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**CONSUMER PROTECTION IN THE
HONG KONG TELECOMMUNICATIONS SECTOR:
IMPLICATIONS FOR COMPETITION POLICY**

CHEUNG CHING YI CHERRY

MPHIL

LINGNAN UNIVERSITY

2007

**CONSUMER PROTECTION IN THE
HONG KONG TELECOMMUNICATIONS SECTOR:
IMPLICATIONS FOR COMPETITION POLICY**

by
CHEUNG Ching Yi Cherry

A thesis
submitted in partial fulfillment
of the requirements for the Degree of
Master of Philosophy in Social Sciences
(Economics)

Lingnan University

2007

ABSTRACT

Consumer Protection in the Hong Kong Telecommunications Sector: Implications for Competition Policy

by

CHEUNG Ching Yi Cherry

Master of Philosophy

Competition policy is meant to ensure a level-playing in the market, but its ultimate goal is to enhance consumer interests. The telecommunications sector is one of the two sectors that have set up a competition policy in Hong Kong. This paper examines the current competition policy framework in the telecommunications sector by analyzing the level of consumer protection using the Structure-Conduct-Performance Paradigm. It examines in detail the consumer related complaint cases received by the Office of the Telecommunications Authority in four markets: fixed line telephone services, mobile phone services, International Direct Dialing services, and Internet services. Regression analysis results reveal that more competition in a market has a positive and significant effect on the frequency of complaints about misleading or deceptive conduct on the part of operators in the period from 1999 to 2006. Also, smaller and newer operators tend to receive more complaints. From the lessons we have drawn from the telecommunications sector, a more comprehensive policy coped with consumer protection regulation is needed in order to better promote consumer interests in Hong Kong.

Keywords: Consumer Protection, Competition Policy, Structure-Conduct-Performance Paradigm, Telecommunications Sector, Misleading or Deceptive Conduct

DECLARATION

I declare that this is an original work based primarily on my own research, and I warrant that all citations of previous research, published or unpublished, have been duly acknowledged.

CHEUNG Ching Yi Cherry
August 9, 2007

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Chapter 1

Introduction

1.1 Background of the Study

As early as 1889, Canada enacted its Competition legislation while United Kingdom and United States adopted theirs in 1890 as well. Nowadays, there are more than 100 nations which have enacted Competition Law or are about to enact it with the general purpose of promoting competition to stimulate economic efficiency. Some countries have even attempted to bring competition policy and consumer protection policy under an integrated framework, such as Australia, Hungary, Poland and France. Their competition laws contain a chapter devoted to consumer protection. Undoubtedly, competition issues are closely related to protection of consumers' interest. In Canada, the Competition Act contains provisions relating to misleading advertising and deceptive marketing practices that are designed to provide consumers with basic uniform and accurate information on certain consumer products and to avoid deceptive and false representation.¹

In Hong Kong, the Government's competition policy is set out in the statement issued by the Competition Policy Advisory Group (COMPAG) in May 1998, with an objective "to enhance economic efficiency and free flow of trade, thereby also benefiting consumer welfare. The Government is committed to competition as a means to achieving the said objective, and not as an end in itself."² Eight years went by; has the policy been achieving its goal to benefit consumer welfare during all these years? This becomes the interest of my paper.

Since 1980s, the Consumer Council, under the chairmanship of Professor Edward Chen, developed a keen interest in studying the anti-competitive behaviors of firms in different service sectors in Hong Kong. With the lead of Professor Chen, the Council has carried

¹ Model Law on Competition "Substantive Possible Elements for a competition law, commentaries and alternative approached in existing legislations", United Nations conference on Trade and Development, New York and Geneva, 2004

² "Report on the Review of Hong Kong's Competition Policy" issued by Competition Policy Review Committee June 2006

out numerous competition studies since then. But due to the limited resources and wavering support of the government, the ongoing studies are slow in progress. In November 1996, the Consumer Council completed a comprehensive report on the competition policy for Hong Kong.³ The report, entitled “Competition Policy: The Key to Hong Kong’s Future Economic Success”, strongly recommends that Hong Kong should adopt a comprehensive competition law and establish a competition authority and an appeal body to enforce the law.

However, in 1997, the new Hong Kong government responded to the report from the Consumer Council and rejected the push towards establishing a comprehensive competition law and an independent agency to administer it.⁴ The Government claimed that, under the philosophy of positive non-intervention policy, there was no need to enact such an all-embracing law in the highly competitive market of Hong Kong. Meanwhile, the Government issued a formal policy statement of competition policy on the objectives of promoting fairly competition in the market place and thereby, enhancing consumer interest. Nevertheless, the policy statement was not *law* and could not be used to require disclosure of information, investigative purposes, or as a remedy in a court of law against public sector or private business.

In 2000, the Hong Kong Government passed two industry-specific ordinances for telecommunications and broadcasting sectors under two enforcement bodies, the Telecommunications Authority (TA) and Broadcasting Authority (BA) respectively. With the enactment of Telecommunication (Amendment) Ordinance, it provides the first sector-specific competition legislative safeguards in Hong Kong. It prohibits against anti-competition practices and abuse of dominant position, and is applicable to all telecommunications licensees.

The argument for introducing a general competition law has gone on for more than 10 years, and has become increasingly important in Hong Kong. In 2006, the need for a

3 Consumer Council (1996), “Competition Policy: The Key to Hong Kong’s Future Economic Success”

4 Trade & Industry Bureau (1997) “Government Response to Consumer Council’s Report Entitled “Competition Policy: The Key to Hong Kong’s Future Economic Success””

general competition law received significant press in the first Policy Address of Chief Executive, Mr. Donald Tsang. The debate is still raging today as most of Asia-Pacific countries have now enacted competition laws, as early as Australia in 1906, New Zealand in 1908, Japan in 1947, India in 1969, Thailand 1979, Republic of Korea 1980, Taiwan Province of China 1991, China 1993, Indonesia 1999, and Singapore 2005, etc.⁵

After six years of this sectoral approach working in telecommunications sector, has the policy really achieve its goal of enhancing consumer interests? It is crucial to evaluate the effectiveness of the policy. A competition policy would not be effective by itself if it cannot ensure that consumer interests are being served. If we are to seriously consider adopting a comprehensive competition policy in Hong Kong, it is important to learn from the experience of the existing policy adopted in the telecommunications sector, especially in the consumers' perspective. This is to ensure that when we promote a general competition policy in Hong Kong, we would have more experience on how to make the enforcement mechanism more effective allowing both the business community and consumers to enjoy optimal benefits.

1.2 Rationales and Significance of the Study

Every policy needs serious, thoughtful and comprehensive consideration beforehand to effectively achieve its policy goals. It is very crucial to review a policy on a regular basis, to identify the pros and cons of it after adoption. The main purpose of which is to ensure that the policy is always heading towards its goal effectively and efficiently under the fast-changing community. If the policy's goal is to enhance the consumer interest and benefit, we should review and evaluate that policy from the view of consumers. Does the competition policy take sufficient account of consumer interest and behavior?

The goal of competition policy, despite the sectoral or general approach, is to protect consumers by keeping prices competitive, encouraging innovation, and upgrading

⁵ "Competition Policy in Developing countries: An Asia-Pacific perspective" by Pradeep S. Mehta, Bulletin on Asia-Pacific Perspectives 2002/2003, Asia-Pacific Economies: Sustaining Growth Amidst Uncertainties

quality and increasing choices. The principles of competition policy and consumer protection should be mutually supportive, and their administration equally so.⁶ With such goal, consumers are expected to be protected and their interests fulfilled. However, despite current law, complaint cases within the telecommunications sector from consumers to the Consumer Council have always surpassed those of other sectors, contributing roughly 25% to 35% of all complaints from 2000 to 2005.⁷ Compared to other sectors, such as the broadcasting sector, another sector which has adopted the sectoral approach of competition policy has been contributing less than 6% of all the complaints throughout these years. With reference to the complaint cases handled by Office of Telecommunications Authority (OFTA) about misleading or deceptive conducts, fixed line telephone service market and Internet service market contribute the majority of all complaint cases, which are around 32% and 38% respectively in the entire sector of telecommunications.⁸

Consumer complaint is an indicator of consumer satisfaction level. Low frequency of complaints is indicative of a properly working system, whereas high frequency of complaints is indicative of some problems within the sector. Therefore, it is very important to analyze the cases in details to pinpoint the problems and figure out practical solutions to ensure that consumers continue to be protected under the existing framework.

Telecommunications service is crucial to almost all of us since it is closely connected to us and becomes part of our lives nowadays; it is highly inconvenient for us without any supply of telecommunications services. The business world, in particular consumes the services from the four main markets, including fixed line telephone, mobile phone, International Direct Dialing (IDD) and Internet; while most of the consumers consume

⁶ “Competition Policy and Consumer Protection Policy” Nitya Nanda, CUTS Centre for Competition, Investment & Economic Regulation, India 2004

⁷ Complaint Cases from the Consumer Council

⁸ Complaint Cases from OFTA

at least one or even all services in these four main markets.⁹ Due to the large consumer involvement in purchasing this sector's services, it is important and valuable to assess the level of consumer protection within this particular sector-telecommunications.

Also the services provided within the telecommunications sector are different from those in other sectors. It is unique because of its rapid development and fast-paced technological innovation, which brings benefits as well as inherent complications.¹⁰ This uniqueness generates sophisticated professional and technical information, which is often beyond the ordinary consumers' ability to digest. From a consumer's viewpoint, protection begins when he or she receives any information from the service providers. In order to protect the consumers under the asymmetric information situation, the operators in the telecommunications sector should disclose the material information in the marketing and sales process. This would affect consumers' decision-making before any formal transaction.

Most consumers basically concern only the price and quality of the service they consume; they would not know or are even not interested to know what competition policy could benefit them or how it is related to them in the daily life. They are not quite aware of how competition law protects their interests. The misconception among some consumers is that competition law is a system for protecting business. They may hold the belief that competition law provides business with business advantages, which would hurt the consumers in the end. However, the consumers' awareness is all the more important- consumers is the group of people who need to understand how the competition policy brings benefits to them. Since once they know about the nature and function of the competition policy, they know what kinds of business practices they are protected against from. And since consumers are the "best detectors" of those unfair business practices so they could give a great hand on reporting those cases to OFTA. In order to have a strong enforcement mechanism, consumer is a vital component in the

⁹ With reference to the key telecommunications statistics from OFTA website, until July 2006, the household fixed line penetration rate is 92%, mobile subscriber penetration rate is 128.9%, and the household broadband penetration rate is 66.9%

¹⁰ For example, for Internet service, it used to be the dial-up access and now is the broadband access, also for Mobile Phone Service, it was from 2G service to now 3G service.

whole process. And that is what my study focuses on. If we consider enacting a more comprehensive competition law in the future, we must also attach great importance to the consumers' perspective, by concretely explaining its benefits for consumers. Consumers need to be educated in various ways that they can be protected or benefited from the competition policy in an easy-to-understand manner. If we could garner enough support from the general public, it would make the prompting process of a general competition law smoother, easier and better. The birth of a general competitive policy would then be speeded up.

Most of the literature review from other scholars or political parties would highlight the general situation and drawbacks of the existing sectoral approach of competition policy in Hong Kong or how it would benefit the small and medium sized enterprises (SME). However, not many studies did shed light on the consumer's perspective. This includes the question of whether or not the consumers are benefiting from the existing policy or they are suffering from it. It is important to have such an evaluation in the telecommunications sector to help consumers understand how the competition policy works in the sector and how they could be protected and benefited from it. Therefore, this study is valuable with the fact that there is lack of comprehensive analysis and systematic study of consumer protection in the telecommunications sector of Hong Kong, especially with connection to competition policy.

As reviewed earlier, many countries have already enacted competition policy laws. Competition policy has become an increasingly important issue in Hong Kong. More and more people are interested in this topic and show serious concern on how it works in Hong Kong. After the sectoral approach of competition policy adopted in the telecommunications sector, it is important to review and assess the effectiveness in light of consumer protection, especially when there is such strong momentum to fight for competition policy in other sectors as well. In order to have better understanding of the existing competition policy from the consumers' standpoint and to show the consumers to what extent they could be protected under existing framework, the pros and cons of the existing framework in the telecommunications sector will be laid out in my study, as

well as their implications for other sectors. An effective policy is one that protects both the consumer and business sides – “a win-win situation”. We should balance both sides and try to achieve the optimal level of economic efficiency and highlight the effects of consumer protection and the benefits it provides from the existing sectoral approach in a practical way.

To summarize, a competition policy would not be effective by itself if it could not ensure that consumer interests are being served. If consumers have a better understanding of the objective or function of competition policy, they would show more support or even would help urge the Government to enact such a law. Also, if we are to seriously consider adopting competition policy in all industries, it is crucial to learn from the experience of the existing policy adopted in the telecommunications sector, especially at the consumer perspective. This is to ensure that when we promote a general competition policy in Hong Kong within other sectors, we would have more experience on how to make the enforcement mechanism more effective and allow both the business community and consumers to enjoy the optimal benefits.

1.3 Research Questions

There are three main research questions in my study.

- 1) Review the current competition policy framework in Hong Kong and analyze the level of consumer protection that current competition policy in the telecommunications industry provides by looking at the development of competition policy, its historical development in the telecommunications sector and other literature on the subject.
- 2) Assess whether the framework provides adequate consumer protection and whether or not it actually achieves the objectives declared by the government by using the Structure-Conduct-Performance Paradigm, to see how a structure of a market could affect the conduct of an operator and with government policy and

enforcement mechanism, assess whether the level of consumers protection is adequate by examining the consumer behaviors in particular market. The complaint cases from the Consumer Council and OFTA will be examined as well in order to see whether the consumers are well-satisfied or not, based on the most crucial attributes that would affect the consumer satisfaction on different criteria, including consistency, efficiency, effectiveness and fairness. Detailed elements of each attribute will be discussed in methodology part in Chapter 4.

- 3) Base on a regression study conducted to examine how competition affects the frequency of misleading or deceptive conduct complaints received and handled by OFTA in the telecommunications sector. I also analyze the effects of operator size, number of service subscribers, market power, and operator age on the likelihood of the complaints.
- 4) Draw the experience from the existing sectoral approach and provide suggestions and recommendations to the existing policy to address the problems I have revealed from my study. Together with other countries' experiences, Hong Kong will be better equipped to prepare for the possibility of enacting a more comprehensive competition law in other sectors in the future.

1.4 Outline of the Study

In Chapter 2, I will review the general competition policy in Hong Kong particularly in the telecommunications sector. Also, I will look at the historical development in the telecommunications sector and how the sectoral approach competition policy first came about and how exactly this sectoral approach worked in the telecommunications sector. I will also assess how the consumers are protected in the telecommunications sector under the existing framework.

In Chapter 3, I will review the different literature on competition policy, compare the pros and cons, and evaluate current scholars' and public opinion on the existing sectoral

approach. Also, I will make reference to the literature of consumer protection in other countries. In Chapter 4, the conceptual framework as well as the connections between my study and economic principles will be explained. I will link the idea of consumer protection with the competition policy. I will also show how I assess the level the consumer protection with by using the Structure-Conduct-Performance Paradigm. The whole methodology part would be explained in details at this chapter as well.

In Chapter 5, analysis of the complaint cases from the Consumer Council and OFTA and as well as the findings projected will be presented. Different dimensions, including type of complainants, nature and outcome of the consumer protection cases, with the focus on misleading or deceptive conduct complaints, will be analyzed in this chapter. In Chapter 6, selected case studies will be discussed, with the analysis of different complaint cases by different telecommunications operators. Key messages will be revealed from analyzing the selected case studies.

Chapter 7 assesses the level of consumer protection will be assessed in four markets in the telecommunications sector, including fixed line telephone services, mobile phone services, IDD services, and Internet services. Significant problems in the telecommunications after analyzing the complaints will also be summarized at the end of this chapter. In Chapter 8, regression study will be conducted, to analyze the effects of competition, the firm size, market power, and firm age on the likelihood of misleading or deceptive conduct complaints. Its methodology and results will also be discussed in this chapter.

In Chapter 9, I will provide policy implications and recommendations to address the problems revealed from my study and discuss possible solutions to promote a more effective competition policy. I will also draw experience from other countries and suggest the best practices for enforcement mechanism to apply in the system of Hong Kong. Chapter 10 is a conclusion of my study after a detailed analysis of the above chapters. I will answer my research questions after I have reviewed the existing sectoral approach. Also I will be able to tell the general effectiveness of this piece-meal

framework of policy in the telecommunications sector. Besides, the limitation of my study and what the future works could be done from the extension of my study are highlighted at the end.

