

**FINAL DECISION OF THE  
COMMUNICATIONS AUTHORITY**

**ALLEGED MISLEADING OR DECEPTIVE REPRESENTATIONS  
BY INTELLIGENCE TELECOM MARKETING LIMITED  
IN RELATION TO THE PROMOTION OF  
THE “IDD1560 SERVICE”**

<b>Licensee concerned:</b>	Intelligence Telecom Marketing Limited (“ITM”)
<b>Issue:</b>	The representations made by the salespersons of ITM in the course of promoting the “IDD1560 service” were alleged to be misleading or deceptive
<b>Relevant Instrument:</b>	Section 7M of the Telecommunications Ordinance (“TO”) (Cap.106)
<b>Decision:</b>	Breach of section 7M of the TO
<b>Sanction:</b>	Financial penalty
<b>Case Reference:</b>	7M/2/5-12

**THE COMPLAINT**

In May and June 2011, the former Office of the Telecommunications Authority (“OFTA”) received a complaint from China Mobile Hong Kong Company Limited (“CMHK”) alleging a number of suspected cases of fraudulent sales practices. CMHK claimed that a number of its customers had received phone calls from salespersons who identified

themselves to be “PEOPLES’ representatives”<sup>1</sup>, “PEOPLES’ staff” or “PEOPLES’ ex-staff” and who then promoted the IDD1560 or other international direct dial (“IDD”) services to them. CMHK said that its own staff had not made any of such phone calls, and CMHK had not appointed any agents to carry out such sales promotion on its behalf. Further, the IDD services provided by CMHK were IDD1523 and IDD1597 services, not the ones promoted by those salespersons. CMHK requested the former OFTA to look into these suspected cases of misleading or deceptive sales conduct.

2. CMHK provided the former OFTA with a list of the customers who had received such phone calls and who had agreed to be contacted by the former OFTA for follow-up investigations. Having contacted each of the customers on the list, the former OFTA managed eventually to obtain signed statements from two of the customers, Mr. A and Ms. B. Details of their claims are stated below.

### **Mr. A’s Statement**

3. In his statement, Mr. A alleged that on 12 May 2011, he received a call made to his mobile phone number registered with PEOPLES from a salesperson who identified herself as Ms. X and claimed to be “PEOPLES’ staff”. Ms. X said that Mr. A was their long time customer and she then started to promote an IDD1560 service to him. After some discussion of the terms of the plan, Mr. A agreed to subscribe to the IDD1560 service. Ms. X then went through the subscription procedures by verifying Mr. A’s personal data. Ms. X was able to correctly spell the surname of Mr. A and provide the first three digits of Mr. A’s Hong Kong Identity (“HKID”) Card number. At Ms. X’s request, Mr. A provided his credit card information to pay \$500 as initial payment for the service. The telephone conversation ended with Ms. X leaving her contact number and staff number to Mr. A. Some five minutes later, Mr. Z, who claimed to be the supervisor of Ms. X, called Mr. A and thanked him for subscribing to the IDD1560 service. Mr. Z then promoted another IDD service plan to Mr. A, but Mr. A did not take it.

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<sup>1</sup> Though CMHK no longer uses the brand name “PEOPLES” to operate its mobile services in Hong Kong, many of its service users still use “PEOPLES” when referring to CMHK’s mobile services, as in this section 7M case.

4. After the telephone conversation between Mr. A and Mr. Z had ended, Mr. A immediately called PEOPLES' hotline to inquire about the IDD1560 service plan and was told by the hotline staff that PEOPLES did not offer the IDD1560 service. Mr. A immediately called the credit card centre to stop payment. Mr. A also called Ms. X for clarification. Ms. X told him that she was only an ex-employee of PEOPLES. Then Mr. Z took over from Ms. X and said that Ms. X was now working for “中港國際長途電話公司” (English translation: “*China-Hong Kong International Long Distance Telephone Company*”). Mr. A replied that he had always been under the impression that IDD1560 was a service offered by PEOPLES and queried why they had his personal data (i.e. knowing the spelling of his surname and his HKID Card number). Mr. Z did not directly answer his questions. Mr. A insisted on cancelling his IDD1560 subscription but this was rejected by Mr. Z. Subsequently, Mr. A lodged a complaint to PEOPLES.

