited in the Code. Non-compliance with the Code might result in immediate summary dismissal.

27. In the case of the Salesperson, whilst HGC received three other similar complaint cases against him in May, September and December 2012, HGC submitted that it had warned the Salesperson upon receipt of the first complaint in May 2012. The Salesperson had resigned in August 2012 before the two other cases and the present case came to the notice of HGC. On the information available, there is no evidence to suggest that HGC has condoned the misconduct of making personal offer by the Salesperson.

28. Further, HGC had designed the Memo to include a clause therein in a prominent size and position specifying that HGC does not allow its sales representative to make any form of personal offer (see paragraph 18 above). A customer when signing the Memo should have a reasonable opportunity to be alerted that any personal offer by a salesperson is not authorized by HGC and thus would likely be alerted also to the cause for questioning the validity of any such personal offer, if received.

29. In the follow-up QC call, the HGC's QC staff confirmed with the complainant that the broadband service plan being subscribed to would be effected based upon the offers and entitlements mentioned in such QC voice recording, using the wordings “今日所登記嘅寬頻計劃，會以今次嘅電話錄

音核實為準”。 The script would put a customer on the alert to any discrepancy between the terms and conditions of the offer and the representations made by a salesperson to the customer, thus minimising the opportunity of misunderstanding by the customer or the customer being misled or deceived by such representations. Upon the occurrence of this incident, HGC further revised the QC script to verify with the subscribers whether or not details of the subscription they have taken out are the same as those provided by the direct sales staff, using the wordings “以上我所講嘅內容同銷售員所提供嘅是否一樣?”. Whilst the amended version of the QC script might be clearer, the amendment made did not mean that the original version could not provide the complainant with the opportunity to confirm whether the details of the service plan explained in the QC call were the same as what the complainant and the Salesperson had agreed in the sales process.

30. Having taken into account all the circumstances of this case and for the reasons stated above, even though HGC should be held liable in general for the conduct of the Salesperson in accordance with the principles stated in paragraph 24 above, OFCA is of the view that it had already implemented sufficient and effective preventive measures to prohibit frontline sales staff from making personal offer to customers. OFCA considers that HGC had provided adequate opportunity for a customer to be alerted to the fact that any personal offer made by a frontline salesperson was not authorized by it (viz. Clause 7 of the Memo and the scripts of the QC call) and thus minimized the possibility of the customer being misled or deceived by any such representations of personal offer by the salesperson as the commitment of HGC.

Conclusion

31. On the basis of the analysis set out above, having taken into account all the circumstances of this case, even though the complainant was misled or deceived into signing the service contract due to a personal offer from the Salesperson, OFCA considers that on the balance of probabilities, a reasonable person in the circumstances of the complainant would unlikely expect or believe that the personal offer was equivalent to a commitment of HGC to waive the concerned service charges. Further, in the circumstances of

the case, OFCA considers that HGC had implemented completely effective measures to prevent its frontline sales staff from making unauthorized personal offer. HGC was thus not in breach of section 7M of the TO.

THE CA'S ASSESSMENT AND DECISION

32. After examining the facts of the case and the information/representations provided by the complainant and HGC, the CA affirms OFCA's assessment that HGC is found not in breach of section 7M of the TO.

The Communications Authority
December 2014