Chapter 2

Competition Policy and Consumer Protection in the Telecommunications Sector

2.1 Historical Development in the Telecommunications Sector

Prior to 1995, there was only one telecommunications operator in Hong Kong providing local and international telephone services. In June 1995, with the expiry of the local telephone franchise, the Office of Telecommunications Authority (OFTA) decided to open up the market and introduce competition. Three new operators were licensed to provide local fixed telecommunications services on a competitive basis. In September 1996, six licenses were issued for provision of personal communication services. In January 1997, full portability of telephone number was achieved for fixed telephone services and mobile number portability was subsequently implemented in March 1999. Effective on January 1, 1999, the external telecommunications services market was liberalized, with full liberalization in January 2000 after the liberalization of the external facility-based market.¹

2.2 The Birth of the Competition Policy in Hong Kong

The previous Hong Kong Government did not consider Competition Policy to be a high priority on its legislative agenda. In response to the Consumer Council's 1996 report advocating the adoption of a general competition law, the government created the Competition Policy Advisory Group (COMPAG) in December 1997 to deal with competition issues on an ad hoc basis.² In May 1998, the Government's objective (as stated in its Statement on Competition Policy) was "to enhance economic efficiency and free flow of trade, thereby also benefiting consumer welfare."³ The Government committed to competition as a means to achieving the said objective, and not as an end

¹ "Telecom Milestones" on OFTA website <http://www.ofa.gov.hk>

² The Competition Policy Advisory Group (COMPAG) chaired by the Financial Secretary directs all government entities (including all statutory bodies) to adhere to the policy statement and guidelines; and calls upon all businesses to abide by the policy statement and guidelines.

³ 'Competition Policy: The Key to Hong Kong's Future Economic Success', Consumer Council, 1996

in itself.”⁴ The government introduced sector-specific competition policy in 2000, establishing unique rules for various sectors, and is enforced by corresponding regulatory agencies. The Sectoral approach of competition policy was put in place for the telecommunications sector with two objectives: (1) providing a level playing field in the telecommunications market and (2) ensuring that consumers get the best services in terms of capacity, speed, and price.

2.3 An Overview of Prohibitive Provisions of the Competition Policy in the Telecommunications Sector

The Telecommunications Ordinance was amended in 1998 to enhance competition safeguards, improve interconnection and access arrangements to telecommunications services, streamline licensing procedures and provide the Telecommunications Authority with powers over certain technical areas. With the enactment of Telecommunications (Amendment) Ordinance 2000 in June 2000, the sectoral approach of competition legislative has established safeguard which prohibits anti-competition practices and the abuse of dominant market position. It is applicable to all telecommunications licensees including mobile operators and internet service providers on top of fixed network carriers.

Anti-Competitive Practices

The Anti-Competitive Practices Provision prohibits telecommunication operators from engaging in conduct, which has the purpose or effect of eliminating, or substantially restricting competition in the telecommunications market. An exhaustive list of prohibited conduct has been made. These prohibited practices include, but not limited to, collusive agreements to price-fix any apparatus or service, boycotting the supply of goods or services to competitors, entering into exclusive arrangements which prevent competitors from having access to supplies or outlets, entering into agreements between

⁴ Statement of Competition Policy , COMPAG, 1998 <http://www.compag.gov.hk/policy/>

licensees to share available market between them along agreed geographic or customer lines.⁵

Abuse of Dominance

Other than outlawing allegedly anti-competitive practices, another provision under the sectoral approach of competition policy in the telecommunications sector is to prevent licensees from abusing dominant market position. An exhaustive list of prohibited conduct includes, but not limited to, predatory pricing, price discrimination, the imposition of contractual terms which are harsh or unrelated to the subject of the contract, tying agreement, discrimination in supply of services to competitors, discounting, and preferential treatment to and/or the receipt of an unfair advantage from associates. OFTA will determine whether a licensee is in a dominant position and whether that position is being abused. If there is no dominant carrier, for example in mobile services, licensees and customers can all react to offers presented by any operator. An operator will become a dominant carrier, and be obliged to comply with dominant carrier restrictions, if its behavior is deemed capable of affecting the market. Any operator having a 75% market share will be viewed as a dominant carrier. The observation point would begin from a 25% market share and upwards.⁶

Mergers and Acquisitions

New provisions on mergers have been inserted into the Telecommunications Ordinance by virtue of the Telecommunications (Amendment) Ordinance 2003, which came into effect on July 9, 2004. The ordinance provides a comprehensive legislative framework to regulate mergers and acquisitions in the telecommunications market by providing a post merger review control regime on the telecommunication operators. The review is supplemented by a voluntary pre-notification system and the utilization of the “substantially lessening of competition” test. If the merger is found to be anti-

⁵ Section 7K of Telecommunications Ordinance (Cap 106), OFTA website <http://www.ofta.gov.hk>

⁶ Section 7L of Telecommunications Ordinance (Cap 106), OFTA website <http://www.ofta.gov.hk>

competitive, the Telecommunication Authority can order the licensee to eliminate the anti-competitive effect of the merger.⁷

In September 2003, COMPAG promulgated a set of guidelines to supplement the Statement on Competition Policy. These guidelines provide objective benchmarks and principles to assess Hong Kong's overall competition environment. These guidelines aim to define and tackle anti-competitive practices and ensure consistent application of competition policy across entire sectors. These guidelines' underlying philosophy is the *rule of reason* with no practice as illegal, *per se*.

2.4 The Enforcement Mechanism of the Sectoral Approach in the Telecommunications Sector

(A) Enforcement Agency

The Telecommunications Authority (TA) implements the government's telecommunications policies, which is supported by the Office of Telecommunications Authority (OFTA). TA oversees the regulation of telecommunications industry in Hong Kong and administers the ordinances governing the establishment and operation of telecommunications services. OFTA was established as a separate government department on July 1, 1993. OFTA serves as the executive arm of the TA, and is appointed under the Telecommunications Ordinance (Cap. 106) as the statutory body to oversee the regulation of the telecommunications sector in Hong Kong.⁸

⁷ Section 7P of Telecommunications Ordinance (Cap 106), OFTA website <http://www.ofta.gov.hk>

⁸ OFTA website <http://www.ofta.gov.hk>

(B) Complaint Mechanism

OFTA has established the Guide, which details the procedure for complaints related to competition provisions of the Telecommunications Ordinance (Cap.106) or any licensee condition relating to these sections.⁹

Preliminary Investigation

The preliminary investigation will be conducted upon the receipt of a detailed complaint. It is intended to establish whether or not there is *prima facie* evidence, which is required for the case to receive a full investigation. When the case merits a full investigation within the scope of the provisions and there is reasonable grounds for TA to believe that there may be an infringement of the Ordinance and/or the license conditions, the OFTA will examine the information provided by the complainant along with any relevant information within the OFTA and/or available from the public domain. It may also be necessary to directly approach the plaintiff and/or defendant to seek information and clarification. Standard OFTA procedure is to complete the preliminary investigation within four weeks from its initiation. If the complaint is not substantiated in the preliminary investigation stage, the plaintiff will be notified in writing for the outcome.

Full Investigation

At the stage of full investigation, OFTA will advise both the plaintiff and the defendant in writing about the commencement of the investigation. OFTA will invite the defendant to comment on the case and to provide any information that is relevant and required for the investigation. In addition, OFTA will also consider whether any information or comments are required from third parties, such as other market participants. OFTA will conduct a full analysis covering aspects of economic, legal and accounting issues etc. when responses have been received from the defendant and/or any third parties.

⁹ “How Complaints Related to Sections 7K to 7N of the Telecommunications Ordinance are Handled by OFTA, December 28, 2005, OFTA website <http://www.ofta.gov.hk>

On the completion of the investigation, the TA will decide whether there is sufficient evidence to establish a breach of the Ordinance and/ or the license conditions. TA strives to complete 80% of investigations within 4 months from the initiation of the full investigation.

Outcome

If a breach is not established after consideration of all relevant information available, the TA will set out her findings in a draft case summary and invite the subject of the complaint to provide comments within 7 days. Subject to any further information or comments received, the TA will finalize the case summary and close the case.

If a breach is concluded from the investigation, the TA will draft its preliminary findings with proposed actions or penalties. If appropriate, TA will invite the defendant to make representations, usually within 10 working days. Possible remedies will be considered in parallel for less complex cases or at a later stage for complex cases.

Urgent or exceptional Cases

When the complaint of a plaintiff against a defendant is an on-going matter and alleged violation is causing real-time damage to consumers or competitors, the TA may consider taking urgent action within such time-scale as the circumstances warrant to deal with the complaint.

(C) Remedies and Penalty

The sectoral-approach of competition policy has spelled out remedies for violation of the provisions. Depending on the severity and nature of a violation, the TA can issue either a warning or a direction, which require a licensee to cease and desist from the action prohibited by the rules. A financial penalty can be imposed for “very serious” cases. For extremely serious cases, the license of the operator may be suspended. Initially, the

financial penalties that could be imposed were small. Prior to 2000, the maximum fine the TA could impose for violations of the competition provisions or breaches of a license contract was HK\$20, 000 for the first offense; HK\$50, 000 for the second offense; and HK\$100, 000 for any subsequent offenses which a penalty is imposed. These figures were raised to HK\$200, 000, HK\$500, 000 and K\$1,000,000 respectively in early 2000 when the Telecommunications Ordinance was amended. The amended Ordinance provided also includes a clause for extremely serious violation where the TA can appeal the case to a Court of Law for a higher penalty of up to HK\$10 million and/or revoke the defendant's license.¹⁰

(D) Appeal Mechanism

Authorized by the Telecommunications Ordinance, the Telecommunications (Competition Provisions) Appeal Board¹¹ was established to hear appeals against that TA's decisions. This is the first ever sector-specific appeal board on competition matters in Hong Kong. The Chief Executive of the Hong Kong SAR Government appoints the Chairman and Deputy Chairman of the Appeal Board for a term not exceeding two years. In appeal hearing, two additional panel members will be appointed by the Chairman. The Appeal Board's decision is final. An appeal from an opinion, determination, direction or decision of the TA relating to the competition provisions of the Telecommunications Ordinance (Cap. 106), or any sanction or remedy imposed by the TA as a consequence of a breach of such provision, Telecommunication (Competition Provisions) Appeal Board may refer any question of law to the Court of Appeal at its discretion although there is no right of determination by the Appeal Board on any matter including a question of law. Any person aggrieved by a decision, opinion, direction, decision of the TA relating to the competition related provisions, or any sanction or

¹⁰ Section 36C of Telecommunications (Amended) Ordinance 2000, OFTA website <http://www.ofta.gov.hk>

¹¹ Telecommunications (Competition Provisions) Appeal Board is an independent statutory body constituted under section 32L-U of the Telecommunications Ordinance (Cap. 106) to determine appeals against the Telecommunications Authority in enforcing fair competition in the telecommunications market in Hong Kong, Commerce, Industry and Technology Bureau website <http://www.citb.gov.hk/ctb/eng/telecom/relevant2.htm>

remedy imposed by TA, may appeal to board. A subsequent ruling will be ready within 14 days.¹²

2.5 Consumer Interests Related Provisions in the Telecommunications Sector

Two competition-related consumer-interest provisions provide protections against misleading or deceptive conduct and non-discrimination practices.¹³ These provisions complement those guarding against anti-competitive practices, abuse of dominance, and merge and acquisitions under the competition policy regime in the telecommunications sector. In the interest of consumers, a licensee cannot offer products, which, in the opinion of OFTA, prevents competition. The conduct of licensees is regulated so as to ensure no discriminatory or deceptive behavior. The licensee's power to make sub-licensee arrangements, entry barriers, degree of product substitutability, for example, are all factors OFTA will consider. In order to ensure consistency of judgment, industry and consumers are consulted and OFTA undertakes reviews and issues guidelines from time to time.

2.6 Misleading and Deceptive Conduct Provision in the Telecommunications Sector

(A) Provision

Section 7M of the Telecommunications Ordinance (Cap. 106) states:

“A licensee shall not engage in conduct which, in the opinion of the (Telecommunications) 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.”

¹² Section 32L to 32R of Telecommunications Ordinance, OFTA website <http://www.ofta.gov.hk>

¹³ Section 7M Misleading and Deceptive Conduct & Section 7N Non-discrimination, Telecommunications Ordinance (Cap. 106), OFTA website <http://www.ofta.gov.hk>

(B) Guidelines

Misleading and Deceptive Conduct Guideline, 21st May 2003¹⁴

On May 21, 2003, the Telecommunications Authority issued guidelines under the Provision of Misleading and Deceptive Conduct of the Telecommunications Ordinance. These guidelines explain how the TA will apply and enforce the provisions and outline the approach with which the TA will take when forming its opinion. However, the guidelines cannot and do not aim to provide a definitive response to any particular conduct, rather the guidelines serve as a guide to determine when corporate behavior has fallen outside legal boundaries. Determining whether any particular conduct is misleading or deceptive requires consideration on a case-by-case basis. The Guidelines are merely intended for use by participants in the telecommunications industry and consumers to ensure parties know their rights and obligations under the Ordinance. Following industry consultation in 1996, the TA issued a voluntary Advertising Code of Practice.¹⁵ The Advertising Code laid down basic guiding principles in relation to the promotion of telecommunications services. However, the enactment of the current Provisions and the published guidelines now supersede the Advertising Code. In future, the TA will address complaints about advertising in reference only to the current Provision in accordance with these Guidelines.

The Misleading and Deceptive Provision refers specifically to promoting, marketing and advertising as particular types of industry conduct. However, it should be noted that the scion is not limited to this type of conduct. Selling, promotions, and advertising generally have been the focus of many complaints to the TA, with the bulk of complaints relating to popular press advertising. However, any type of conduct which is misleading or deceptive is prohibited by the Provision.

¹⁴ “Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets”, Telecommunications Authority Guidelines, May 21, 2003, OFTA website <http://www.ofta.gov.hk>

¹⁵ Advertising Code, January 1996, OFTA website <http://www.ofta.gov.hk>

In determining whether promoting, marketing or advertising telecommunications products or services is misleading or deceptive, the TA will take into account all information provided by both the licensee and the plaintiff. This includes information concerning the characteristics of the products or services, the target audience, the price or the manner in which the price is calculated, the terms and conditions under which the products are supplied or service provided, and if relevant, the nature, attributes and rights of the licensee (including, for example, its identity and ownership of intellectual property rights). A licensee may breach the provision if it is found to be misleading or deceptive. It is not necessary for the TA to form an opinion on conduct that is both misleading and deceptive, although conduct which is deceptive is also likely to be misleading. Also, a licensee's conduct need not be proven to have actually misled or deceived anyone for that licensee to be in breach of the Provision. The TA does not require evidence that someone has actually been misled or deceived to find a licensee in breach of the Provision; although such evidence will often be a persuasive factor in considering whether a "reasonable person" would have been misled.

When TA forms an opinion as to whether a licensee has engaged or is engaging in misleading or deceptive conduct, the TA will assess the circumstances surrounding the conduct. The TA will examine the facts and assess whether a "reasonable person" would be misled or deceived by the licensee's conduct. A "reasonable person" is an ordinary member of the target audience; that is a person at whom the conduct is directed. For example, the target audience differs when a licensee runs an advertisement in the newspaper from an advertising campaign in corporate newsletters. It is the responsibility of the licensee to identify the target audience and ensure that a "reasonable person" from this audience is not misled or deceived. In other words, the level of comprehension expected, and therefore the standard of care required by the licensee will differ depending on the target audience.

With ordinary consumers, it can usually be assumed that they have some knowledge of the product or service they are buying and capable enough to read simple terms and conditions. However, if products are new and/or complex, general working knowledge

cannot be assumed and consumers will most likely require additional as well as clearer information about the product or service. It is the responsibility of the licensee to identify its own product and determine the level of consumer education necessary to avoid misconduct.

Promoting, marketing and advertising are, by no means, the only types of conduct with which the TA may be concerned. Oral representations, product labeling, packaging, guarantees and the content of internet sites, for example, are other areas of conduct covered by the Provision.

Conducts of Concern

(1) Advertising Puff

There are several conducts of concern listed in the guidelines. Puffery, or boasting about a product or service, is common in commerce and consumers can be expected not to take advertising “puff” too seriously. For the advertising puff, it will be misleading where facts are wrong or distorted. In determining whether conduct is mere puffery or is actually misleading or deceptive, the TA will assess the conduct through the eyes of a reasonable person, taking into account the nature of the target audience.

(2) Misrepresentations

Misrepresentations are oral and/or written statements which contain incorrect or false information. Such misrepresentations typically are statements or information which is wrong or inaccurate, leaving out important facts or creating a false impression. For example, a service provider in the UK was found to have misrepresented information provided to customers. The operator led her customers to believe that existing telephone

numbers were at risk of compulsory changes due to regulatory changes, when in fact, the “compulsory” changes were merely proposals and was not yet compulsory.¹⁶

It may also be misleading or deceptive conduct to falsely imply that certain statutorily terms have been excluded when such terms cannot, in fact, be excluded as a matter of law.¹⁷ For example, under the Control of Exemption Clauses Ordinance (Cap. 71), it is not possible to exclude or limit liability for breach of the seller’s obligations under the Sale of Goods Ordinance (Cap. 26). The TA considers licensees purporting to limit their own liability as having engaged in misleading or deceptive conduct in breach of the Provision.