### **Ms. B's Statement**

5. In her statement, Ms. B alleged that on 31 May 2011 her mother received a call made to the mobile phone number that Ms. B registered with PEOPLES. Ms. B's mother said that the person on the other side of the phone claimed to be “PEOPLES' staff” and would like to talk to Ms. B. Ms. B then talked to that person, Mr. Y, who “claimed that he was from PEOPLES, and said something about being with IDD at the time” (her exact wording in Chinese is: “他說是 PEOPLES 的，又說現在是 IDD 什麼的”). Ms. B did not hear him very clearly but thought that Mr. Y was with PEOPLES and he had been transferred to the IDD department of PEOPLES. Mr. Y promoted an IDD service plan to Ms. B. After some discussion of the terms of the IDD service plan and Ms. B had agreed to subscribe to the service, Mr. Y verified Ms. B's mobile phone number and requested her to provide her full name and address. Mr. Y then left his contact number<sup>2</sup> and staff number to Ms. B, and requested Ms. B to provide her credit card information to pay \$500 as initial payment.

6. Ms. B at first was reluctant to do so but after hearing Mr. Y's claim that he would refund the money to her in case of any problems, she provided the credit card information to him. Ms. B said that her decision to

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<sup>2</sup> The contact number provided by Mr. Y was identical to the one provided by Ms. X in Mr. A's case.

provide the credit card information to Mr. Y was also influenced by the fact that she believed that Mr. Y had already had her information, because he knew that she was the registered user of the mobile phone number despite the fact that the phone was actually used by her mother.

7. All the while Ms. B's mother was listening to the conversation between Ms. B and Mr. Y and she urged Ms. B not to join the IDD plan. Ms. B subsequently changed her mind and told Mr. Y that she wanted to cancel the subscription. However, Mr. Y said that \$500 had already been transferred from her credit card account and the IDD service she had subscribed to could not be cancelled. At this point, Mr. Z<sup>3</sup> took over from Mr. Y and talked to Ms. B. Mr. Z claimed that Mr. Y had no authority to make decisions so he took over to handle the matter. As Ms. B suspected that she had been cheated, she rang off. Ms. B immediately called the credit card centre and was informed that payment of \$500 had already been effected.

8. Later, Mr. Z contacted Ms. B again and reiterated that Ms. B's subscription could not be cancelled. Mr. Z told Ms. B that Mr. Y had worked for PEOPLES before but he did not work for PEOPLES anymore. Mr. Y was at the time working for IDD1560. Mr. Z also admitted that Mr. Y had brought customers' data from PEOPLES to IDD1560. The next day, Ms. B called Mr. Z and reiterated that they had cheated her and misappropriated her data. Subsequently, Ms. B lodged a complaint to PEOPLES.

## **THE INITIAL ENQUIRY**

9. According to the former OFTA's record, the service access code "1560" for external telecommunications services was allocated to P&P Corporation Limited ("P&P"), which at the time held a Services-Based Operator Licence of Class 3 Service (Licence No. 1314) issued under the TO. According to Ms. B, she subsequently received a confirmation letter and a membership card issued by ITM. The former OFTA checked the website of IDD1560, the confirmation letter and the membership card received by Ms. B, and noted that ITM was responsible for the retail operations

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<sup>3</sup> Mr. Z in this case was the same Mr. Z in Mr. A's case. See paragraph 3.

of the IDD1560 service<sup>4</sup>.

10. The former OFTA had also verified that the phone number left by Ms. X and Mr. Y was registered under P&P at the time.

11. On 15 June 2011, the former OFTA sent a letter to P&P enclosing a copy of Ms. B's statement seeking clarifications on Ms. B's case. On 16 June 2011, the former OFTA sent another letter to P&P enclosing a copy of Mr. A's statement seeking clarifications on Mr. A's case. On 17 June 2011, P&P provided information on the two cases to the former OFTA. For Mr. A's case, P&P claimed that the salesperson in question (i.e. Ms. X) was at the time working for P&P after leaving her employment with PEOPLES. P&P claimed that Mr. Z had explained this to Mr. A, who accepted that it was a misunderstanding. P&P also advised that it had cancelled Mr. A's subscription and no payment had been effected. P&P had contacted Mr. A on 16 June 2011 and Mr. A confirmed that no credit card payment had been effected by his bank.

