

**FINAL DECISION OF THE
COMMUNICATIONS AUTHORITY**

**BREACH BY
SMARTONE MOBILE COMMUNICATIONS LIMITED OF
GENERAL CONDITION 12.1 OF UNIFIED CARRIER LICENCE**

Licensee Concerned:	SmarTone Mobile Communications Limited (“SmarTone”)
Issue:	Use of radiocommunications installation not specified in Schedule 3 to the Unified Carrier Licence (“UCL”) held by SmarTone
Relevant Instruments:	General Condition (“GC”) 12.1 of SmarTone’s UCL No. 018
Decision:	Breach of GC 12.1 of SmarTone’s UCL No. 018
Sanction:	Financial penalty
Case Reference:	LM T 69/17 in OFCA/O/F/37 C

BACKGROUND

On 20 September 2017, the Office of the Communications Authority (“OFCA”) received a complaint referred by a District Council Member about a dispute between the Incorporated Owners of Kwai Ying Building (address: 1-5 Shek Man Path, Kwai Chung) and SmarTone Mobile Communications Limited (“SmarTone”) regarding the installation of radio base stations at the rooftop of Kwai Ying Building (“the premises concerned”). As revealed by OFCA in the course of its investigation, SmarTone had been using the radio base stations at the premises concerned since March 2012. The stations are not radiocommunications installations specified in Schedule 3

to its UCL.

2. GC 12.1 of the SmarTone's UCL stipulates that -

“12.1 Each radiocommunications installation operated by or on behalf of the licensee shall be used only at the location and with emissions and at the frequencies and of the classes and characteristics specified in Schedule 3 to this licence and with such power and aerial characteristics as are specified in that Schedule in relation to the class and characteristics of the emission in use.”

SMARTONE'S APPLICATION FOR USE OF RADIO BASE STATION

3. On 24 August 2013, SmarTone submitted an application for use of a 3G radio base station¹ at the premises concerned for provision of mobile services with receive and transmit frequencies in the 1950.1 MHz – 1964.9 MHz and 2140.1 MHz – 2154.9 MHz bands respectively. These frequency bands are assigned to SmarTone under its UCL for provision of public mobile radiocommunications services. In the course of processing the application, OFCA had repeatedly requested SmarTone for submission of all necessary supporting documents. Nevertheless, SmarTone failed to provide the required documents after OFCA's last reminder issued in July 2016. On 8 August 2016, OFCA informed SmarTone that its application was rejected due to incomplete information.

THE COMPLAINT AND OFCA'S INVESTIGATION

4. In September 2017, OFCA received a complaint referred by a District Council Member about a dispute between the Incorporated Owners of Kwai Ying Building and SmarTone regarding radio base stations installed at the rooftop of the building. In response to the complaint, OFCA checked and found that SmarTone had not obtained approval of the CA regarding any of its radio base stations installed at the premises concerned.

¹ 3G radio base station uses WCDMA technology to provide mobile services.

5. Site inspection conducted by OFCA on 22 September 2017 confirmed that there were 3G and 4G radio base stations² installed at the premises concerned and these stations were transmitting radio signals in the frequency bands listed below -

- (a) 877.5 MHz – 882.5 MHz (“Band I”)
- (b) 952.5 MHz – 960.0 MHz (“Band II”)
- (c) 1835.1 MHz – 1845.1 MHz (“Band III”)
- (d) 2110.3 MHz – 2115.3 MHz (“Band IV”)
- (e) 2140.1 MHz – 2154.9 MHz (“Band V”)
- (f) 2640 MHz – 2650 MHz (“Band VI”)

6. As these frequency bands are assigned to SmarTone, OFCA suspected that the radio base stations were operated by SmarTone. On 29 September 2017, OFCA notified SmarTone of the investigation results and invited it to make representations on this case.

7. In response, SmarTone admitted that the stations had been in operation between 9 March 2012 and 29 September 2017³. It also indicated that the stations provided service coverage in Kwai Chung residential area around Shek Pui Street, Shek Man Path, Shek Ying Path, Tai Loong Street and Wo Yi Hop Road. SmarTone claimed that it was not aware that its application for use of the stations had been rejected and SmarTone could not find any record of OFCA’s rejection letter.

OFCA’S ASSESSMENT

8. OFCA is of the view that the stations had essentially been used as normal radio base stations for providing public mobile radiocommunications services and this view was acknowledged by SmarTone in its representations. GC 12.1 of SmarTone’s licence states that “*each radiocommunications installation operated by ... the licensee shall be used only at the location ...*

² 4G radio base station uses LTE technology to provide mobile services.