(3) Silence or Deception by Omission

Silence is regarded as a form of conduct (or misconduct) under section 7M of the provision. A licensee’s silence or non-disclosure breaches the Provision when failure to disclose relevant facts results in consumers being misled or deceived. Licensees who half-truths or remain silent in situations where consumers have a reasonable expectation to receive full disclosure are considered to have engaged in inappropriate conduct. A licensee is expected to fully disclose all material terms and condition, including price. This is especially relevant when a term or condition is particularly stringent or in the situation where the consumer might have made a different choice had he or she previously known about the terms or condition. Failure to mention an extra cost or condition will be of serious concern to the TA in circumstances where a reasonable consumer would expect there be “no more to pay” only to find the service or product does not work or is not available without further payment for “add-ons”

¹⁶ “UK Office of Telecommunications complaint against Cable and Wireless, case reference BX/879/017 (September 1997) stated in “Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets”, Telecommunications Authority Guidelines, May 21, 2003, OFTA website <http://www.ofta.gov.hk>

¹⁷ For example, the Sales of Goods Ordinance (Cap.26), the Control of Exemption Clauses Ordinance (Cap.71) and the Supply of Services (Implied Term) Ordinance (Cap. 457)

Silence or deception by omission was illustrated by a New Zealand service provider who failed to disclose the fact that its phones for sale were second-hand phones. The provider was successfully prosecuted by the New Zealand Commerce Commission for misleading or deceptive conduct.¹⁸

(4) Predictions

Licensees are allowed to make predictions. Failure of predictions to come true is not enough ground to make the prediction (conduct) misleading or deceptive. However, if a licensee makes a prediction knowing ahead of time that it will prove to be false, or makes a prediction without regard to whether or not it will be true or false is cause for investigation by the TA. Such disregard may be viewed as misleading or deceptive conduct.

(5) Fine print disclaimers and qualifications

With reference to conduct under fine print disclaimers and qualifications, all significant terms and conditions must be immediately and easily accessible to consumers. It is not acceptable to expect consumers to conduct exhaustive searches for terms and conditions. The Provision requires all significant terms and conditions to be provided to the consumers in hard or soft copy along with a copy of the contract, which confirms the transaction. The terms and conditions should also be available in a language (English or Chinese) which the customer is familiar with.

Terms and conditions which dictate consumer purchasing decisions must be clearly spelled out. Such terms include total contract fees or the minimum contract period for a mobile phone service contract. The more significant or onerous the terms or conditions of an offer, the more likely it is that their omission from the main text of a promotion or

¹⁸ NZ Commerce Commission, “Old phones for new? Retailer admits cordless phones were second-hand”, Media Release 1999/3, <http://www.comcom.govt.nz> stated in “Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets”, Telecommunications Authority Guidelines, May 21, 2003, OFTA website <http://www.ofta.gov.hk>

advertisement would be regarded as misleading or deceptive. Such an omission was documented in the case of a Hong Kong external telecommunications service licensee. The operator advertised in a promotional leaflet that its prepaid calling card would provide a specified number of minutes to a particular destination. However the specified usable minutes could only be achieved if each call was less than certain duration, otherwise a connection charge would apply. Although the leaflet's small print stated that the service is subject to the licensee's terms and conditions available upon request and provided a customer service hotline number, the TA decided that this disclosure was insufficient to alert customers to the fact that the usable minutes may be less than the figure stated in the leaflet, and the licensee was therefore in breach of the Provision.¹⁹

Another example occurred in Australia where a telecommunications provider offered a specified value of free calls on weekends. The promotional material included a small print disclaimer stating "some exclusion applies". However, the disclaimer did not explicitly state that the free call value did not include calls to other mobiles. The Federal Court held that the disclaimer was inadequate to avoid a misleading or deceptive effect.²⁰

(6) Unsolicited goods or services and opt out clauses

Licensees should not rely on a consumer's failure to act to make a sale, especially when the product offered is new or has been offered on a trial basis. To avoid potentially misleading conduct associated with "passive" acceptance of offers, the TA recommends that licensees require consumers to actively elect to subscribe for a product or service. If a service is offered at a discounted price for a limited promotional period whose terms will change after the promotional period, the licensee should specifically and clearly inform the customer at the time of service rendered of such changes. If there is an opt-

¹⁹ Complaint against Pacific 1636, May 2002 (case reference T2/02), http://www.ofta.gov.hk/ca_bd/case_closed/T2.02.pdf stated in "Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets", Telecommunications Authority Guidelines, May 21, 2003, OFTA website <http://www.ofta.gov.hk>

²⁰ Trade Practices Commission v Optus Communications Pty Ltd & Anor (1996) ATPR 41-478 stated in "Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets", Telecommunications Authority Guidelines, May 21, 2003, OFTA website <http://www.ofta.gov.hk>

out option after the trial or promotional period, licensees should exercise particular care to ensure consumers are not misled about the difficulty of opting out of the service.

(7) Comparative advertising

Comparative advertising involves a comparison between the products and services that a licensee is advertising versus the products and services of others. Comparison should only be made between products or services that meet the same needs or are intended for the same purpose. Any claims in the comparative advertising should only be made when such differences can be verified with reference to independent studies or surveys.

Inappropriate comparative advertising was demonstrated by a Hong Kong external telecommunications services licensee. In an advertisement, the licensee claimed that its calling card offered the lowest market price by including a table comparing its rates with several other operators. However, the table excluded the rates of a major competitor whose rates were lower during off-peak hours. The TA considered the omission in the advertisement was misleading; the operator had breached the Provision.²¹

(8) Bait advertising

Bait advertising is where an attractive offer for a product or service is used by a licensee to lure a consumer into a retail outlet or initiate contact with some other means. Once contact is established, the consumer will be informed that the product or service has sold out, or is only available from selected retail outlets or locations or is no longer available. The licensee then uses the opportunity to sell higher priced products or services to the consumer, while never having the intention of providing the cheaper advertised products or services. TA considers such actions as misleading or deceptive conduct when a licensee did not, or will not, possess the advertised products or services at the time of the

²¹ Complaint against ZONE Ltd, September 2002 (case reference T141/02), http://www.ofta.gov.hk/ca_bd/case_closed/t141_02.pdf stated in “Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets”, Telecommunications Authority Guidelines, May 21, 2003, OFTA website <http://www.ofta.gov.hk>

promotion. In circumstances where the advertised product or service is limited by capacity, the licensee is required to inform consumers of such limitations or else such an omission may constitute misleading or deceptive conduct.

For example, an Australia mobile phone operator was engaged in bait advertising by offering mobile phones at a special low price. This was found to be misleading or deceptive conduct because even though customers were required to purchase the mobile phones from the service provider's retail outlets, not all of the service provider's retail outlets offered the special low price. And those retail outlets that did offer the special low price only carried a limited number of mobile phones at the price advertised. This was considered misconduct because not any of the information was contained in the original advertisement.²²

(9) Use of words such as “Free”, “Unlimited”, or “No more to pay” etc

Use of words such as “free” is a popular means of promoting a product or service and is often used when trying to establish a product or service in the market. A licensee should ensure that all the significant terms and conditions are spelled out. Also, products and services advertised as free are, in fact, free. Products and services are not free when the consumer has to pay for them in some other, undisclosed way.

In Australia, the Federal Court found a newspaper to be guilty of misleading or deceptive conduct in relation to a “free” mobile phone promotion. The front page of the newspaper promised free mobile phones to readers with a paid subscription to the newspaper. However, only on receipt of the mobile phones were consumers made aware

²² Australian Competition and Consumer Commission, Mobile promotion: misleading, bait advertising, Media Release 147/05.08.1998, <http://www.accc.gov.au> stated in “Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets”, Telecommunications Authority Guidelines, May 21, 2003, OFTA website <http://www.ofta.gov.hk>

the significant minimum access charges they would be required to pay to use the phone. This fact negated the purported “free” phone.²³

In New Zealand, an internet service provider was also found to have engaged in misleading or deceptive conduct when it advertised a free internet service offer while failing to disclose that consumer in some areas would be required to make toll calls to connect to the provider or pay extra telephone line charges after 10 hours of usage per month.²⁴

(10) Prizes

If a sales promotion involves a prize, licensees should ensure that it includes no misleading or deceptive terms relating to the prize or has any material omissions, such as entry requirements or restrictions on the number of entries.

(11) Unlawful churn and slamming

Churn in telecommunications sector means the time when consumers switch their service providers. The ability of consumers to switch from one network to another helps ensure that licensees remain sensitive to consumer demands in respect to quality and price. Consumer however can become confused or misled by the very nature of churn. It is misleading or deceptive to misrepresent the nature of a particular transaction, i.e. leading consumers to believe a switch is temporary when, in reality, the switch is permanent. A suggestion by a salesperson that a signature is required to “prove” the salesperson’s attendance is misleading or deceptive when in fact the signature authorizes the transfer of services. It is also necessary for licensees to accurately disclose to consumers the full facts pertaining to their current provider and the identity the licensee.

²³ Australian Competition and Consumer Commission v nationwide News Pty ltd (1996) ATPR 41-519 stated in “Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets”, Telecommunications Authority Guidelines, May 21, 2003, OFTA website <http://www.ofta.gov.hk>

²⁴ NZ Commerce Commissions, Not so “free” internet services costs Clear Communicants \$15,000, Media Release 2001/110, <http://www.comcom.govt.nz> stated in “Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets”, Telecommunications Authority Guidelines, May 21, 2003, OFTA website <http://www.ofta.gov.hk>

In UK, a service provider seeking to persuade customers to switch telephone providers was found to have made misleading statements about its relationship with another service provider, causing customers to switch providers under false premises.²⁵

Slamming is the practice of changing a consumer's telephone service without permission. Licensees who do not inform consumers they are being switched to another network are engaging in slamming, conduct which the TA considers to be misleading or deceptive under the Provision. In circumstances where a customer agrees to a change of service provider following misleading representations from the new service provider, the TA will assume, in the absence of any contrary evidence, that there has been a breach of the Provisions.

(12) Cramming

“Cramming” describes the practice of placing misleading or deceptive charges on consumers’ telephone bills. Examples of cramming include, but are not limited to charges for services not requested or authorized by the consumer, charges for services that are only explained on the telephone bill in general terms (such as “service charge” or “other fees”) and charges that are added to consumers’ telephone bills without clear explanation of the services provided, (such as “monthly fee”).

(13) Telemarketing

Telemarketing refers to the practice of calling potential consumers on the telephone and asking them to purchase products or services. The aim of a telemarketer is to get the consumer excited about a product or service so that they make an immediate decision to purchase or, at the very least, agree to hear the details of the product or service sent to

²⁵ UK Office of Telecommunications, complaint against Reach Telecom Ltd, case reference CW/00496/01/02 (10.05.2002) stated in “Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets”, Telecommunications Authority Guidelines, May 21, 2003, OFTA website <http://www.ofta.gov.hk>

them. The failure to inform the consumer of material terms and conditions is regarded misleading or deceptive conduct.

The obligations of licensees under the Provision are in addition to obligations under the Unconscionable Contracts Ordinance (Cap. 458) and other applicable laws, including the Sales of Goods Ordinance (Cap. 26), the Control of Exemption Clauses Ordinance (Cap. 71) and the Supply of Services (Implied Terms) Ordinance (Cap. 457).

(C) Complaint Mechanism

Anyone who believes a licensee has engaged in conduct which is misleading or deceptive may complain to the OFTA. The TA may also initiate an investigation on its own initiative when relevant matters come to its attention (rather than in the form of a consumer complaint). Further information about how to make a complaint can be found on the OFTA web site.

Upon the receipt of a complaint, OFTA will decide whether the complaint merits a formal investigation and, and will follow the normal procedure for complaints. Details of each complaint received by OFTA will be sent to the relevant licensee, who will be asked to respond to the allegations. This will enable the licensee to defend its actions and submit any additional information to OFTA. This process also provides the licensee an opportunity to voluntarily remedy any outstanding issues of concern.

The materials gathered during an investigation, including any responses from the licensee, are all directed to and considered by the TA. The TA's opinion will be provided to the licensee, giving the licensee an opportunity to comment on the TA's reasoning before the final decision is made. Where the TA considers that there has been a breach of the provision, a licensee will also be given an opportunity to comment and put forward submissions in relation to the penalty the TA is considering.

(D) Remedies and Penalty

There are various penalties which the TA may impose on a licensee following a finding that the licensee has breached the provision, including financial penalties, disclosure to the public and corrective advertising and warnings.²⁶ For the financial penalties, TA may impose a financial penalty on the licensee for failure to comply with the provision. On the first occasion the penalty is imposed, the penalty may be up to and including \$200,000, on the second occasion, up to and including \$500,000 and, on any subsequent occasions, the penalty may be up to and including \$1,000,000.

(E) Appeal Mechanism

Decisions of the TA in relation to the provision may be appealed to the Telecommunications (Competition Provisions) Appeal Board. The detailed procedure is the same as the other competition-related provisions which was discussed in section 2.4.

2.7 Consumer Interests Related Code of Practice in the Telecommunications Sector

Besides the Misleading and Deceptive Conduct Guideline that the OFTA issued on May 21, 2003, there are other consumer-related codes of practice. All the Codes are voluntary in nature and the operators are to police themselves in compliance to the Codes. They have the responsibility to maintain both the integrity and goodwill of the telecommunications industry. The following are the main Code of Practices related to my study.

²⁶ Guidelines on the Imposition of Financial Penalty under Section 36C of the Telecommunications Ordinance, April 15 2002 OFTA Website <http://www.ofta.gov.hk>

Code of Practice on Protection of Customer Information for Fixed and Mobile Service Operators, June 17, 2002²⁷

This Voluntary Code of Practice lays out the best practices for preventing unauthorized disclosure of consumer information by staff. In the course of business and provision of services, operators also collect a large volume of customer personal data. Data such as telephone numbers, residential address and call history details may be sensitive in certain circumstances and of value if used for illicit purposes. The code therefore sets the standards that fixed and mobile service operators are required to protect customer information.

The best practices suggested are not exhaustive, but they provide guidelines in the areas of customer personal data protection, technical measures for protection of customer personal data, location security, staff security, and transfer of customer personal data. Fixed and mobile service operators may adopt other standards and measures which can provide reasonably sufficient protection to customer information. In addition, fixed and mobile service operators are reminded to observe the requirements of the legal provisions related to privacy of personal data and prevention of bribery.

The Code is based on the Legislation of Personal Data (Privacy) Ordinance (Cap. 486) which requires all personnel privy to consumer-data not engaging in a practice that contravenes the data protection guidelines listed in the Ordinance. Exceptions to this rule are also outlined under the Ordinance. The Code is also based on the Legislation of the Prevention of Bribery Ordinance (Cap. 201), which, states that any agent who uses consumer data for personal gain or discloses consumer data without lawful authority or reasonable excuse, may be in breach of the Provision.

²⁷ “Code of Practice on Protection of Customer Information for Fixed and Mobile Service Operators”, June 17, 2002 OFTA website <http://www.ofta.gov.hk>

Code of Practice of the Service Contracts for the Provision of Public Telecommunications Services, November 12, 2004²⁸

Code of Practice of the Service Contracts for the Provision of Public Telecommunications Services became effective on November 12, 2004. This voluntary code recommended basic standards and guiding principles for public telecommunications service contracts. Service Providers contracts should be balanced, fair and reasonable. Service contracts should not be written with preferential treatment to the service provider. Contracts should be written in plain and legible Chinese or English requested by the consumer. Service providers should not specify that the Chinese or English version of the contract would prevail the other.

Code of Practice of the Service Contracts for the Provision of Public Mobile Radiocommunications Services, November 12, 2004²⁹

The Service Contracts for the Provision of Public Mobile Radiocommunications Services code became effective on November 12, 2004. This voluntary code recommended basic standards and guiding principles for public mobile radiocommunications service (PMRS) operators service contracts. This Code is similar to the Code for the Provision of Public Telecommunications Services.

Since this Code is voluntary in nature, PMRS operators are to police themselves and self ensure adherence to the code. Each operator has the responsibility to maintain both the integrity and goodwill of the telecommunications industry. The TA will monitor the industry response to the Code. If the Code and the associated self-disciplinary mechanism are ineffective, the TA will review further options, including inserting special conditions for the licensees or enacting new legislation to regulate business practice of the PMRS operators in relation to the preparation of the service contracts.