12. For Ms. B's case, P&P claimed that its sales staff had explained to Ms. B on 31 May 2011 and 1 June 2011 that the salesperson in question (i.e. Mr. Y) was at the time working for P&P after leaving his employment with PEOPLES. P&P claimed that Ms. B accepted that it was a misunderstanding. Further, P&P advised that Ms. B understood that the service would be provided to her after credit card payment of \$500 had been effected. P&P said it had confirmed with Ms. B on 15 June 2011 that she would continue with her subscription.

13. In its letters of 27 and 28 June 2011, P&P provided the full names of Ms. X, Mr. Y and Mr. Z and clarified that they were employed by P&P's sales agent in the Mainland. Calls to Mr. A and Ms. B were made from its sales agent's call centre. As regards the reference to “中港國際長途電話公司” (English translation: “*China-Hong Kong International Long Distance Telephone Company*”) in Mr. A's statement, P&P submitted that the name was neither the Chinese name of P&P nor any of its sales agents. P&P understood from its sales agent that telephone numbers were randomly generated for the purpose of making telesales calls. P&P claimed that no

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<sup>4</sup> See paragraphs 17 to 21 further for relationship between P&P and ITM.

customer information had been provided to the telesales staff. The alleged misappropriation of personal data might have been the result of the misconduct of individual salespersons.

14. As P&P claimed that Ms. X and Mr. Y were “PEOPLES’ ex-employees”, the former OFTA on 13 July 2011 requested CMHK to verify whether Ms. X and Mr. Y had worked for CMHK. The human resource (“HR”) manager of CMHK gave a statement to the former OFTA on 1 August 2011, stating that CMHK had maintained records of all the current and past employees of the company and advised that Ms. X and Mr. Y were neither the existing nor former employees of CMHK. The HR manager of CMHK however advised that their records did not include the employee records of CMHK’s agents.

## **THE INVESTIGATION**

15. After considering the statements given by Mr. A, Ms. B and the HR manager of CMHK, P&P’s reply letters to the former OFTA and other relevant information, the former Telecommunications Authority (“TA”) considered that the two cases were within the scope of section 7M of the TO. There were reasonable grounds to suspect that Ms. X and Mr. Y, when promoting P&P’s IDD1560 service to Mr. A and Ms. B respectively, had represented themselves to be “PEOPLES’ staff”, and that Mr. Z had represented to both Mr. A and Ms. B that Ms. X and Mr. Y were “PEOPLES’ ex-staff”, though according to CMHK Ms. X and Mr. Y had never been employed by CMHK. As such there were reasonable grounds to suspect that through its agents or employees, P&P engaged in misleading or deceptive conduct in breach of section 7M of the TO. 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.”*

16. The former OFTA thus commenced an investigation on the matter and on 15 August 2011 requested P&P to specifically provide –

- (a) representations on the allegations made by Mr. A in his statement to the former OFTA;
- (b) representations on the allegations made by Ms. B in her statement to the former OFTA;
- (c) substantiation that Ms. X and Mr. Y were “PEOPLES’ ex-staff”; and
- (d) voice recordings of all telephone conversations between Mr. A and Ms. X and between Mr. A and Mr. Z on 12 May 2011, and those between Ms. B and Mr. Y and between Ms. B and Mr. Z on 31 May and 1 June 2011.

### **The Relevant Licensee**

17. The former OFTA considered it necessary to first address the fundamental issue as to whether P&P or ITM should be regarded as the relevant licensee in this investigation since it was noted that P&P was licensed to operate the IDD1560 service, but ITM was responsible for the retail operations of the IDD1560 service. The former OFTA sought clarification from P&P, which advised that ITM was its subsidiary and mainly focused on the retail marketing of the IDD 1560 service.

18. As mentioned in paragraph 11 above, since receipt of the complaint in June 2011 and throughout the subsequent handling of the case, the former OFTA has corresponded with P&P. The former OFTA had all along been receiving reply letters with P&P’s letterhead or emails from persons acting on behalf of P&P.

19. In order to double confirm the identity of the relevant licensee in this investigation, the Office of Communications Authority (“OFCA”) made further clarification with P&P in June 2012. P&P advised that ITM had been authorised by P&P to resell the IDD1560 service to retail customers.

Customers subscribing to the IDD1560 service would enter into service contracts with ITM. Moreover, the sales agent in the Mainland, which employed Ms. X and Mr. Y, was also authorised by ITM.

