

Circular letter to 3G Mobile Network Operators

6 May 2013

Dear Sir/Madam,

Comments by Certain 3G Mobile Network Operators about Price Increase in the context of the Competition Provisions of the Telecommunications Ordinance (Cap. 106)

The Office of the Communications Authority (“OFCA”) notes that, in response to the second consultation paper issued by the Government on 28 December 2012 on the proposed arrangements for the 3G spectrum upon expiry of the existing frequency assignments, the industry, members of the public, the media and other interested parties have made various comments on issues raised therein, including on a proposal on the spectrum re-assignment put forward for further consultation with the industry and interested parties, viz. a hybrid between administratively-assigned and market-based approach (the “hybrid option”).

In that context, a number of 3G mobile network operators have made assertions to the effect that the hybrid option, if adopted, would inevitably increase cost pressure on them and this would translate into higher mobile service charges. In some cases, the specific figures in terms of percentage of price increase or cost increase in dollar terms were openly mentioned. OFCA notes that such public pronouncements of

potential price increase were made either during the announcement by mobile operators of their business results for the year, or when responding to press enquiries. Such specific price information, along with the other comments made by the 3G mobile network operators, has been widely reported in the press.

OFCA encourages all stakeholders concerned, especially the incumbent 3G mobile network operators, to fully participate in the foregoing 3G consultation exercise, and to freely express their views and comments on the various proposals put forward for consideration. As such, OFCA sees nothing wrong *per se* in the 3G mobile network operators making comments publicly about the adverse effect of one or more of the proposals in the 3G consultation on their costs and pricing. Further, OFCA has no intention or interest in interfering with normal and legitimate business conduct of operators, including on occasions when they discuss their companies' future plans and directions during company results announcement briefings or on other public forum.

However, the recent events as stated above appear to suggest that the operators have, one after another, publicly announced their future pricing plans, to the extent of providing detailed information on the direction and timing of price change, as well as the magnitude of possible price movements. In this regard, OFCA considers that the operators' conduct may potentially go beyond the normal operation of the market and raises a legitimate concern that the relevant competition provisions of the Telecommunications Ordinance (Cap 106) ("TO"), which the operators are subject to, may be engaged.

Section 7K(1) of the TO provides that

A licensee shall not engage in conduct which, in the opinion of the [Communications] Authority, has the purpose or effect of preventing or substantially restricting competition in a telecommunications market.

More specifically, section 7K(3)(a) of the TO provides that

Without limiting the general nature of [section 7K(1)], a licensee engages in conduct prescribed under [section 7K(1)] if he enters into an agreement, arrangement or understanding that has the purpose or effect prescribed by [section 7K(1)].(Emphasis added)

In this connection, reference is made to paragraph 3.2 of the *Guidelines to Assist Licensees to Comply with the Competition Provisions under the Telecommunications Ordinance* (“Competition Guidelines”) issued on 30 December 2010¹, which provides that

An “arrangement or understanding” is something less formal than a written or oral “agreement”, whether or not they are legally enforceable. It is any sort of communication between two or more parties which results in each party expecting the other to act in a particular way. Arrangements and understandings apply to any communications which result in a meeting of minds to behave in a way that has the purpose or effect of preventing or substantially restricting competition in a

¹ http://tel_archives.ofca.gov.hk/en/report-paper-guide/guidance-notes/gn_201026.pdf

*telecommunications market. (Emphasis original)*²

OFCA reiterates that it has no intention of obstructing or preventing any parties from freely expressing their views and comments on any aspect of the foregoing 3G consultation. However, operators are respectfully reminded to act carefully, and have regard to the statutory provisions and Competition Guidelines stated above, when they make public announcements or comments to the press with regard to their future pricing or price-related strategies, to avoid the risks of inadvertently engaging in potentially anti-competitive behaviour in breach of their statutory obligations as prescribed by the TO.

This letter will be posted on the Communications Authority's website for information of the industry and the public. If you have any queries, please do not hesitate to contact the undersigned.

Yours sincerely,



(Gary Shiu)

for Director-General
of Communications

² OFCA has also given regard to the *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* issued by the European Commission in 14 January 2011. Paragraph 63 of the guidelines reads, “Where a company makes a unilateral announcement that is also genuinely public, for example through a newspaper, this generally does not constitute a concerted practice within the meaning of Article 101(1). However, depending on the facts underlying the case at hand, the possibility of finding a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors, not least because strategic responses of competitors to each other’s public announcements (which, to take one instance, might involve readjustments of their own earlier announcements to announcements made by competitors) could prove to be a strategy for reaching a common understanding about the terms of coordination”.
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF>.