²⁸ “Code of Practice of the Service Contracts for the Provision of Public Telecommunications Services”, November 12, 2004 OFTA website <http://www.ofta.gov.hk>

²⁹ “Code of Practice of the Service Contracts for the Provision of Public Mobile Radiocommunications Services”, November 12, 2004 OFTA website <http://www.ofta.gov.hk>

2.8 Conclusion

The competition-related provisions and guidelines provide detailed description of specific prohibited or disallowed conducts. With such, consumers' benefits seem to be well protected literally. However, whether there is adequate consumer protection in practice, we need to analyze the consumer behavior in the sector and examine the complaint cases in greater details. Detailed discussion will be in Chapter 6 and Chapter 7.

Chapter 3

Literature Review

3.1 Related Studies on the Competition Policy in Hong Kong

There are only few studies exist which focus on consumer protection in the Hong Kong telecommunications sectors. Even fewer studies have been done since the establishment of new regulations under the sectoral approach of Competition Policy. Despite their small number, the studies on the Competition Policy in Hong Kong represent crucial and significant discussions on the efficacy of the current policy in Hong Kong. The following remarkable studies review the pros and cons of the existing approach.

(A) Drawbacks of the Existing Mechanism

Chen & Lin (2002) have highlighted the fact that the existing sectoral approach distorts resource allocation in long run due to different rules set for different sectors. Another credibility problem is that the same agency acts as both the traditional industry regulator and competition policy enforcer, where full impartiality of their decisions may not be credibly conveyed to the general public. They also discussed other specific problems associated with the sectoral approach, such as the exclusion of structural issues, narrow coverage of sectors, and the lack of public enforcement.¹

Williams (2005) (2006) critically analyzes the current competition policy stance of the government and argues that the sectoral approach to competition issues is likely to prove insufficient. The sectoral approach may effectively address the issues in specific sectors; however, the absence of a general competition law means that a range of anti-competitive practice in other important sectors could remain, with great cost to the consumer-at-large and other competitors. Since there is dominance of the economy by a small number of family-controlled conglomerates (who supply everything from

¹ “Competition Policy under Laissez-faireism: Market Power and Its Treatment in Hong Kong” Professor Edward K.Y. Chen and Profess Ping Lin, *Review of Industrial Organization*, 21, 2002, 145-166

electricity to telecommunications services, port services, groceries, estate management and other retail services, etc.), anti-competitive behavior is simply a function of rational decision making by profit maximizing entrepreneurs. These firms dominate the domestic economy and operate a substantial number of monopolies and cartels, exacerbating high concentration ratios and a lack of competition by bundling products within conglomerate structures. The nexus of concentrated economic and political power held by these conglomerates may explain the historical reluctance of government to tackle anti-competitive behavior effectively. Only with the installation of new political leadership might there be hope for a change of policy. With regards to the telecommunications sector, he states that the limited and ineffective nature of the piecemeal approach has been demonstrated by the outcome of the Banyan Garden Case.² This complaint concerned the bundling of telecommunication services as part of the management fee for a residential housing estate.³ The obvious problem in disposing of this case is the limited ambit of the competition provisions in the Telecommunications Ordinance, which is sector specific and only *prima facie* applies to telecommunication licensees and not to other economic actors. Hong Kong has no provision for statutory economic investigations of sectors that appear to have structural impediments to competition. The concern of OFTA is that even an isolated sectoral regime, as in the telecommunications, maybe prohibited from successful operation by the artificial limitations placed on the scope of OFTA competition enquiries by the legislation. He claims that the current policy is lacking credibility and is weak in the long term and that Hong Kong's overall best interests lie in another course.⁴

Cheng and Wu (1998) point out that the existing mechanism has no effective power to investigate, prevent, or stop anti-competitive practices without legal sanction. They

² Case T 261/03, see OFTA website for the full decision

http://www.ofa.gov.hk/en/c_bd/completed-cases/t261_03.pdf

³ Banyan Garden is a large residential housing estate developed by the Cheung Kong Group, who appointed their subsidiary company Citybase as property manager. In September 2003, Citybase contracted with Hutchinson Multimedia and PowerComto supply broadband internet and with Hutchinson Global Communications to provide residential landline telephone services to all the residential units in the development

⁴ "Seeds of its own Destruction: Hong Kong's Dysfunctional Competition Policy" Mark Williams, 2006, *The Journal of Business Law*, page 52-73.

believe that Hong Kong's free trade policy is a necessary, but not sufficient, spur to competition in the territory because many goods and services are not traded. They have listed real estate, retailing, transportation and utilities as major problem areas where the government's dismissal of competition policy has been an error. It is vital to have full legal investigatory powers to uncover the facts, given that business typically does not voluntarily disclose internal information or co-operate with fact-finding investigations. This observation reflects the difficulties encountered by the Consumer Council and COMPAG sectoral competition investigations.

(B) Need for a Comprehensive Competition Policy

Due to the drawbacks of the existing sectoral approach, Chen and Lin (2002) (2007) propose that a blanket competition law can better promote competition and economic efficiency in Hong Kong. They state that Hong Kong economy is highly competitive in international markets but not in domestic markets. The public also holds various misconceptions about the role of competition law, in particular the confusion of free competition (*laissez-faire*) with fair or perfect competition, and international competitiveness with competition among domestic firms. Some regard competition law as a means to protect certain groups of players, rather than to protect competition. Both the government and the public believe that the competition law is necessary government intervention, but such intervention results in distortion of the functions of a free market system. They argue that what Hong Kong really needs for a competition policy system to be effective, is to educate the public, correct the various misconceptions regarding the competition policy and develop a culture for fair competition. Also, an independent enforcement body unrelated to any traditional regulatory duties is required to close the information gap inherent in the sectoral approach.⁵

Williams (2005) (2006) also highlights that enacting a comprehensive law is urgently needed to ensure that all sectors of industry are subject to congruent rules. He suggests

⁵ "Promoting Competition- Maintaining our Economic Drive" Edward K.Y. Chen and Profess Ping Lin, Response to Public Discussion Document, 2007

mobilizing of political pressure to convince the administration that the existing measures are illogical and ineffective in enhancing Hong Kong's economic prosperity. Besides, the Consumer Council should continue to investigate and publish its findings on competition complaints to ensure compliance. Academia should highlight the inconsistencies and illogicalities of government policies, and non-governmental organizations should take up the cudgels. Finally, a new campaign should be launched to increase public pressure on the government to legislate a comprehensive competition statute.

Cheng & Wu (1998) advocate that comprehensive competition policy applicable across industries (including the telecommunications sector) and continued market liberalization is necessary to secure adequate competition, protect consumer interests, and prevent anti-competitive behavior by incumbent merger and acquisitions.⁶ Without such law, there will be no consolidated legal basis to prevent, investigate, and stop anti-competitive practices. Favoritism or perception of favoritism will persist as a symptom associated with "crony capitalism". They also suggest that a competition law for Hong Kong should aim to prohibit horizontal agreement such as those involved in price-fixing cartels, bid rigging, territorial restraints, and market division. Such a law should also aim to prohibit any abuse of a dominant position, including monopoly pricing and vertical restraints such as tie-in sales. Adequate guidelines in regard to mergers and acquisitions and the abuse of power by corporations owned by the SAR and other governments in China should also be included to make such a law comprehensive.

(C) Official Study by Competition Policy Review Committee

The Competition Policy Review Committee (CPRC) has been appointed by COMPAG in June 2005 to review the effectiveness of Hong Kong's competition Policy and report its findings to COMPAG. The CPRC has looked at competition policy and law in overseas jurisdictions as well as the current sector-specific approach in Hong Kong.

⁶ In Hong Kong Economic Policy Studies Series, Leonard K. CHENG and Chanqi WU "Competition Policy and the Relation of Business", 1998, City University Press

Whilst formal public consultation on completion will be conducted by the Government in due course, for the purpose of gathering initial views, the CPRC has also written to over 300 trade and industry organizations inviting their views on Hong Kong's competition policy and in response has received submissions from individuals and organizations. The report summarizes the CPRC's deliberations on the future approach to competition in Hong Kong. The report also gives a brief overview of the characteristics of the local economy, and describes how competition is regulated in foreign economies. It outlines the key issues CPRC members consider when forming recommendations on Hong Kong's future competition policy.

CPRC suggests that new legislation which guards against anti-competitive conduct would have an adverse effect on economic efficiency and free trade in Hong Kong. The new law should also encompass all sectors rather than be sector specific. Provisions should be included in the legislation to allow the Government to grant exemptions to the application of the law in defined circumstances on public policy or economic grounds. The regulatory authority should have the discretion to disregard inappropriate complaints, so as to guard against the new law being used to stifle legitimate competitive business activities. The new law would not target market structures, nor seek to regulate "natural" monopolies or mergers and acquisitions.

A regulatory authority, known as the Competition Commission, should be established under the new law. The Commission should have a two-tier structure, comprised of a governing board underpinned by an executive arm that would include staff with relevant expertise. The Commission should have an advocacy role tasked with keeping the scope and application of the new law under review. The commission should also have sufficient powers to thoroughly investigate any suspected anti-competitive conduct prohibited by the new legislation. The Government should seriously consider the merits of establishing a Competition Tribunal to hear cases brought by the Competition Commission and to hand down sanctions. With regard to sanctions, civil penalties should apply in cases where anti-competitive conduct is found to have occurred. And while a case is pending a decision, the Competition Commission should be allowed to

apply for an order from the Competition Tribunal to require an offender to cease and desist from anti-competitive conduct.

The Government should engage the community in setting the parameters of the new competition law and regulatory structure before finalizing the new legislation, and it should be planned and made available relevant resources for the establishment of a regulatory structure. The new regulatory authority would effectively take over the work currently done by COMPAG.⁷

(D) Official Report by Office of Telecommunications Authority about Effectiveness of Competition

In the “Report on the Effectiveness of Competition in Hong Kong’s Telecommunications Market in 2005: An International Comparison” conducted by OFTA, the Hong Kong telecommunications sector has been found to have largely maintained its competitiveness in the past two years. This is achieved through a strong pro-competitive framework adopted by the regulator and the consequent market trends and dynamics. In particular, Hong Kong consumers and businesses have benefited significantly from the high levels of competition in the reviewed the telecommunications sectors with subsequent benefits to the wider economy.

However, the analysis has highlighted two areas in which Hong Kong has performed relatively weaker as benchmarked against the other review markets, including Singapore and Taiwan. First, Hong Kong has one of the lowest mobile data revenues amongst other review markets. Second, the emergence of new technologies such as fixed-mobile convergence and the union of telecommunications and broadcasting will continue to pose challenges to existing regulatory frameworks. In light of these challenges, OFTA will continue to examine and update existing regulatory regimes to facilitate

⁷ “Report on the review of Hong Kong’s competition Policy”, Competition Policy Review Committee, June 2006

technological applications, infrastructure investment, market development and enhancement of consumer benefits.

The Hong Kong government continues to only have indirect involvement in the telecommunications industry via its regulatory duties. In contrast to many other markets, it has no ownership in the incumbent or any other operator and has no foreign ownership restrictions for any operator (Governments of other markets have only recently relaxed foreign ownership restrictions.). This has allowed the regulator to objectively adopt policies which it considers most beneficial for Hong Kong and for end-users. The local loop unbundling (LLU or Type II Interconnection in Hong Kong) is more advanced in Hong Kong than in most other markets and Hong Kong has made significant progress in furthering the LLU process in recent years. LLU has facilitated market entry and helped to increase the level of competition in the local fixed market in Hong Kong. Given that the policy objectives of increasing market competition have been met, mandatory type II interconnection at telephone exchange level will be fully withdrawn by 30 June 2008 to promote investment and consumer choice in high bandwidth customer access networks.

For the development and effectiveness of competition, the report claims that Hong Kong is still considered one of the leading markets in terms of effectiveness of competition. This reflects the regulator's strong and continued emphasis on the promotion of competition. It scores consistently high on all variables reflecting sustained competitiveness in the telecommunications sector in Hong Kong. The effectiveness and intensity of competition in Hong Kong's local fixed voice sector is significant as evidenced by rapid erosion in the market share of the incumbent in the last two years. The deployment of six additional local wire lined-based fixed networks after January 2003 has increased the level of competition. Hong Kong's continued emphasis on the promotion of competition in the mobile sector has resulted in very effective competition in the sector. Hong Kong continues to record the lowest mobile market concentration in the sample. The impact of competition is less significant in the data access sector, with the incumbent's share of the broadband access market decreasing only slightly from 2002 to 2004. Competitive pressure has been maintained in Hong Kong's international

services sector. IDD market concentration has remained stable between 2002 and 2004. Hong Kong recorded one of the largest increases in international bandwidth (from 13, 712Mbps to 53, 058Mbps) and bandwidth per capita (from 2.0kbps/capita to 7.6kbps/capita) in the sample from 2002 to 2004.

As for consumer benefits, the analysis of consumer benefits focuses on service innovation and development, take-up of services and the associated costs of consumption. The analysis indicates that Hong Kong has performed well relative to comparable markets. In terms of service innovation and development, Hong Kong is one of the leading markets amongst the eight review markets, as measured by the fact that Hong Kong has the largest number of IPTV (i.e. television services over broadband telecommunications network) subscribers in the world. Hong Kong remains one of the most affordable markets for local fixed voice calls. Hong Kong has by far the highest mobile penetration rate at the end of 2004. The decline in mobile prices between 1997 and 2002 has been the highest in Hong Kong, compared to the other review markets. Hong Kong is also the most affordable market in the sample for mobile calls in 2004. The broadband penetration rate in Hong Kong in 2004 is second only to South Korea. The use of IDD services in Hong Kong has grown rapidly. On a per capita basis, Hong Kong has generated the largest amount of IDD traffic in the world in 2004, with the largest increase in IDD traffic from 1998 to 2004.

For the Industry Investment Section, generally, the capital expenditure to revenue ratio of individual operators in the review markets has decreased in recent years. This is likely to be a function of more cautious investment strategies, particularly after the post-2000 burst of the IT bubble. Another possible reason is that most operators are now focusing on upgrading and enhancing their existing networks, instead of deploying entire new infrastructures. Recent network investments by operators in Hong Kong and in other review markets have enhanced coverage and capacity of existing networks as well as upgrade their network to keep abreast of new technological developments.⁸

⁸ "Report on the effectiveness of competition in Hong Kong's Telecommunications Market in 2005: An International Comparison", OFTA, Spectrum Strategy Consultants, 2005

3.2 Related Studies on Consumer Protection in Hong Kong and United Kingdom

Ho (2006) examines the current system in protecting consumers in Hong Kong and there is generally inadequate level of consumer protection under the existing mechanism by focusing on three fundamental asymmetries between consumers and business. This puts consumers at a disadvantage, including market power asymmetry, information asymmetry (price, non-price, advertising, business-drafted contracts) and access to justice asymmetry, from which consumers need protection because of the unequal bargaining power in real society with imperfect information. His analysis on the effects of these asymmetries provides a framework and criterion for the assessment of consumer protection policies and mechanism. He suggests that removing these asymmetries and leveling the playing field could benefit not only consumers, but also the business as well, and it may be the only way to maintain a strong economy in Hong Kong.⁹

Office of Communications (Ofcom) in UK has published a consultation paper in 2006 with the purpose of laying down Ofcom's approach to the promotion of consumer interests and eliciting stakeholder views on a number of issues related to consumer policy.¹⁰ Consumer policy should work together with other organizations and industry to ensure that consumers benefit from competitive communications markets, and that they are protected from financial and physical harm, unreasonable annoyance and anxiety, and have the information and tools necessary to make informed choices. The paper lists four key elements of an effective consumer protection regime: (1) the rights of consumers and the obligations of suppliers should be clearly defined and simple enough to be readily understood; (2) information and advice should be readily available to consumers; (3) an effective process must be in place for handling consumer complaints with appropriate redress measures; (4) and regulations governing supplier behavior should be actively monitored and effectively enforced.

⁹ "In Search of the Level Playing Field: Asymmetries and Consumer Protection in Hong Kong" John D.Ho, Hong Kong Law Journal, Volume 36, Part 1, 2006

¹⁰ "Ofcom's Consumer Policy" A consultation paper from Ofcom, February 8 2006, UK

In order for Ofcom to strengthen consumer policy in UK, the Department of Trade and Industry (DTI) in UK laid out the Government's goal of creating a world-class consumer regime. Features of such a regime include: consumers are equipped with the skills, knowledge, information and confidence to exercise their rights to get a good deal; strong consumer advocacy at the general policy making level; consumers access to appropriate and convenient sources of advice and redress, including effective alternative dispute resolution (ADR); Consumer rights are proportionate and balanced as well as clear and simple enough to be well understood; and, consumers are able to understand the impacts of their own consumption decisions. Such a regime will also protect vulnerable consumers without placing undue restraints on markets overall. Enforcement should be fair, consistent, effective and proportionate in the eyes of both consumers and businesses.