20. Having considered the information provided by P&P, and noting from Ms. B's case that on subscription, a customer would receive a confirmation letter and a membership card issued by ITM for subscription of the IDD 1560 service, OFCA considered that the IDD 1560 service was offered to end customers by ITM. ITM should therefore be the relevant licensee in this case. In this regard, ITM was a class licensee for offer of the IDD1560 service under section 8(1)(aa) of the TO<sup>5</sup>.

21. OFCA sought confirmation from the person acting for P&P whether all the submissions or representations made or information provided by P&P to the former OFTA in this case could be treated as provided by ITM. The person acting for P&P was also a director of ITM and he advised OFCA on 25 June 2012 that as ITM and P&P were managed by the same management team<sup>6</sup>, all the submissions or representations made or information provided by P&P to the former OFTA in this case could be treated as provided by ITM. OFCA therefore processed the case on the basis that ITM was the relevant licensee, and treated all submissions, representations, and information received from P&P throughout the enquiry and investigation stages as if they were provided by ITM<sup>7</sup>.

### **ITM's Representations**<sup>8</sup>

22. On 1 September 2011, ITM submitted in respect of Mr. A's case two voice recordings in relation to the telephone conversations between Mr. A and Ms. X, and between Mr. A and Mr. Z, together with statements made by

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<sup>5</sup> Under section 8(1)(aa) of the TO, any persons who offer telecommunications services without operating any telecommunications equipment will fall within the scope of the Class Licence for Offer of Telecommunications Services ("Class Licence"). Persons who resell telecommunications services will automatically become Class Licensees and are subject to the licence conditions under the Class Licence. The Class Licence is given in

[http://www.coms-auth.hk/filemanager/common/licensing/Offer\\_of\\_Tele\\_Services\\_\(Eng\).pdf](http://www.coms-auth.hk/filemanager/common/licensing/Offer_of_Tele_Services_(Eng).pdf)

<sup>6</sup> P&P and ITM each had only a single company director, which was the same person.

<sup>7</sup> For the avoidance of doubt, all submissions, representations and information provided by P&P as referred to in paragraphs 11 to 14 are to be treated as provided by ITM.

<sup>8</sup> In light of paragraph 21, the representations summarised in this section are treated as if they were representations made by ITM.



Ms. X and Mr. Z reciting their respective telephone conversations with Mr. A. For Ms. B's case, ITM only provided a statement made by Mr. Y reciting the telephone conversation between Ms. B and Mr. Y, and a statement made by Mr. Z reciting the telephone conversations between Ms. B and Mr. Z. The voice recordings in relation to Ms. B's case were not provided and no explanation was given by ITM. In addition, ITM provided a copy of its company guidelines “代理商電話銷售守則” (English translation: “*Telesales Guidelines for Agents*”) which was addressed to the sales agents of IDD1560 and issued in the name of ITM, and a copy of “IDD1560 銷售及開戶流程” (English translation: “*Call Flow of Selling and Account Opening for IDD1560*”).

23. In respect of Mr. A's case, according to the voice recording of the conversation between Mr. A and Ms. X, Ms. X told Mr. A that she was the salesperson who had handled his mobile phone account in PEOPLES before. She mentioned that she had left PEOPLES and was now working for “IDD1560 長途電話公司”<sup>9</sup> (English translation: “*IDD1560 Long Distance Telephone Company*”). Ms. X promoted an IDD1560 service plan to Mr. A and he accepted the offer. To register the IDD1560 service for Mr. A, Ms. X read out the exact mobile phone number of Mr. A and the exact spelling of Mr. A's surname for seeking his confirmation. Mr. A then gave the remaining part of his full name and provided his credit card information to pay \$500 as the first payment for the IDD1560 service.

24. In the voice recording of the conversation between Mr. A and Mr. Z, Mr. Z mainly verified the personal data and subscription details with Mr. A, and promoted other IDD service plans to Mr. A, who rejected them. In Mr. Z's statement, he also mentioned that about one hour after his conversation with Mr. A, Mr. A called the company again during which Mr. A requested to cancel the service. The voice recording provided by ITM did not cover this further conversation between Mr. A and Mr. Z<sup>10</sup>.

25. In respect of Ms. B's case, according to the statement made by Mr. Y, when he talked to Ms. B, he began by saying that he was the salesperson who had handled Ms. B's mobile service plan in PEOPLES before, and asked whether Ms. B was happy with the service. After Ms. B had replied that she

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<sup>9</sup> ITM submitted that there was no company named as “IDD1560 長途電話公司”.