³ On 6 October 2017, OFCA conducted another on-site measurement and found that SmarTone had ceased the use of the stations.

and at the frequency ... specified in Schedule 3 to this licence ...". The wording of GC 12.1 makes it clear that the use of radiocommunications installation by the licensee outside the specification of Schedule 3 is prohibited.

9. OFCA considers that SmarTone's explanation of its failure to provide the required supporting document for the application in 2013 for use of a radio base station at the premises concerned and its claim of not finding any record of OFCA's rejection letter in respect of that application not acceptable. As indicated by SmarTone, the stations had been put into operation since 9 March 2012, more than one year before the relevant application was submitted to OFCA.

10. Furthermore, in the 2013 application, it was stated that the transmit frequencies of the 3G radio base station would be in Band V only, but the 3G and 4G stations actually in use also transmitted in other five frequency bands (viz. Band I to IV and Band VI) as revealed by OFCA's on-site measurements conducted on 22 September 2017. Based on OFCA's records, SmarTone has never submitted any application to the CA for the stations with transmit frequencies in these five frequency bands.

11. In the light of OFCA's findings and SmarTone's representations summarised in paragraphs 4 to 7 above, it is OFCA's assessment that SmarTone has breached GC 12.1 of its UCL for using the stations without the prior approval of the CA.

THE CA'S CONSIDERATION AND DECISION

12. OFCA completed its investigation and submitted its findings to the CA on 28 November 2017. Having considered the findings of OFCA, the CA issued its Provisional Decision to SmarTone on 30 November 2017. SmarTone submitted its representations on 14 December 2017.

13. Having considered SmarTone's further representations, the CA maintains its view that SmarTone has failed to comply with GC 12.1 of its UCL in respect of the use of a radiocommunications installation not specified in Schedule 3 to its UCL.

14. In considering the sanction that it should impose, the CA notes that financial penalties were imposed on mobile network operators in three precedent cases of unauthorised radio base stations. Against this background and taking into account full circumstances of the case, the CA considers that a financial penalty should be imposed on SmarTone.

15. A warning was issued to SmarTone for a breach of GC 12.1 of its UCL in February 2013. The current case is the first occasion on which financial penalty is imposed on SmarTone under GC 12.1 of its UCL. The maximum penalty stipulated by the TO is \$200,000 for the first occasion on which a penalty is so imposed. 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 under Section 36C of the Telecommunications Ordinance” (“the Financial Penalty Guidelines”)⁴. Under the Financial Penalty Guidelines, the CA would consider the gravity of the breach (such as the nature and seriousness of the infringement, damaged caused to third parties by the infringement, and the duration of the infringement), whether the licensee has previous records of similar infringements, and whether there are any mitigating and aggravating factors.

16. In considering the gravity of the breach and hence the starting point for the level of financial penalty, the CA notes that -

- (a) SmarTone’s breach of GC12.1 of its UCL in the current case is significantly more severe than its previous breach in February 2013 on which the CA issued a warning -
 - (i) this is the second occasion where SmarTone is found to have breached GC 12.1 of its UCL;
 - (ii) the breach was committed before submission of an application for use of the radio base station and lasted for a long period of over five years; and
 - (iii) SmarTone had never submitted any application to the CA for the use of the stations with transmit frequencies in Band I to IV and Band VI;

⁴ http://tel_archives.ofca.gov.hk/en/legislation/guideline_6d_1/guideline_6d_1_150402.pdf

- (b) the stations fulfilled the telecommunications requirements in respect of electromagnetic compatibility and radiation safety⁵. They had not posed any threat of radiation hazard to members of the public, nor had any adverse impact on telecommunications services or telecommunications service users; and
- (c) SmarTone had operated the stations at its own assigned frequencies to improve mobile coverage so as to better serve its customers.

17. Having regard to the starting point of financial penalty of the three precedent cases (i.e. \$100,000) and the maximum applicable penalty of \$200,000, the CA is of the view that the appropriate starting point for determining the level of financial penalty for this case is \$100,000. Taking into account the severity of the breach of the current case, the CA considers that additional financial penalty of \$20,000 should be applied to each of the offences mentioned in paragraph 16(a) above. In other words, the financial penalty should amount to \$160,000. On the other hand, SmarTone has readily admitted the unauthorized use of the stations and has ceased the use of the stations in September 2017 right after the case was brought to its attention. Taking into account these mitigating factors, the CA considers it appropriate to reduce the financial penalty by \$20,000.

18. Having carefully considered the circumstances of the case and all relevant factors, the CA concludes that imposition of a financial penalty of \$140,000 upon SmarTone is proportionate and reasonable in relation to the breach.

The Communications Authority
February 2018

⁵ The non-ionization radiation level at the premises concerned was also checked during the on-site measurement conducted on 22 September 2017 and found in compliance with the safety requirement.