3.3 Related Empirical Studies on Consumer Protection in United States and Competition in the Telecommunications Sectors around the World

There is a lack of empirical studies about competition policy and consumer protection in Hong Kong, even though Li and Xu (2004) do study the impact of privatization and competition in the telecommunications sector around the world by examining the country-level panel data set covering the period from 1990 to 2001. Results revealed that full privatization has contributed substantially to improving the allocation of labor and capital, expanding service output and network penetration, and improving labor and total factor productivities. However, partial privatization shows no significant impact. The increase in competitive pressure has contributed substantially to growth in the sector by raising both factor inputs and total factor productivity. Also, there is a complementarity between privatization and competition in deepening network penetration and in restraining the rise of service pricing among privatized operators.¹¹ Although there has been much theoretical and empirical research on the effects of privatization and competition in infrastructure in general, relatively little empirical work has been done on

¹¹ "The Impact of Privatization and Competition in the Telecommunications sector around the world", Wei Li and Lixin Colin Xu, *Journal of Law and Economics*, vol. XLVII (October 2004)

how the degree of privatization and competition affects performance and how components of the policies interact in shaping the reform outcomes.¹²

Federal Trade Commission staff has conducted a study about consumers' fraud in the United States in 2004. The study examines both the extent of the consumer fraud problem and the degree to which certain groups of consumers may be more or less likely to become victims of fraud. The underlying data is drawn from an FTC-commissioned survey which was conducted in 2003, and asked consumers whether they had been a victim of any of ten specific types of fraud in the previous twelve months. Based on the survey results, they conducted a regression study on the likelihood of being a victim of one of the types of fraud investigated in the study varies with the consumers' demographic characteristics. They suggested that American Indians or Alaska Natives faced the greatest risk. Hispanics and African Americans are also significantly more likely to have been victims than were non-Hispanic whites.¹³

3.4 Conclusion

Different studies have already highlighted the drawbacks of existing sectoral approach of competition policy, as well as the urging need of enacting a competition law in Hong Kong. However, there is lack of empirical study about how competition would affect consumers' benefit, especially in the Hong Kong telecommunications sector, where the sectoral approach of competition policy has been implemented for more than six years. It is crucial to review the shortcomings of the existing approach, while the effect of bringing in more competition in the market on consumers is also important. This is especially valid when we are under the consideration to introduce a more comprehensive competition law in Hong Kong.

12 "Does Ownership or Competition Matter? The Effects of Telecommunications Reform on Network Expansion and Efficiency", Agustin J. Ros, *Journal of Regulatory Economics*; 15:65-92(1999)

13 "Consumer Fraud in the United States: An FTC Survey" Federal Trade Commission Staff Report, August 2004

Chapter 4

Conceptual Framework and Research Methodology

4.1 Conceptual Framework

The relationship between competition policy and consumer protection policy is complex. These two policy goals generally complement one another, but under some instances, the relationship becomes contradictory. There is no doubt that these policies share the same objective of enhancing consumer interests (which includes protecting consumers from unfair business practices and providing consumers with adequate price and quality information). Consumer protection and consumer policy can aim to ameliorate the risk inherent in the market place and ensure that even the most disadvantaged and vulnerable consumers be treated fairly. However, creating a competitive market does not necessarily equate to a consumer-friendly market place.

Introducing competition in any market is often justified by the fact that there are potential benefits to consumers. Competition among operators to acquire and retain users involved the development and deployment of newer and/or higher quality products, services, implementation of technologies, and development of new source revenue streams to offset declining, more competitive, prices. In competitive markets, consumers see lower prices, increased choice and more innovative products. Competition provides substantial benefits to consumers which would have been otherwise foregone in non-competitive markets.

On the other hand, increased competition can sometimes lead to consumer harm. This is because more competition in the market does not necessarily mean effective competition. A highly competitive market does not guarantee that there is adequate consumer protection. Extremely competitive markets with limited or no barriers to entry and exit may enhance economic efficiency, but the ferociousness of competition increases the temptation for operators seeking an advantage to engage in fraudulent practices. Competition may harm the consumers through misleading and deceptive conduct. An

effective competition policy should simultaneously consider market efficiency alongside consumer benefit and consumer protection. Therefore, the traditional framework is flawed in suggesting that the current competition policy in the telecommunications sector is optimal.

Failure to protect consumers means that the competition policy is ineffective. According to Dennis Swann (1979), consumer protection is an important ingredient of an effective overall approach to competition. Consumer protection should focus on minimizing or eliminating consumer detriment. This can often be achieved by increasing competition and/or increasing ability of consumers to take advantage of competition. However, competition will not always meet the goals of minimizing or eliminating consumer detriments, and consumer protection and consumer policy must therefore treat as priority goal in its own right.¹ Consumer protection is therefore an ingredient of an effective overall approach to competition. Competition laws are essential to the protection of consumers by protecting the process of competition. In the absence of effective competition, consumer interest will be damaged.² If the competitive system is to serve the needs of consumers, then the system needs to protect consumers from deception or injury and provide consumers with adequate price and performance information. In some countries, including Japan and China, competition laws also meet these consumer protection objectives. (Lin 2003)³

In Hong Kong, with the introduction of competition policy and aggressive market liberalization in the telecommunications sector, the telecommunications industry has

¹ “Competition and Consumer Protection”, Dennis Swann, Great Britain: Richard Clay (The Chaucer Press) Ltd., (1979)

² Optimal level of consumer protection cannot be easily measured or determined. However, to a certain extent, effective competition in the market may imply consumers are well protected. One of the ways to achieve effective competition is to ensure that there is optimal number of competitors in the market. This concept is to balance the benefit of economies of scale (which is important in the telecommunications sector) with having sufficient competition in the market. It implies that all firms operate at the minimum efficient scale (assuming this can be achieved). Therefore, in my study, I attempted to estimate the optimal number of service provider in the sector by conducting regression analysis. However, the empirical results are insignificant due to the data limitations, which are attached in Appendix II. Hence, the optimal level of competition or consumer protection cannot be determined empirically in this thesis.

³ “Competition Policy in East Asia: The Cases of Japan, People’s Republic of China, and Hong Kong” Ping Lin, working paper series 133, Center for Asian Pacific Studies, Lingnan University, Hong Kong (2003)

experienced a dramatic transformation over the previous five years with significant benefits to consumers, i.e. declining prices. Even though there is effective competition in the telecommunications sector, effective competition policy by itself is not enough to ensure that consumer interests are protected. The rapid change in technology and the unique asymmetric information problems in this sector raise the question of whether this transformation equates to adequate consumers protection.

Protecting consumers is important, especially in the telecommunications sector where technical information has high potential of creating an information gap between consumers and providers. Therefore, special attention is required in the telecommunications sector due to the complexity and volume of information. Ofcom's consumer policy says "well-informed consumers help markets to work effectively, more information should be provided to the consumers needs." Therefore, with consumer interests as an objective of competition policy, Ofcom has integrated consumer protection policy into competition policy. This integrative law ensures that competition policy take sufficient account of consumer interest and behavior.⁴

There is relatively scant literature that deals with the role of the competition law in the protection of consumers, and even fewer studies discuss consumer protection in the telecommunications sector in Hong Kong under the sectoral approach. However, it is becoming increasingly important to examine the relationship between consumer protection and competition policy. Therefore, my study focuses on consumer protection under the existing sectoral approach of competition policy in the telecommunications sector in Hong Kong. Due to the potentially contradictory relationship between competition policy and consumer protection, I will first examine the actual benefits competition policy brings to consumers. I will focus on how an effective competition policy needs to provide both consumer benefit and consumer protection. The objective of my study is to assess the extent to which consumers have gained protection from the

⁴ "Implementing Ofcom's Strategy: Effective Competition Review Guidelines", Ofcom, UK, August 2000
Ofcom website http://www.ofcom.org.uk/static/archive/ofcom/publications/about_ofcom/crev0800.htm

introduction of competition in the different review markets and specifically, to assess the protection for consumers under the existing sectoral approach.

4.2 Methodology: Structure-Conduct-Performance Paradigm

My model combines the Structure-Conduct-Performance (SCP) paradigm with the Consumer Behavior features of Effective Competitive Indicators.

(A) Structure-Conduct-Performance (SCP) Paradigm

(1) Background

Industrial organization is the study of the structure of firms and markets and of their interactions. It adds to the perfectly competitive model real-world frictions such as limited information, transaction costs, costs of adjusting prices, government actions, and barriers to entry by new firms into a market. And one of the approaches to study of industrial organization is structure-conduct-performance (SCP), which is primarily descriptive and provides an overview of industrial organization. This SCP approach was developed by Professors Mason and Bain in 1950s, and it is a traditional framework which dominated the industrial organization field during the third quarter of the 20th century and still serves as a basic framework in many studies on market power-profitability relationship, arguing that the performance of an industry or a firm is determined by the behavior (conduct) of suppliers and buyers, which in turn is determined by structural attributes of the market in which it operates.⁵

⁵ Dennis W. Carlton and Jeffery M. Perloff, *Modern Industrial Organization*, 4th Edition, N.Y.: HarperCollins Publisher, 2004

(2) Traditional SCP Paradigm (Figure 4.1)

Relationship A and B

(Structure → Conduct → Performance in the Telecommunications Sector)

Relationship C and D

(Performance → Conduct → Structure)

The traditional SCP paradigm has been modified to account for the impact of competition on market structure. A causal relationship between structure, conduct and performance, is assumed, such that structure determines conduct, and conduct in turn determines performance (although backward linkages are also recognized). The relevant market is defined, and then the conduct at issue is assessed according to whether the structural features of the market indicate that as a result of the conduct there will be an increase in the firms' market power and consequently a substantial lessening of competition. A further elaboration on the conceptual basis of these three components will be useful. Market conduct of firms is a reflection of competitive activity in terms of pricing strategies, policies toward product design and services, how they advertise and promote their products like bundling, tie-ins etc. An examination of market conduct is supposed to reveal the sources of observed conduct. The origin of an observed conduct may be the attainment of monopoly position or superior competitive capabilities attained. What can be regarded as anti-competitive and what pro-competitive conduct is, is arrived only after a detailed examination of the given industry. Market performance is the outcome of the market conduct of the participating firms.

(3) Modified SCP Paradigm (Institution) (Figure 4.1)

Relationship E, F, G (Institution → Structure & Conduct & Performance)

Relationship H (Conduct → Institution)

Besides the impact of competition on markets, the institutional impact through government law and policy enforcement also affect the market structure, its conduct and

performance. Appropriate regulation of industries with a high degree of market power can complement competition policy. Regulation may prevent the exercise of market power, e.g. by the application of price control of monopolies, and thus, regulation directly impacts performance. Regulation may conflict with competition policy, for instance, entry regulation and minimum price regulation. Regulation may serve other legitimate objectives, such as environmental, safety, and fairness, which may or may not conflict with competition policy objectives. Regulation is an increasingly important part of competition policy. As monopoly positions are deregulated and/or privatized, the application of traditional antitrust law may be insufficient. Regulation can complement antitrust law, especially when dominant firms exist prior to the enactment of such laws.

The competition policy will not be effective if its enforcement is not effective. One main criticism of current policy is that it relies upon the individual consumer for its enforcement. This is cause for concern because consumers may be ignorant of his or her rights. And with the complexity of telecommunications services, it is particularly difficult for consumers to know if they have been wronged. Consumers may also lack the resources to take action, or feel it is too troublesome to take action despite being wronged. Litigation is expensive especially to seek claims for a relatively small amount of money. It has been previously commented that consumers often need 'superspite' to take action. The failure of current policy to adequately protect consumers is due to a lack of an enforcement body. Therefore, it is important for enforcement authorities to know, aid, and protect consumer interests. Therefore, in order to see whether adequate protection for consumer exist in the telecommunications sector, we must analyze the regulatory mechanisms in this sector.

(B) Effective Competitive Indicators (Figure 4.1)

Besides the SCP Paradigm, I also refer to the effective competition indicators as part of the model in my study. In UK, many consumer policies related studies were conducted. Consumers are at the heart of the Ofcom's regulatory approach studies. Effective competition is most likely to meet their needs, but consumers are also interested in the

benefits of competition in terms of improved quality, choice and value for money, rather than simply facilitating competition in particular markets. For competition to be effective, consumers must be knowledgeable enough to take advantage of competition.⁶ The assessment of effective competition is consisted of two principle strands of market analysis; (1) feasibility and utility of competition and (2) assessment of the outcomes for consumers to establish benefits consistent with an effectively competitive market. Effective competition indicators include consumer outcome, consumer behavior, market structural and operator behavior.

Relationship I and J

(Conduct → Consumer Behavior and Consumer Behavior → Conduct)

After introducing competition into the market, its structure and conduct will be changed. Consumer behavior is affected by operator behavior, and often operator behavior is reciprocally affected by consumer behavior. For example, if consumers lack the sophistication to interpret information provided by operators, operators may take advantage of this ignorance and provide more fraudulent information.

As mentioned earlier, competition policy and consumer protection can be complementary or contradictory. Competition can enhance efficiency, but fierce competition may lead to misleading and deceptive information harming consumers. Therefore, effective competition must provide consumer benefit as well as consumer protection. To assess the effectiveness of competition, it is important to measure consumer protection by examining consumer behavior to assess the level of consumer protection.

By looking at consumer complaints, one can identify the problems of the sector under fierce competition. Understanding sector-specific problems, including consumer protection problems and the shortcomings of current law are the measurements of how

⁶ “Implementing Oftel’s Strategy: Effective Competition Review Guidelines”, Oftel, UK, August 2000
Oftel website http://www.ofcom.org.uk/static/archive/oftel/publications/about_oftel/crev0800.htm

well consumers are benefiting from competition. Such information can provide valuable insight to improve current law and enhance consumer protection.

From the observation of the complaint cases, there is a huge number of complaints happened in year 2004, when there was more service providers provide telecommunications service in the sector. Increased complaints may suggest that consumers have increased awareness of their rights, but in the case in Hong Kong, the structural change in the sector seems to be a reason to trigger more complaint cases. Therefore, consumer complaints could be one of the measurement of consumer satisfaction and which is important in my study in order to find out the how does the structural change of the sector could affect consumers. However, there are limits to relying on consumer complaints as a measure of consumer protection. First, members of lower socio-economic groups are less willing to complain, and generally less likely to invoke the law. Encouraging lower status consumers to complain and providing them with increased access to consumer advisers may or may not improve their situation. Complaining has been successful because retailers have an incentive to resolve any consumer issue in hopes of retaining their loyalty. Retailers may be less concerned with retaining customers of lower income. Retailers are also less willing to accept complaints of a judgmental nature. Yet, matters such as the durability and quality of goods, misrepresentations and bad selling practices are the very problems which consumer protection laws seek to redress. Finally, voluntary settlements by traders may mask problems which continue to affect a sizeable number of consumers who take no action. Consumer complaints play an important role in quality control. Businesses themselves monitor consumer complaints and utilize them to improve standard.⁷ However, increasing the rate complaints will benefit some consumers; strengthening current law will undoubtedly benefit all consumers, regardless of socioeconomic class.

⁷ Geraint G. Howells and Stephen Weatherill, *Consumer Protection Law*, Cambridge University Press (1995)

(C) My Research Model

Figure 4.2

Therefore, in order to use the modified SCP diagram to effectively assess consumer protection in the telecommunications sector under the sectoral approach of competition Policy, I will examine previous complaint cases of the Consumer Council and OFTA and analyze the following: the nature of the complaint cases, how the cases were handled, how many of them were not established and related rationale, whether it was effectively solved with the established cases and whether the penalty was fair under the breached cases. This strategy will provide relatively good insights to assess the effectiveness of the current competition policy because complaint cases represent the main source of consumer behavior and operator conduct.

My integrated framework is based on the SCP model with modified effective competition indicators. Since the SCP model is a well known framework for normative competitive analysis, it will be used to illustrate how the introduction of competition will change the structure, conduct, and performance in the telecommunications sector. It will also show how the conduct of the sector could change the consumer behavior and vice versa. First I will analyze the consumer complaints, in order to examine the consumer behavior. Also, econometric study of the attributes to misleading or deceptive conducts will be done, to find out how the structure of the section affects the conduct of an

operator, and how the conduct influence the consumers benefit. Hence, I will draw policy implications and recommendations after both qualitative and quantitative analysis. This framework is better suited to assess the level of consumer protection under the existing competition policy in the telecommunications sector in Hong Kong.

Figure 4.1
Structure-Conduct-
Performance Paradigm

Chapter 5

Analysis of Complaint Cases

5.1 Introduction

(A) Source of the Data

The data that I am going to analyze in this chapter is divided into two parts. One is the data from the Consumer Council, which is classified statistically into different categories by the Consumer Council. Another data is from the OFTA website, which basically is some raw data without any statistical classification. All of the data I collected from the OFTA is classified into different categories and dimensions in a more systematical and statistical way.