<sup>10</sup> See paragraph 4 for Mr. A's account of this part of the conversation he had with Ms. X and Mr. Z.

was happy with the service, Mr. Y said that this was good and that he was no longer in PEOPLES having responsibility for Ms. B's monthly mobile service plan, which was at \$35 per month for 850 minutes. He told Ms. B that he had now switched his work to promoting IDD1560 long distance service. Mr. Y then promoted an IDD1560 service plan to Ms. B, who accepted it. To register the IDD1560 service for Ms. B, Mr. Y read out the exact spelling of Ms. B's surname and requested Ms. B to provide the remaining part of her full name. Mr. Y then read out the exact mobile phone number of Ms. B for seeking her confirmation. During the conversation, Ms. B provided her credit card information to pay \$500 as first payment for the IDD1560 service.

26. According to the statement made by Mr. Z, after he knew that there was problem between the salesperson (i.e. Mr. Y) and the customer (i.e. Ms. B) over the registration (of service), Mr. Z took over and talked to Ms. B. During their telephone conversation, Mr. Z mainly discussed with Ms. B about her request to cancel the IDD1560 service subscription and persuaded her to keep the subscription. Mr. Z also explained to Ms. B that all the services of his company bore no relationship with PEOPLES. The next day, Ms. B contacted Mr. Z again and claimed that she suspected his company had misappropriated the customers' data of other companies for conducting sales. Mr. Z explained to Ms. B that he did not know how Mr. Y got her personal information and promised to suspend the employment of Mr. Y and conduct a full investigation on the matter.

27. As for the guidelines “代理商電話銷售守則” (English translation: “*Telesales Guidelines for Agents*”), it was noted that they were issued by ITM on 23 August 2011 in view of the growing number of complaints on telesales conducted by sales agents. The guidelines set out measures introduced to strengthen the internal control of the sales conduct of the salespersons of its sales agents. It was noted in particular that the guidelines prescribed that sales agents could only use randomly generated numbers to make sales calls. If sales agents would like to make use of any customer data, they should seek prior approval from IDD1560 by providing the relevant authorization documents five working days in advance. The guidelines also provided that sales agents were prohibited from mentioning or suggesting to customers anything that was untrue with regard to the company's background and service quality. Breach of the guidelines would, depending on the seriousness of the

case, result in the issue of warnings, deduction of commissions, financial penalty, or termination of the agency agreement. ITM had also revised the “IDD1560 銷售及開戶流程” (English translation: “*Call Flow of Selling and Account Opening for IDD1560*”) for the salespersons of its sales agents to follow when conducting telesales.

28. As regards ITM’s claim that Ms. X and Mr. Y were “PEOPLES’ ex-staff”, the former OFTA asked ITM to provide evidence showing that Ms. X and Mr. Y had been employed by CMHK, or had worked for the agents of CMHK. On 23 and 29 September 2011, ITM advised that Ms. X and Mr. Y were employed by a company (“Company A”) between May and June 2010, but no supporting documentation was provided.

### **Further Information from CMHK**

29. In the light of the information provided by ITM on Ms. X’s and Mr. Y’s previous employment, the former OFTA sought confirmation from CMHK as to whether Company A had previously been engaged by CMHK to conduct telesales activities on its behalf, and if so, whether the salespersons in question had been employed by that company. CMHK advised the former OFTA that it had engaged a company (“Company B”) to provide certain call centre services between May 2008 and April 2009. CMHK had also searched the relevant websites and advised that a company in the Mainland (“Company C”) was believed to be affiliated with Company B. It was noted that Company B and Company C did not bear the same name of Company A, although the name of Company C did bear some resemblance to that of Company A.

### **OFCA’S ASSESSMENT**

30. Having considered the available evidence and taken into account the representations made by ITM, OFCA’s assessment is set out in paragraphs 31 to 45 below.

### **Employment Status of Ms. X and Mr. Y**

31. It is by ITM's own admission that at the material time, Ms. X and Mr. Y were not employed by and did not work for CMHK. ITM advised that at the material time, Ms. X and Mr. Y were salespersons employed by ITM's sales agent in the Mainland responsible for promoting ITM's IDD1560 service.

32. Also according to ITM, Ms. X and Mr. Y had previously worked for PEOPLES. When ITM was requested to provide proof to that effect, either directly or indirectly, ITM advised instead that both were employed by Company A between May and June 2010.

33. On the other hand, CMHK advised that Ms. X and Mr. Y had never been directly employed by CMHK. The agent that CMHK had used was Company B, which CMHK believed to be associated with Company C in the Mainland. Although the names of Company A and Company C bear some resemblance, on the basis of the information available to OFCA, we are unable to establish association between the two companies. CMHK engaged Company B as its agent between May 2008 and April 2009, whereas ITM claimed that Ms. X and Mr. Y were employed by Company A between May and June 2010. Therefore, even though CMHK did not have any record of the employees of its agents, given that the two periods were different, it was unlikely that Ms. X and Mr. Y had worked for PEOPLES even assuming that Company A might have any association with Company B or Company C.

34. As for Ms. X's and Mr. Y's apparent possession of the customer data of Mr. A and Ms. B respectively, it is considered that such fact alone is no indication that Ms. X and Mr. Y had been employed by CMHK or the agents of CMHK. Personal data of customers could be obtained by various means, either legitimately or illegitimately<sup>11</sup>.

35. Thus, based on the information available, there is no evidence showing, on the balance of probabilities, that either Ms. X or Mr. Y had ever

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<sup>11</sup> Whether a person's personal data has been mishandled, misused or misappropriated is outside the scope of section 7M of the TO. OFCA will nonetheless bring this case to the attention of the Office of the Privacy Commissioner for Personal Data.

been employed by CMHK or the agents of CMHK to promote the services of PEOPLES.

### Mr. A's Case

36. As regards Mr. A's case, it was Mr. A's recollection that Ms. X had claimed herself to be "PEOPLES' staff". Mr. A's statement in this respect is contradicted by the voice recording provided by ITM, in which Ms. X told Mr. A that she was the salesperson who had handled his mobile phone account in PEOPLES, but she had left PEOPLES and was at the time working for "IDD1560 長途電話公司" (English translation: "*IDD1560 Long Distance Telephone Company*"). There is no reason to suspect that the voice recording has been tempered with. OFCA is inclined to accept that Ms. X had on the occasion represented to Mr. A that she had previously handled his mobile phone account in PEOPLES and that she had left PEOPLES, and was at the time working for "IDD1560 Long Distance Telephone Company". On the basis of the voice recording, it was quite clear that the message given by Ms. X to Mr. A was that she no longer worked for PEOPLES at the time.

37. Even so, given our analysis in paragraphs 32 to 35 that there is no evidence showing, on the balance of probabilities, that Ms. X had ever been employed by CMHK or the agents of CMHK to promote the services of PEOPLES, Ms. X's claim to Mr. A that she had previously handled his mobile phone account in PEOPLES would constitute misrepresentations.

38. That notwithstanding, OFCA is of the view that no connection can be established between Ms. X's misrepresentations and Mr. A's agreement to subscribe to the IDD1560 service plan. It was Mr. A's recollection that Ms. X had told him that she was with PEOPLES. Therefore he was under the impression that IDD1560 was a service offered by PEOPLES. Apparently, he agreed to subscribe to the IDD1560 service plan on the basis that it was a service offered by PEOPLES. However, as analysed in paragraph 36 above, Ms. X actually told him that she no longer worked for PEOPLES and was working for "IDD1560 長途電話公司" (English translation: "*IDD1560 Long Distance Telephone Company*"). Mr. A had therefore either misheard or misunderstood what Ms. X said as to which company she was working for. As such, the fact that he agreed to subscribe to the IDD1560 service was based

on his own perception of what Ms. X had said, but not on what Ms. X had actually said. In short, it cannot be established that Mr. A's decision to subscribe to the IDD1560 service was the result of him having been affected by Ms. X's misrepresentations.

39. Consideration has also been given to whether a reasonable person, in Mr. A's situation and without misunderstanding what Ms. X said to him, would have been misled or deceived by Ms. X's misrepresentations into subscribing to the IDD 1560 service<sup>12</sup>. In this regard, OFCA considers that Ms. X's misrepresentations would not have the effect of creating a false impression on a customer that she was promoting IDD services offered by PEOPLES, because Ms. X had made it clear that she was no longer working for PEOPLES. The question is therefore whether Ms X's misrepresentations would likely have the effect of making a reasonable person subscribe to the IDD 1560 service, knowing that it was not offered by PEOPLES. OFCA considers that if a reasonable person had not misunderstood what Ms. X had said, the likely reaction of that reasonable person would have been to question why Ms. X, as an ex-employee of PEOPLES, would still keep his personal data and use it for promoting services of another company. Indeed, this was the reaction of both Mr. A and Ms. B as soon as they became aware, respectively, that Ms. X and Mr. Y were in fact not working for PEOPLES. A reasonable person would likely be put on guard, rather than let off guard, in a situation like this. Therefore, applying the reasonable person test, we consider it unlikely that the misrepresentations of Ms. X (that she was an ex-employee of PEOPLES) would have misled or deceived a reasonable person into subscribing to the IDD1560 service. As such, a case of misleading or deceptive conduct in the promotion of IDD1560 service cannot be established.