(B) Meaning of the Data

The data from the Consumer Council is consumer complaints received by the Consumer Council and they are counted by number of cases. The data from OFTA is the cases received and handled by OFTA which is put in document files with detail description of the cases. OFTA did not provide any numerical statistics record of the complaint cases; instead, they posted the completed complaint cases on its website. By completed, it means the investigation done and decisions made. For those current cases which are still under investigation, they did not post any information on their website. Since there is lack of systematically and statistical analysis from OFTA, I read through case by case throughout the 8-year period and did the numerical statistic to generate and different dimensional analysis in order to examine the problems in the sector.

First I will look at the general picture of consumer complaints in Hong Kong. Then, I will examine the trend of the consumer complaints in the telecommunications sector and analyze them in specific telecommunications markets and in different dimensions.

5.2 Consumer Complaint Statistics from the Consumer Council

(A) General Picture

From the number of the consumer complaint data provided by the Consumer Council (CC), it shows that there is a general increasing trend with some remarkable points which are interesting to look at.

Table 5.1

Total Number of the Consumer Complaint Cases Received by the Consumer Council from 1999 to 2006

	1999	2000	2001	2002	2003	2004	2005	2006
Total No. of Complaint Cases in All Sectors	16470	18932	20798	22890	26501	26756	36614	35962
Total No. of Complaint Cases in Telecom Service Sector	1820	3113	4684	5800	7105	7743	12029	11801

Source: OFTA

Table 5.1 provides a general picture of consumer complaints in Hong Kong. In the period 1999 to 2006, there is an increasing trend of consumer complaints in Hong Kong. There is an increase from 2002 to 2003, which is around 16%, with another remarkable point from year 2004 to 2005, which has a huge 37% increase.

The increasing number of consumer complaints may be due to the reason of the increase awareness to complain about what they are not satisfied with on the part of the consumers. The increasing trend also shows that more consumers are not satisfied with the products or services they consume. However, the remarkable change of the complaint number is definitely worth examining since there are usually some reasons behind sudden changes.

(B) Telecommunications Sector

In this section, I will analyze the data from the Consumer Council statistically and specifically in the telecommunications sector. With reference to the Table 5.1, telecommunications service sector dominates among all other sectors in terms of the number of consumer complaints during 2000 to 2006.¹ Table 5.1 shows the total consumer complaints in the telecommunications service sector has been increasing during the period 1999 to 2006. There are two remarkable increases during this ten-year period. There are an increase of 1,571 cases from year 2000 to 2001 and 4,286 increased cases from 2004 to 2005. Viewing the percentage share among all complaint cases as a whole, the telecommunications sector's percentage share is about 5% among all the complaints in year 1999 and increases to more than 10% in year 2000 and 2001, and thereafter it keeps increasing to more than 20% from 2002 to 2005, and it even reaches 30% in 2006. Compared to second most complaint service sector, broadcasting Service sector is only around 1% among all complaints before 2005 and only around 5% after 2005. Also, there is around 90% increase in total number of complaints in all sectors from 2000 to 2006, the change in the telecommunications service sector alone is almost 300% increase.

It shows that there is not only an increasing trend of the complaints in this sector, but also the percentage share among all complaints has been increasing throughout these years. It suggests that the seriousness of consumer complaints in this sector has been even more noticeable. As the consumer complaints situation in the telecommunications sector is the most serious one, I put my focus on this particular sector in my study.²

¹ "Consumer Complaint Cases Statistics" on OFTA Webpage <http://www.ofa.gov.hk>

² With reference to the Singapore Data by the Consumers Association of Singapore (CASE) in 2006, CASE received a total of 20,175 complaints; Timeshare complaints top the list with 2,363 cases and only 911 complaints about mobile phone services, which is not even on the top five of the most complaints list.

Table 5.2

Breakdown of the Consumer Complaint Cases Received by the Consumer Council in the Telecom Service Sector from 2000 to 2006

	Fixed Line Service	Mobile Phone Service	IDD Service	Internet Service	Others
2000	64	1706	293	928	122
2001	221	2003	136	2042	282
2002	546	1653	351	2851	399
2003	1479	1533	594	3018	481
2004	2037	1221	689	3464	322
2005	2269	1708	1190	4382	2480

Source: OFTA

Table 5.2 shows how the consumer complaints situation changes over the years from 2000 to 2005 among the 4 different specific telecommunications services.

If we look at the consumer complaint cases by different telecommunications markets, we could find that there are different characteristics among different markets. In my study, I will classify the complaint cases in four specific telecommunications markets - fixed line services, mobile phone services, and International Direct Distance Dialing Services (IDD) and Internet services. Those which do not belong to any of these markets would go to the others category.

First of all, for the Internet services market, there is an increasing trend throughout the years, with a more-than-double jump from 2000 to 2001 and another remarkable jump from 2001 to 2002. The consumer complaints have been increasing dramatically from 2000 to 2001 and from 2004 to 2005. And it contributes the most complaints among all other markets in the telecommunications sector, that is, 40% share of all complaint cases.

Fixed line services market has the second most consumer complaints among all markets in the telecommunications sector. There is an increasing trend of the consumer complaints and it is even more dramatic than in the Internet market. The most significant one is that there is a huge jump from 2002 to 2003 and 2003 to 2004. Also it contributes the most complaints in 2003 and 2004 among all complaints, which are respectively 21% and 26% share of all complaints.

Compared with other markets, the changes of complaints situation in the mobile phone service market is relatively stable, which has around 1,000-2,000 cases throughout the years. However, its share of all the complaint has a decreasing trend, which, in year 2000, after an around 300 cases increase from 2000 to 2001, it starts to fall. Until 2005, it has another jump, which is around 500 cases increase. Also it gets 55% among all the complaints. However it has been decreasing to 14% share among all the complaints in 2005.

From 2000 to 2005, the complaint cases in the fixed line services market has increased more than 3,000% (from 64 cases in 2000 to 2,269 cases in 2005), while it is more than 300% in the Internet services market and mobile phone service market has only 0.12% increase. It shows the seriousness of consumer complaint situation in the fixed line services market and Internet service market. Not only these two markets get the most complaint cases, there are very obvious increasing trends observed in these two particular sectors. This also accounts for the reason why I focus on these two markets in my study.

The data from the Consumer Council helps generate a general picture of why examining the complaint cases in the telecommunications sector is important and especially in Internet and fixed line services markets. For the detailed discussion with the situation, I will examine the data from OFTA, which facilitates a better understanding of the sector and to dig further to a more significant problem in this sector.

5.3 Analysis of Complaints Received and Handled by OFTA

From the investigated cases (completed cases) data provided by OFTA, there are three categories in relation to competition and consumer interests. They are the complaints about misleading or deceptive conduct, anti-competition/abuse of dominance, and merger and acquisitions.

The complaint cases data in this section is different from those from the Consumer Council; the data in this section are the completed investigated cases, which are considered more serious, less impulsive and more representative, because OFTA actually conducted investigation over those cases. Also, these cases are the completed investigation cases, which means there may be still some more cases being undertaken, and are not provided by OFTA but they are in this data file.

(A) Type of Complaint

Table 5.3

Total Competition-related Completed Cases Handled by OFTA from 1999 to 2006

	1999	2000	2001	2002	2003	2004	2005	2006	Total
Misleading or Deceptive Conduct	26	15	24	67	110	101	8	3	354
Anti-competition Conduct/ Abuse of Dominance	23	2	4	1	149	0	0	0	186
Mergers and Acquisitions	0	0	0	0	0	0	3	1	4

Source: OFTA

As Table 5.3 shown, there is a main concentration in 2003 to 2004 of all the cases among these three categories mentioned. Also, there is a concentration in misleading or deceptive conduct cases, especially from 2002 to 2004.³ There has been a huge jump of Anti-competition conduct cases in 2003. There are not many cases in merge and acquisition and it starts to have a few in 2005 and 2006. Misleading or deceptive conduct cases take up more than 60% of number of cases among all, showing that the misleading or deceptive conduct seems more serious in this sector. This also explains why my study highlights the misleading and deceptive conduct cases as it is the dominant category. At the same time, I would like to find out the reason why there are many cases in year 2002 to 2004.

³ One of the reason for decreasing number of complaints received by OFTA after 2003 and 2004 is that OFTA have streamlined the procedure for handling consumer complaints from mid 2003

Analysis of Misleading and Deceptive Conduct Complaints

(B) Type of Complainant of Misleading and Deceptive Conduct Complaints

Table 5.4

Type of Complainants of the Completed Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from 1999 to 2006

	1999	2000	2001	2002	2003	2004	2005	2006	Total
Consumer	17	11	18	52	91	91	2	3	285
Operator	2	4	6	14	16	8	6	0	56
OFTA	7	0	0	1	3	2	0	0	13

Source: OFTA

The Consumers are the dominant complainants in the complaint cases. However, the operators (competitors) and OFTA would lodge the complaints as well. With reference to the breakdown of complainant's data, the consumers have lodged more than 80% of the complaints, and the operators (competitors) have lodged 16% and only 4% of the complaints have been lodged by OFTA. Consumers have lodged the most complaints from year 2002 to 2004 and operators have initiated more complaints around the same time too. Not only consumers complaint about they have been unfairly treated, operators also complaint about their competitors. The figures show that consumers have initiated most complaints to OFTA, which again suggests there is a need to examine consumer protection issue in the telecommunications sector.

(C) Nature of Complaint of Misleading and Deceptive Conduct Complaints

Table 5.5

Nature of the Completed Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from 1999 to 2006

	1999	2000	2001	2002	2003	2004	2005	2006	Total
Salesperson	0	0	1	34	69	88	2	1	195
Advertisement	24	14	14	30	24	13	6	2	127
Others	2	1	9	3	17	0	0	0	32

Source: OFTA

With the support of these two figures here, cases which have complained against the salesperson contribute most of the complaint cases is around 55% and those about advertisement is the second most, which is around 36%. While complaints in others category such as about the rates and terms, are not many, which is around 9%. Cases complained about salesperson concentrate from 2002 to 2004 and cases complained about advertisement concentrate from 2000 to 2004 with year 2002 and 2003 being the most.

Salesperson and advertisement are the two important channels for delivering information to the consumers. Salesperson would be the most important channels since in telecom sector, information is way too complicated and hard to understand, and consumers will need a salesperson who is perceived as a professional staff and be able to explain all the information (including terms and conditions about the service) to the consumers. Therefore, with such a huge number of complaints towards the salesperson, it shows that there may be some misleading or deceptive conducts done by the salesperson and it definitely has harmed the consumer benefits.

(D) Breakdown of the Misleading and Deceptive Conduct Complaints into Different Service Markets

Table 5.6

Breakdown of the Completed Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from 1999 to 2006

	Fixed Line Service	Mobile Phone Service	IDD Service	Internet Service	Others	Total
1999	1	7	15	3	0	26
2000	2	1	9	3	0	15
2001	3	4	11	4	2	27
2002	8	3	19	37	0	67
2003	73	3	18	16	3	112
2004	26	2	6	67	0	101
2005	1	4	1	2	0	8
2006	1	1	1	0	0	3
Total	115	25	80	132	5	359

Source: OFTA

With reference to Table 5.6, this shows the breakdown of the completed misleading and deceptive conduct complaint cases by different telecommunications markets. The Internet service market is the largest category of the complaints; most cases concentrate from 2002 to 2004 and 2004 is the peak. For the fixed services market, there is a concentration in 2003 and 2004 of which 2003 is the peak. It is the second largest category. For the mobile service market, most misleading and deceptive conduct complaints are in 1999 and compared to other markets, the number of complaints is relatively small and has no dramatic changes throughout the years from 1999 to 2006. For the IDD service market, it does not have so many cases, which concentrate from 2000 to 2003 and 2002 is the peak. Internet and fixed line markets get the most complaint cases about misleading or deceptive conduct, which are around 38% and 32% respectively, while compared to other two markets, IDD and mobile markets are only 22% and 7% respectively.

The table above shows that more complaints about misleading and deceptive conduct for fixed line and Internet markets. This is consistent with the key message I have drawn from the Consumer Council that fixed line and Internet markets are the two markets which need more in-depth analysis.

(E) Nature of Misleading and Deceptive Conduct Complaints by Breakdown into Different Services Markets

Table 5.7

Nature of the Total Completed Misleading or Deceptive Conduct Complaint Cases Handled by OFTA between 1999 and 2006

	Fixed Line Service	Mobile Phone Service	IDD Service	Internet Service
Salesperson	82%	4%	1%	75%
Advertisement	15%	92%	89%	12%
Others	3%	4%	10%	13%
Total	100%	100%	100%	100%

Source: OFTA

Table 5.7 shows the breakdown of the main nature categories of complaints by different service markets and some remarkable points are noticeable. First, the misleading conduct from the salesperson dominates in Internet and fixed line markets, which are around 75% and 82% respectively. The misleading information from the advertisement has dominated in the IDD and mobile services markets, which are 89% and 92% respectively. The salesperson's misleading conduct concentrates most in Internet and fixed line markets.

There is something unique about the Internet and fixed line services markets, as it is rather easier for salesperson to have cheated consumers since the two service markets here entail complicated information and fast technology change while more competition has been introduced in these markets.

On the other hand, advertisement is the main promotional strategy in IDD and mobile services markets. And penetrations rates are high, especially in mobile service market which the penetration rate is over 100%.⁴ Also, services need less complicated information to comprehend since there are not so many changes in these two markets when compared to Internet and fixed line services markets, in terms of popularity and technology.

Therefore, examining the reasons of the high number of complaints and concentration of complaints in particular years in Internet and fixed line markets are the main focus of my study. Detailed discussion will be in the section 5.4 of this chapter.

(F) Outcome of Complaint of Misleading and Deceptive Conduct Complaints

For the outcome of misleading or deceptive conduct, with reference to the 7M Ordinance and the Misleading or Deceptive Conduct Guideline issued by OFTA on May 21 2003, it can be divided into three main categories.⁵ Case that is considered as breach

⁴ Key Telecommunications Statistics on OFTA Website <http://www.ofta.gov.hk>

⁵ 7M Telecommunications Ordinance, Misleading or Deceptive Conduct Guideline, May 21, 2003, OFTA

means it has breached the 7M Ordinance; that considered as no breach means there is either not enough evidence to prove it has breached the Ordinance or it has enough evidence but OFTA consider it has not breached the 7M Ordinance. For case resolved, it means it is the established case which OFTA has decided to resolve and will work with the concerned operator towards which the complainant complain to handle the complainant.

General Picture

Table 5.8

Outcome of the Completed Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from 1999 to 2006

	1999	2000	2001	2002	2003	2004	2005	2006	Total
No Breach	7	6	16	37	8	9	6	2	91
Breach	19	9	18	53	37	5	2	1	144
Case Resolved	0	0	0	0	65	87	0	0	152

Source: OFTA

Table 5.8 illustrates the outcome of completed misleading or deceptive conduct complaint cases from 1999 to 2006. Most of the breach cases are in 2002, and from 2000 to 2002, there is an increasing number of cases; and there is a huge drop after 2003. More Resolved Cases concentrate in 2003 and 2004.

The outcome of total completed misleading or deceptive conduct complaints between 1999 and 2006; most of the cases are resolved cases which is about 39% among all the cases. These cases are decided to be resolved by the complainants and the concerned operators. 24% of all complaints are no breach cases, which do not absolutely mean those operators which were complained against did not have misleading or deceptive conduct that may have harmed the consumer benefit; it may just shows that it is hard for the third party to find the evidences. However, for the 37% of Breach cases among all the misleading and deceptive conduct complaints mean that they are the “real” cases which investigations have been done by OFTA and considered to be breach of the Ordinance of Misleading or Deceptive Conduct. Therefore, it is worth looking into these

breach cases under different dimensions in order to have a better understanding of these breach complaints and how consumers have been harmed in terms of their benefits.

Analysis of the Breach Misleading or Deceptive Conduct Complaints

For the 37% breach complaints of total misleading or deceptive conduct complaint cases between 1999 and 2006, different dimensions will be examined in order to have a better understanding of the level of consumer protection in the telecommunications sector.