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<sup>12</sup> See the guidelines "Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets" at [http://tel\\_archives.ofca.gov.hk/en/report-paper-guide/guidance-notes/gn\\_20030521.pdf](http://tel_archives.ofca.gov.hk/en/report-paper-guide/guidance-notes/gn_20030521.pdf) issued on 21 May 2003. Paragraph 2.10 provides that "[t]he CA must form an opinion as to whether a licensee is engaging, or has engaged, in misleading or deceptive conduct. In forming his opinion, the CA will make assessment of all of the circumstances of the conduct. It will examine the facts and ask whether a "reasonable person" would be misled or deceived by the licensee's conduct". Paragraph 2.15 further provides that "[a] licensee's conduct need not be proven to have actually misled or deceived anyone for that licensee to be in breach of section 7M. The CA does not require evidence that someone has actually been misled or deceived to find a licensee in breach of section 7M; although such evidence will often be a persuasive factor in considering whether a "reasonable person" would have been misled."

## **Ms. B's Case**

40. As regards Ms. B's case, Ms. B said in her statement that Mr. Y had said to her that "he was from PEOPLES, and said something about being with IDD at the time" (her exact wording in Chinese is: "他說是 PEOPLES 的，又說現在是 IDD 什麼的"). Although Ms. B said that she did not hear him very clearly, she was nonetheless under the impression that Mr. Y was with PEOPLES and had been transferred to the IDD department of PEOPLES.

41. Ms. B's recollection is not contradicted by Mr. Y's own statement. In Mr. Y's statement, he recited his "introductory" conversation with Ms. B in a detailed manner. He began by saying that he was the salesperson who had handled Ms. B's mobile service plan in PEOPLES before, and asked whether Ms. B was happy with the service. After Ms. B had replied that she was (happy with the service), Mr. Y said that this was good, and that he was no longer responsible in PEOPLES for Ms. B's monthly mobile service plan, which was at \$35 per month for 850 minutes. He told Ms. B that he had now switched to promoting IDD1560 long distance service. Mr. Y then started to promote an IDD1560 service plan to Ms. B.

42. OFCA considers that Mr. Y's introductory conversation, taken as a whole, would likely create a false impression on a reasonable person in Ms. B's situation that he was still working for PEOPLES, and it was just that he had been transferred from the department handling PEOPLES' mobile services to another department handling its IDD services. Indeed, Ms. B was under such a false impression. The fact that Mr. Y claimed that he was no longer responsible for her mobile service plan, and had switched his work to promoting IDD1560 service (his exact wording in Chinese is: "咁睇翻我就無咗萬眾再負責開你 35 元 850 分鐘手提月費啦，轉咗去 IDD1560 負責翻長途優惠") gave no express indication that he had left PEOPLES and was at the time working for an IDD service company which bore no relationship with PEOPLES. In the first place, one cannot assume that Ms. B, or a reasonable person in Ms. B's situation, would readily know that the IDD1560 service was not operated by PEOPLES. Further, the fact that Mr. Y started off by asking about Ms. B's use of PEOPLES' mobile services, and citing the terms of her mobile service plan (irrespective of whether the terms were accurate or not), all gave the impression to Ms. B that he was familiar with Ms. B's mobile

service account details and was still working for PEOPLES. When he started to promote the IDD1560 service to Ms. B, he just said vaguely that he had “switched to IDD1560”. The way Mr. Y conducted the introductory talk would have created a false impression on a reasonable person, and in fact did create a false impression on Ms. B, that Mr. Y was at the time working for PEOPLES and was promoting PEOPLES’ IDD services. Such a false impression would have operated in the mind of a reasonable person, and did operate in the mind of Ms. B, when Mr. Y continued to promote the IDD 1560 service. As such, OFCA considers that, on the balance of probabilities, Mr. Y’s conduct had misled or deceived Ms. B into subscribing to the IDD1560 service plan, on the belief that Mr. Y was at the time working for PEOPLES and was promoting PEOPLES’ IDD services. A reasonable person in Ms. B’s situation would have likely been similarly misled or deceived.