(1) By Type of Complainant of the Breach Misleading or Deceptive Conduct Complaints

Table 5.9

Type of Complainant of the Breach Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from 1999 to 2006

	1999	2000	2001	2002	2003	2004	2005	2006	Total
Consumer	10	7	12	45	19	0	1	1	95
Operator	2	2	0	7	15	4	1	0	31
OFTA	7	0	0	1	3	1	0	0	12

Source: OFTA

With reference to Table 5.9, for the 144 breach complaints about the misleading or deceptive conduct between 1999 and 2006, most breach complaints were lodged by consumers. Consumers lodged most complaints in 2002 and for operators; they lodged most complaints in 2003 and OFTA lodged most in 1999. More complaints are considered as breach and were lodged by consumers mean there is consumer protection issue and if they were lodged by operators, that means it is the competition-related issue. Since these two issues are correlated, consumers will be harmed by competition-related issue, and operators (competitors) will be harmed by consumer-related issue, therefore, as accessing the level of consumer protection under the competition policy in the telecommunications sector, it is important to exam the reason behind the high breach complaints in those particular years. Detailed discussion will be in section 5.4 in this chapter.

(2) By Nature of Complaints of the Breach Misleading or Deceptive Conduct Complaints

Table 5.10

Nature of the Breach Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from 1999 to 2006

	1999	2000	2001	2002	2003	2004	2005	2006	Total
Salesperson	0	0	0	33	0	0	1	0	34
Advertisement	19	9	15	18	21	5	1	1	89
Others	0	0	3	2	16	0	0	0	21

Source: OFTA

Table 5.10 shows that more breach complaints are concerned with the misleading or deceptive advertisement during the years between 1999 and 2006, except for year 2002 where more breach complaints are about the misleading or deceptive conduct from salesperson. And overall, around 61% of breach complaints are on the misleading or deceptive advertisement.

Table 5.11

Outcome of the Total Breach Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from 1999 to 2006

	Salesperson	Advertisement
No Breach	83%	37%
Breach	17%	63%
Total	100%	100%

Source: OFTA

With reference to Table 5.10, more breach complaints are concerned with the misleading or deceptive advertisement than salesperson during the years between 1999 and 2006, except for year 2002 and 2005 where more breach complaints are on the misleading or deceptive conduct from salesperson in 2002. Table 5.11 shows among the overall complaints about advertisement, 63% are breach cases, and for the salesperson conduct which alleged to be misleading or deceptive, 83% of them are no breach and only 17% of them are decided to be breach. It could be the reason that it is comparatively easier to

get the evidence in the alleged misleading conduct about the advertisement, since most of the information is found on hard copies.

The reason behind of these findings maybe that it is harder to get the evidences from the salesperson. The salespersons always quit right after the incident and it is hard for OFTA to investigate and collect information, especially that there is no record of any format during the sales process and consumers are hard to be protected due to these reasons.

(3) By Telecommunications Markets of the Breach Misleading or Deceptive Conduct Complaints

Table 5.12

Breakdown of the Breach Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from 1999 to 2006

	Fixed Line Service	Mobile Phone Service	IDD Service	Internet Service	Others	Total
1999	0	6	11	2	0	19
2000	1	1	5	2	0	9
2001	0	2	6	7	0	15
2002	8	2	8	35	0	53
2003	4	2	15	16	3	40
2004	1	0	4	0	0	5
2005	0	1	1	0	0	2
2006	0	1	0	0	0	1
Total	14	15	50	62	3	144

Source: OFTA

With reference to Table 5.12 which shows the breakdown of breach misleading or deceptive conduct complaints from 1999 to 2006 into different telecommunications markets. It is apparent that most breach cases are in Internet service market, and it has 43% share compared to other telecommunications markets among all the breach complaints. As highlighted earlier, Internet and fixed line services markets are the two main service markets which have the most complaints among all the misleading and deceptive conduct complaints from 1999 to 2006. Internet service market, one of the most complaint markets, still dominates other telecommunications services markets in

terms of breach complaints. However, fixed line service market, being the second largest complaint market, has only 10% share of all breach complaints; whereas IDD and mobile services have share more of breach complaints than its, with 35% and 10% respectively. Therefore, it is interesting to examine why there are so many complaints in fixed line service market yet only a few are regarded as breach cases.

Table 5.13

Outcome of the Total Breach Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from 1999 to 2006

	Fixed Line Service	Mobile Phone Service	IDD Service	Internet Service
No Breach	88%	40%	38%	38%
Breach	12%	60%	63%	63%
Total	100%	100%	100%	100%

Source: OFTA

To better understand the successful breach cases among all complaints in different services markets, Table 5.13 has shown that mobile and IDD service markets, 60% and 63% respectively are breach complaints, however, for Internet and fixed line service markets, the breach complaints out of the total complaints are only 47% and 12% respectively. With a huge number of complaints in these two markets but in which a few number are breach complaints, it is interesting to find out the reason in order to assess the level of consumer protection since a lot of consumers have shown their dissatisfaction about the services in these two markets but only a few are considered breach. The reason may be that it is harder to get the “evidence” from these two markets as earlier discussion mentions that with the complaints on salesperson’s conduct in Internet and fixed line service markets, it is hard for the third party to find the evidence since the salespersons keep changing working places, and they are mostly hired through other agents. This is the reason why the same misleading and deceptive conduct kept happening and the consumers keep suffering. On the other hand, in IDD and mobile service market, the cases which considered as breach cases and no breach are equally distributed. It may be that it is easier to get the “evidence” from these markets, since the misleading conducts are mostly from the advertisement, which, there are more “solid” or “tangible” evidences, like leaflets, website, etc.

Therefore, we can see that it is hard to prove the misleading or deceptive conduct from salesperson in Internet and fixed line service markets but more consumers are suffered from the misleading or deceptive conducts of salesperson in these two markets. This leads to a question of how consumers are being protected from salesperson's trick in the real situation. Further discussion will be in section 5.4 of this chapter.

(G) Remedies of Complaints of the Misleading or Deceptive Conduct Complaints

For those which are considered as breaching the 7M Misleading or Deceptive Ordinance, there are various penalties which OFTA may impose on a licensee following a finding that the licensee has breached section 7M. There are cases which no further action has been taken, there are cases where there is some written warning, and for some more serious cases, there are actually financial penalty imposed and they are ranged from \$25,000 to \$100,000 for the breach complaints between 1999 and 2006.⁶ There are also some cases which are decided to have breached the Advertising Code, which is the Code OFTA start to adopt in January 1996. It is with reference to the malpractices in advertising which can do serious harm to the industry and mislead consumers. The Code has been replaced by the guideline of 7M in 2003. The Code and the Guideline are both adopted by OFTA under the misleading or deceptive conduct complaint cases.⁷

⁶ Under section 36C of the Ordinance, the TA may impose a financial penalty on the licensee for failure to comply with section 7M. On the first occasion the penalty is imposed, the penalty may be up to and including \$200,000, on the second occasion, up to and including \$500,000 and, on any subsequent occasions, the penalty may be up to and including \$1,000,000.

⁷ Advertising Code, OFTA, January 1996, OFTA Website
<http://www.ofta.gov.hk/en/code/practice/ta960124.html>

Table 5.14

Remedy of the Breach Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from 1999 to 2006

	No Further Action	Written Warning	Financial Penalty \$25,000	Financial Penalty \$30,000	Financial Penalty \$50,000	Financial Penalty \$70,000	Financial Penalty \$80,000	Financial Penalty \$100,000	Advertising Code
1999	0	0	0	0	0	0	0	0	19
2000	0	0	0	0	0	0	0	0	9
2001	3	4	0	0	0	0	0	0	11
2002	1	50	0	0	0	0	0	0	2
2003	0	31	3	0	2	1	0	0	0
2004	0	3	0	1	1	0	0	0	0
2005	0	1	0	0	0	0	1	0	0
2006	0	0	0	0	0	0	0	1	0
Total	4	89	3	1	3	1	1	1	41

Source: OFTA

With reference to Table 5.14, the outcome of the breach cases of misleading and deceptive conduct complaints from 1999 to 2006 are mainly written warning and Advertising Code. There are more breach cases having breached the Advertising Code in 1999. Advertising Code has been used before year 2003 and in 2003, it has been replaced by the Guideline of 7M, and therefore, after year 2003, there is no breach of Advertising Code. Most written warning has been issued in 2002 and 2003 and for financial penalty imposed after year 2003, after the Telecommunications Ordinance was amended in 2003 and the most severe case is the most recent one in Dec 2006.⁸

Within the breach cases, written warning shares more than 62% of all the breach complaints and financial penalty shares only 7%. While Advertising Code has been adopted throughout 1999 to 2002, it shares about 28% of all the breach complaints. Those 7% of financial penalty complaints, which is 10 complaints among all the misleading or deceptive conduct complaints, reflect that there are some serious conducts done by the operators and therefore OFTA impose penalty financially. It is important to have a deeper look at those complaints, and examine them in different dimensions in order to see how seriously the misleading and deceptive conducts have harmed the consumers.

⁸ SmarTone Vodafone Case in December 2006 Case Reference T66/06

Financial Penalty of Misleading or Deceptive Conduct Complaints

For the 7% of financial penalty complaints among the total breach of misleading or deceptive conduct complaints between 1999 and 2006, different dimensions will be examined in order to have a better understanding of the level of consumer protection in the telecommunications sector.

(1) By Type of Complainants of the Misleading or Deceptive Conduct Complaints which are under Financial Penalty

Table 5.15

Type of Complainant of the Financial Penalty Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from 1998 to 2006

	1999	2000	2001	2002	2003	2004	2005	2006	Total
Consumer	0	0	0	0	1	0	1	1	3
Operator	0	0	0	0	4	1	0	0	5
OFTA	0	0	0	0	1	1	0	0	2
Total	0	0	0	0	6	2	1	1	10

Source: OFTA

Table 5.15 breakdowns the type of complainants of all misleading or deceptive conduct complaints which are under financial penalty, from 1999 to 2006, and all financial penalties have imposed after 2003. Operators have lodged most of the complaints which financial penalty has been imposed in 2003. With reference to the Table, 50% of the financial penalty complaints are lodged by operators, and only 30% by consumers and 20% by OFTA. More financial penalty complaints have been lodged by operators mean more serious complaints are competition-related issue since the misleading and deceptive conducts by other operators would definitely hurt their competitors too, apart from consumers themselves.

(2) By Nature of Complaints of the Misleading or Deceptive Conduct Complaints which are under Financial Penalty

Most misleading or deceptive conduct complaints which are on financial penalty are complaints about advertisement; it shares 90% of the total financial penalty complaints. Even though about salesperson, it only shares 10% among the total. However, it could also mean that it is hard for the third party to get the evidence to prove the misleading or deceptive conducts from salesperson. Further discussion will be in section 5.4 of this chapter.

(3) By Telecommunications Markets of the Misleading or Deceptive Conduct Complaints which are under Financial Penalty

Table 5.16

Breakdown of the Financial Penalty Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from 1999 to 2006

	Fixed Line Service	Mobile Phone Service	IDD Service	Internet Service	Total
1999	0	0	0	0	0
2000	0	0	0	0	0
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	2	0	4	0	6
2004	1	0	1	0	2
2005	0	1	0	0	1
2006	0	1	0	0	1
Total	3	2	0	5	10

Source: OFTA

With reference to Table 5.16, it is observed that the misleading or deceptive conduct complaints which are under financial penalty have happened mostly in year 2003, and mostly in other markets, which is the prepaid phone cards market. Fixed line and mobile markets share 27% and 18% respectively among all the misleading or deceptive conduct complaints which are under financial penalty. For IDD and Internet markets, they are 46% and 0% respectively. Even though not so many complaints with financial penalty imposed in the fixed line services market and even none in Internet service market, it

could also be due to the difficulty to get evidence to prove the misleading or deceptive conduct, since most of the complaints in these two service markets are from salespersons, making it even harder to get solid evidence to prove their frauds. And even they are not considered as breach cases by OFTA, it does not mean that consumers are not being harmed by their conducts. As my study is to access the level of consumer protection in the telecommunications sector under the competition policy, breach cases definitely have shown some frauds conducts from operators which have exploited consumers' benefits. However, those no breach complaints sharing a large number in Internet and fixed line Service markets should not be neglected since it is a fact that many consumers have already shown their dissatisfaction explicitly.

5.4 Discussions of the Findings and the Significant Problems in the Telecommunications Sector

Key Messages from the Findings

(A) From the Consumer Council Data

(1) Consumers have shown Far more of their Dissatisfaction in the Telecommunications Service Sector than in All Other Sectors

There is an increasing trend of consumer complaint cases in the telecommunications sector, and the consumer complaint cases in the telecommunications sectors has topped for 6 years among all other different sectors. Also, in terms of the number of consumer complaint cases, it is way more than the second most sector, the broadcasting sector. For just 6 years from 2000 to 2006, the consumer complaint cases have increased about 300% but for the overall consumer complaints cases, it is only about 100% increase. This also supports why the consumer complaints situation is more serious in the telecommunications sector. The fact the popularity or penetration of the market does not seem to account for the observation here: as other common services sector, such as, financial service sector, medical service sector does not record such trend. Therefore,

the large number of the consumer complaints in the telecommunications sector is not simply because of the large number of consumers is consuming the service, there is something special about this sector which makes more and more consumers are dissatisfied about the services they consume.

(2) Consumers have shown their Dissatisfaction mostly in the Internet and Fixed Line Service Markets within the Telecommunications Service Sector and they both have Increasing Trends.

Within the telecommunications service sector, the consumers complain most in the fixed line service market and Internet market, and there are obvious increasing trends in these markets compared to other two main markets, that is mobile service market and IDD service market. Most people may think most of the consumer complaint cases should come from mobile market since its penetration rate is highest among all other markets throughout the years.⁹ Therefore, most consumer complaints about the services in Internet and fixed line services market should not just have the reason of more consumers consuming the services.

(B) From the OFTA Data

(1) The Most Consumer-Related Complaints Received and Handled by OFTA are the Misleading or Deceptive Conduct Complaints

Among all the consumer-related cases received by OFTA, complaints about misleading or deceptive conducts contribute the most, which is about 65%. And among all the misleading or deceptive conduct complaints, consumers have lodged around 80% of them. The most frequent misleading conduct complaints are about the salesperson and advertisement, which contribute about 55% and 36% respectively. Salesperson and advertisement are the most serious types of complaints among all. It shows that their misleading and deceptive conduct would hurt consumers' benefits as correct and reliable

⁹ Key Telecommunications Statistics on OFTA Website <http://www.ofta.gov.hk>

information is important for consumers consuming services in this sector, which is full of complicated and fast changing information. Salesperson and advertisement got the most complaint cases because these two are the important channels for delivering the information to the consumers. But due to the nature of telecom industry, often complicated and detailed information is released through advertisement and salespersons. Salesperson is the most important marketing and sales channels in the telecommunications sector; the information is way too complicated and hard to understand, at best we need a salesperson, who is able to explain all the necessary information (including terms and conditions about the service) to the consumers.

(2) Most of the Misleading or Deceptive Conduct Complaints happened in the Internet and Fixed Line Service Markets

Internet and fixed line service markets are the two service markets which get the most complaints between 1999 and 2006, contributing about 38% and 32% respectively among the total misleading or deceptive conduct complaints. This is consistent with the key message I have drawn from the Consumer Council that fixed line and Internet markets are two markets which we need to focus on. The misleading or deceptive conduct complaints in fixed line service market concentrate most in 2003 and 2004; while most complaints happen in year 2002 and 2004 in Internet service market. For the Internet service market, due to the rapid development in technology within these years, alongside with the dial-up connection migrating to broadband Internet, more advanced technology has allowed consumers faster transmission speed. However, fast development in technology also brings complicated information for the consumers, which are hard for them to understand, and under fierce competition in Internet service market, consumers may be easier to get tricked by advertisement or salesperson due to asymmetric information. Consumers often do not have much technical sense about the technological issues regarding the service in Internet service market.

(3) Complicated and Asymmetric Information Problem with Consumers Lack of Awareness of Further Liberalization and Competition in the Telecommunications Sector may Trigger Most of the Misleading or Deceptive Conduct Complaints in Internet and Fixed Line Service Markets

For the fixed line service market, there are huge numbers of misleading or deceptive conduct complaints in 2003 and 2004, which can be explained by the further liberalization and competition which have been introduced in the market and that government has implemented the type II interconnection policy in January 2003. All these trigger most misleading and deceptive conduct complaints in year 2003 and 2004. More competition in the market definitely would bring lower prices and more choices for the consumers. However, since under the Type II interconnection policy, more competitors are providing services at the same time and consumers do not know that there are more competitors providing services in the market (since Hong Kong Telecom was the monopoly which provides the fixed line service for a long time). The new comers, in order to attract more consumers, may use some fraud statements to attract the consumers and slamming behaviors have emerged in order to attract the consumers to switch their existing service contract to the new competitors’.