### **ITM’s Liability for the Conduct of its Sales Agent**

43. In the light of the analysis in paragraphs 36 to 42 above, it is considered that a case of misleading or deceptive conduct in the selling of IDD1560 services is established on the part of the conduct of Mr. Y in Ms. B’s case. At the time, Mr. Y was employed or engaged by ITM’s sales agent in the Mainland to promote ITM’s IDD1560 service. As such, ITM, as the principal and the telecommunications licensee offering the IDD1560 service, is liable under section 7M of the TO for the misleading or deceptive conduct committed by the salesperson of its sales agent.

44. The following two licence conditions in the Class Licence applicable to ITM are relevant to the case:

*“[T]he Class Licensee shall comply with the Ordinance, regulations made under the Ordinance, licence conditions or any other instruments which may be issued by the Authority under the Ordinance and such guidelines or codes of practices which may be issued by the Authority as in his opinion are suitable for the purpose of providing practical guidance on any particular aspect of any conditions of this Licence.” (Condition 4.1)*

*“[I]f the Class Licensee employs any person under contract for*



*the purpose of the offering a telecommunications service under this Licence (a “contractor”), the Class Licensee shall continue to be responsible for compliance with the conditions of this Licence, and the performance thereof, by any contractor.” (Condition 4.2)*

45. The combined effect of the two licence conditions make it unequivocal that ITM, as a licensee of the Class Licence, is responsible for its contractor’s compliance with the licence conditions, including the licence condition to comply with the TO.

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

46. After examining the facts of the case, the information/representations provided by the complainant (i.e. Ms. B) and ITM, the CA affirms OFCA’s assessment that, in Ms. B’s case, ITM had engaged in misleading or deceptive conduct in breach of section 7M of the TO. A financial penalty should be imposed.

47. This is the first occasion on which a financial penalty is imposed on ITM under section 7M of the TO, and the maximum penalty stipulated by the TO is \$200,000. In considering the appropriate level of financial penalty in this case, the CA has had regard to the Guidelines on the Imposition of Financial Penalty Issued under Section 36C of the TO (the “Guidelines”). Under the Guidelines, the CA is to consider the gravity of the breach (such as the nature and seriousness of the infringement, damage caused to third parties by the infringement, and duration of the infringement), whether the licensee under concern has previous records of similar infringements, and whether there are any aggravating or mitigating factors.

48. In considering the gravity of the breach and therefore the starting point for the level of penalty, the CA is unable to put Mr. Y’s conduct down to a merely careless or negligent act. The way Mr. Y conducted himself was more likely to be a calculated move on his part to make Ms. B believe that he was working for PEOPLES and was selling PEOPLES’ services at the time, so that Ms. B would continue to listen to him and take up the IDD service

promoted by him. Notwithstanding that Ms. B eventually agreed to keep the IDD1560 subscription, the CA nonetheless considers this to be a substantive breach of section 7M of the TO.

49. While considering that this was a substantive breach of section 7M of the TO, the CA also notes that although the former OFTA had received a number of suspected cases referred to by CMHK, only two cases were expressly stated to be related to the IDD1560 service. Whilst the customers of these two cases agreed to give statements to enable the former OFTA to pursue the matter further, ultimately, only one case of breach is established. As such, there is no sufficient evidence to prove that a considerable number of consumers have been misled or deceived by the conduct of ITM or its sales agent.

50. In consideration of the above, the CA is of the view that the appropriate starting point for determining the level of financial penalty is \$70,000.

51. On mitigation factors, the CA notes that ITM has promptly issued company guidelines to strengthen the internal control of the sales conduct of the salespersons of its sales agents, with specific emphasis on the prohibition of using unauthorised customer data and making untrue statements relating to the company's background. The CA considers that ITM has taken a positive and responsible step towards strengthening its compliance with section 7M of the TO. Furthermore, ITM has been cooperative with the former OFTA throughout the investigation.

52. Having carefully considered the circumstances of the case and taking all factors into account, the CA concludes that in this case of the first occasion on which a financial penalty is imposed under section 7M of the TO on ITM, the penalty which is proportionate and reasonable in relation to the conduct concerned is \$50,000.