(4) Most Misleading or Deceptive Conduct Complaints are in Relation to the Salesperson’s Conducts

On the other hand, among the misleading or deceptive conduct complaints in fixed line and Internet service markets, most of the complaints are related to the salespersons, contributing 82% and 75% respectively. The salespersons’ misleading conducts are usually found in Internet and fixed line markets since these two markets are in fierce competition and the technology and service plan information are relatively new and more complicated. To complicate the picture, there are some new innovation and bundling packages which bundled with broadband telephone or broadband TV as well. They are newly introduced in the market. The consumers might not be able to digest the information good enough before they enter into the contract. However, obviously it is

the operators' responsibility to deliver all the important information to the consumers which would affect their decision making. If they cannot do so, the consumers may be tricked or even suffer the financial loss. And also, those information in these two markets are usually better to be delivered by the salesperson because the information are way too complicated to understand. The salespersons, however, take advantage of that and mislead the consumers in certain ways. Also the fierce competition within these two markets has further intensified salespersons' misleading conduct in order to get consumers switching the operators. The misleading information in the advertisement is the second largest misleading conduct in the sector, and mostly in IDD and card markets. These two markets do not contain much complicated service plan, new innovation and knowledge, as well as technical information, and therefore need not be explained as much as the Internet and fixed line market.

(5) Most of the Outcome of the Misleading or Deceptive Conduct Complaints is Case-resolved, which OFTA Do Not Impose Any Penalty to These Resolved Cases.

Among all the misleading or deceptive conduct complaints, most of the complaints are resolved cases, contributing 39%; while 37% are breach cases, and 24% are cases decided as not breach. Most of the resolved cases come from similar cases, which happen in fixed and Internet service markets. OFTA has decided to resolve the cases and no penalty have even been imposed on any of the particular operators. Detailed discussion will be in Chapter 7, the mis-selling cases.

(6) The Out-sourcing Scheme of Hiring Salesperson in the Telecommunications Sector Makes it Harder for Consumers to Provide Solid Evidence when the Salesperson Does Commit the Misleading or Deceptive Conduct.

Among 37% of misleading or deceptive conduct complaints breach cases, 61% of them complain about the misleading or deceptive advertisement and only 24% of them are about salespersons. However, as earlier discussed, salesperson contributes most of the total misleading or deceptive conduct complaint cases; however, among all the

misleading or deceptive conduct complaints about the salespersons, only 17% of them are breach. The reason for large number of the complaints are not breached, but breached for the cases in advertisement may be due to the difficulty to prove the misleading or deceptive conducts of salesperson in Internet and fixed line service markets where actually more consumers are suffering from the misleading or deceptive conducts of salespersons. This leads to a question of how consumers are being protected by salespersons' tricks. As mentioned earlier on, the fact that salespersons quit the job right after the complaint incident and the fact that there is no recording or proof of sales process details leaves very slim chance for the case to be investigated. Further discussion will be in Chapter 6, the mis-selling cases.

(7) The Reason of Complicated and Asymmetric Information Problems and Outsourcing Hiring Salesperson Scheme may Contribute a Reason to Only a Small Percentage of Complaints are Found to be Breach in the Fixed Line and Internet Service Markets.

Also, among all the misleading or deceptive conduct complaints breach cases, 43% are from Internet service market and 35% from IDD service market. However, only 10% are in fixed line service markets. As discussed earlier of all the misleading or deceptive conduct complaints, 32% are from fixed line service market. However, only a small percentage of breach cases are from fixed line service market, which could be explained by most of the complaints are the resolved cases, where OFTA has decided no remedies on any of the operators. Further discussion will be in chapter 7.

(8) Most Misleading or Deceptive Conduct Complaints with Financial Penalty have been Lodged by Operators but Not Consumers. It could be Due to the Difficulty in Finding Evidence by Consumers Themselves, as well as the Complicated and Asymmetric Information Problem in the Sector.

For the misleading or deceptive conduct complaints which are breach cases between 1999 and 2006, most remedies OFTA have imposed are written warning, contributing

62% among all, and only 7% of the breach complaints financial penalty has been imposed the. And within these 7% of financial penalty imposed breach cases, operators have lodged 50% of them, while consumers have only lodged 30%. It shows consumers have even lodged most of the misleading or deceptive conduct complaints, however, only a small percentage of them are with financial penalty imposed. This could be a reason of asymmetric information. Since for the operators (the competitors), they have more knowledge and information about how the other competitors have committed the misleading or deceptive conducts, and they can provide more sophisticated information to OFTA. While for ordinary consumers, it is hard for them to collect the evidence or point out the misleading or deceptive conduct as they might not have much information as the operators do.

(9) Recent Newspaper States that Consumers may Suffer from the Misleading Statements Made by the Operators in the Internet Service Market and Consumers may not Even Realize it Due to the Asymmetric and Complicated Information Problem.

Due to the asymmetric information problem, consumers may not be able to get the solid evidence or even realize they are being tricked. Recent newspaper supports this argument in the Internet service market.¹⁰ As my study is to access the level of consumer protection in the telecommunications sector under the competition policy, breach cases definitely shown some frauds conducts from operators which exploit consumers' benefits. However, those no breach complaints have shared a large number in Internet and fixed line service markets. This should not be neglected since it is a fact that more consumers had shown their dissatisfaction explicitly but not having received effective treatment.

¹⁰ SingTao Newspaper article "Misleading Telecommunications Services, Three Hundred Cases in Kwai Ching District" on November 27, 2006

Chapter 6

Study of Selected Cases

6.1 Detail Discussion of Top Six Most Complained about Operators

In this section, I will focus on the top six telecommunications operators which were the subject of the most complaints in regards to suspected misleading or deceptive conduct according to the OFTA. I will examine the complaints on different dimensions with a special focus on repeated misleading or deceptive conduct. Repeated offenses may suggest that enforcement mechanisms are not strong enough to deter misleading or deceptive conduct by telecommunications operators, perpetuating the harm done to consumers. Therefore, it is important to examine the breach cases in order to see whether any of these operators have repeatedly misled or deceived consumers on multiple occasions.

General Picture of Top Six Most Complained about Operators

Of all the misleading or deceptive conduct complaints received and handled by OFTA, six operators have a seemingly larger share of complaints compared to all other telecommunications operators. These six operators have been selected for further examination in order to see the factors which undermine the protection for consumers.

Table 6.1

Top Six Operators which have the Most Misleading or Deceptive Conduct Complaint Cases Handled by OFTA between 1999 and 2006

	i-CABLE WebServe Limited	HGC	HKBN&CTI	PCCW	Wharf	NWT
Total No. of Complaints	94	57	46	37	34	32

Source: OFTA

Table 6.2

Breakdown of the Completed Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from 1999 to 2006

	i-CABLE WebServe Limited	HGC	HKBN&CTI	PCCW	Wharf	NWT
1999	0	3	4	7	1	5
2000	0	1	6	1	3	0
2001	0	3	3	6	3	1
2002	14	1	26	11	2	1
2003	15	43	4	8	2	24
2004	65	4	2	2	23	1
2005	0	1	0	3	0	0
2006	0	1	1	0	0	0

Source: OFTA

Breakdown of Complaints by Telecommunications Markets

Table 6.3

Breakdown of the Total Completed Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from between 1999 and 2006 by Service Markets

	i-CABLE WebServe Limited	HGC	HKBN&CTI	PCCW	Wharf	NWT
Fixed	0	45	5	11	30	24
Mobile	0	6	0	3	0	0
IDD	0	2	15	16	5	7
Internet	94	3	23	10	0	0

Source: OFTA

Breakdown of Complaints by Type of Complainants

Table 6.4

Percentage Share of the Total Completed Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from between 1999 and 2006 by Type of Complainants

	i-CABLE WebServe Limited	HGC	HKBN&CTI	PCCW	Wharf	NWT
Consumer	100%	93%	80%	66%	86%	91%
Operator	0%	5%	17%	24%	14%	6%
OFTA	0%	2%	2%	11%	0%	3%

Source: OFTA

Breakdown of Complaints by Nature of the Complaints**Table 6.5**

Percentage Share of the Total Completed Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from between 1999 and 2006 by Type of Complaints

	i-CABLE WebServe Limited	HGC	HKBN&CTI	PCCW	Wharf	NWT
Salesperson	82%	75%	48%	13%	66%	91%
Advertisement	2%	25%	50%	79%	23%	9%
Others	16%	0%	2%	8%	11%	0%

Source: OFTA

Breakdown of Complaints by Outcome of Complaints**Table 6.6**

Percentage Share of the Total Completed Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from between 1999 and 2006 by Outcome of Complaints

	i-CABLE WebServe Limited	HGC	HKBN&CTI	PCCW	Wharf	NWT
No Breach	69%	86%	30%	160%	83%	75%
Breach	31%	14%	70%	40%	17%	25%

Source: OFTA

Outcome of Breach Misleading or Deceptive Conduct Complaint Cases**Table 6.7**

Outcome of Total Breach Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from between 1999 and 2006

	i-CABLE WebServe Limited	HGC	HKBN&CTI	PCCW	Wharf	NWT
Advertising Code	0	6	8	5	3	6
Notice	0	0	0	0	0	0
Written Warning	29	2	26	10	2	1
Financial Penalty	0	0	1	0	1	1

Source: OFTA

Table 6.8

Breakdown of the Total Breach Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from between 1999 and 2006 by Service Markets

	i-CABLE WebServe Limited	HGC	HKBN&CTI	PCCW	Wharf	NWT
Fixed	0	1	2	7	3	1
Mobile	0	3	0	5	2	1
IDD	0	0	8	11	2	6
Internet	29	3	23	6	2	0

Source: OFTA

Table 6.9

Nature of the Total Breach Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from between 1999 and 2006

	i-CABLE WebServe Limited	HGC	HKBN&CTI	PCCW	Wharf	NWT
Salesperson	41%	13%	57%	0%	0%	0%
Advertisement	7%	88%	43%	100%	100%	100%
Others	52%	0%	0%	0%	0%	0%

Source: OFTA

Table 6.10

Percentage Share of the Total Breach Misleading or Deceptive Conduct Complaint Cases Handled by OFTA from between 1999 and 2006 by Type of Complainants

	i-CABLE WebServe Limited	HGC	HKBN&CTI	PCCW	Wharf	NWT
Consumer	100%	88%	80%	44%	33%	963%
Operator	0%	0%	20%	31%	67%	25%
OFTA	0%	13%	0%	25%	0%	13%

Source: OFTA

Background information and a brief description of the services provided by the six operators which received the most misleading or deceptive conduct complaints is provided in the following section.

Top 1: i-cable WebServe

(A) Background Information of the Operator

i-CABLE WebServe Limited is involved in the telecommunications sector through its subsidiary i-CABLE Communications Limited, which provides Internet service. It acquired the Internet service provider license in October 1990. In January 2000, it received FTNS license and has been allowed to provide local fixed line service in Hong Kong. In March 2000, broadband Service was formally launched using cable modem technology. i-CABLE Communications Limited owns and operates one of two near universal broadband telecommunications networks in the territory.

(B) Complaint Cases (Table 6.1 – Table 6.5)

There is a concentration of suspected misleading and deceptive conduct complaints against i-Cable WebServe Limited from 2002 to 2004. Consumers have lodged all of the complaints about the misleading or deceptive conducts about salesperson, advertisement, and reduced speed without notice. A total of 97 complaints have been lodged between 2002 and 2004. There is an increasing trend and there has been a big jump from 2003 to 2004 in the total number of complaints. In 2003, it is mainly the complaints about the advertisement misleading the upload speed, which they have claimed to be 30 times faster than others. They have the most complaints in 2004, which are the cases complaining the salesperson (door-to-door) selling the bundling service, which the salesperson has claimed to use a marketing excuse: “giving special offer only to the loyalty customers of cable TV such as more channels, free internet and free IDD etc.” And afterwards the salesperson asks the customers to sign the contract without telling them the full terms and conditions. Eventually they end up having two contracts with i-cable WebServe and Cable TV at the same time. While some salesperson are just selling broadband Internet service by offering “special offer”, which are bundled with Cable TV

service. Also, they have asked the consumers to sign the contracts without explaining the terms and conditions of them.

(C) Outcome of the Complaints (Table 6.6 – Table 6.10)

Among all the suspected misleading or deceptive conduct complaints, 69% of the complaints have occurred in 2002 and 2003 and they have been found to be breach, and written warning has been issued. When the operator first found to have 2 suspected misleading or deceptive conduct complaints in 2002, OFTA decided the particular conduct has breached the 7M Ordinance and written warning has been issued. However, suspected misleading or deceptive conduct has been found again in 2003 where there are 12 complaints about the salesperson, and 15 complaints about the reduced speed without notice. Both of them are found to breach 7M Ordinance, however, no serious penalty has been imposed; only written warning is issued. In 2004, similar suspected misleading or deceptive conducts again have been lodged by 65 Consumers, complaining about the misleading or deceptive slamming conducts by the Salespersons, however, OFTA has decided to resolve the case and the case is considered as “mis-selling” without any imposition of penalty on i-Cable WebServe, with the reason that compliance program has been launched by i-CABLE after the conduct. Detailed discussion will be in the later section *Case Study: Mis-selling Case*.

(D) Repeated Behavior

Repeated similar misleading or deceptive (M/D) behavior has happened in¹

Internet service market:

2002(Advertisement, breach of 7M, written warning)

2002(Salesperson, breach of 7M, written warning)

2003(Advertisement, breach of 7M, written warning) → *Repeated Breach M/D Conduct*

2004(Salesperson, case resolved)

¹ Year (Nature of Complaint, Outcome of Complaint, Remedy of Complaint)

Top 2: Hutchison Telecommunications Group (HGC)

(A) Background Information of the Operator

Hutchison Telecommunications (Hong Kong) Limited is one of the mobile service operators in Hong Kong. The Company is also a provider of fixed line service market through its fixed line arm Hutchison Global Communications Limited (HGC). The group has started to launch its residential and business telephone line service in January 1997. Besides, the group also provides Internet and IDD services in the sector.

(B) Complaint Cases (Table 6.1 – Table 6.5)

There are 57 suspected misleading or deceptive conduct complaints against HGC throughout the years from 1999 to 2006 and among which, 93% of the total complaints have been lodged by consumers. The operator has the most complaints in 2003 and most of them have happened in fixed line service market. In 2003, there are 43 complaints complaining about the salesperson (door-to-door) who have the “slamming” act, tricking the consumers to acquire telecom service they would not otherwise choose to acquire, ie switched to HGC from PCCW-HKT. The salesperson usually use similar tricks, for example, by saying “HGC has cooperated (merged) with PCCW-HKT and HGC would be in charge of the administration work”, fabricating the relationship between the two companies; or saying “PCCW-HKT has ceased to operate and that HGC has tendered for its business”, but they emphasize that they are the same operator. Some cases just use the price reduction as an excuse to ask the consumers to sign the contracts without telling them that it is a switch in fact. They try to offer a cheaper plan and convince the consumers to join their service. Some of them are elderly people and the illiterate.

(C) Outcome of the Complaints (Table 6.6 – Table 6.10)

For Hutchison Group, only 14% of the suspected misleading or deceptive complaints are found to be breach. Most of the no breach complaints are those happening in 2003, lodged by 42 consumers, complaining about the misleading or deceptive slamming conduct by the salesperson. However, OFTA has decided to resolve the case and the case is considered as “mis-selling” case without any imposition of penalty on i-Cable WebServe, with the reason that compliance program has been launched by i-CABLE after the conduct. Detailed discussion will be in the chapter *Case Study: Mis-selling Case*.

(D) Repeated Behavior

Repeated similar misleading or deceptive behavior has happened in ²

Fixed line service market:

2002 (Salesperson, breach of 7M, written warning)

2003 (Salesperson, case resolved) → *Repeated Breach M/D Conduct*

2004 (Advertisement, no breach of 7M)

2004 (Advertisement, no breach of 7M)

Mobile service market:

1999(Advertisement, breach of Advertising Code)

1999(Advertisement, breach of Advertising Code) → *Repeated Breach M/D Conduct*

2000(Advertisement, breach of Advertising Code) → *Repeated Breach M/D Conduct*

2004 (Advertisement, no breach of 7M)

2004 (Advertisement, no breach of 7M)

2005 (Advertisement, no breach of 7M)

IDD service market:

1999(Advertisement, no breach of Advertising Code)

2006(Advertisement, no breach of 7M)

² Year (Nature of Complaint, Outcome of Complaint, Remedy of Complaint)

Top 3: HKBN/CTI**(A) Background Information of the Operator**

City Telecom (HK) Limited (CTI) has launched its IDD300 Calling Service in January 1997, and in March 2000, CTI's wholly-owned subsidiary; Hong Kong Broadband Network Limited (HKBN) has started to launch its Broadband Internet Service. In April 2002, HKBN has upgraded to become a wireline-based FTNS licensee and officially launches local telephony service in Hong Kong.

(B) Complaint Cases (Table 6.1 – Table 6.5)

A total of 46 suspected complaints have been received by OFTA complaining against CTI/HKBN throughout the years of 1999 to 2006 and consumers have lodged 80% of them. The Group gets most complaints in 2002, which are complaining about the misleading conduct from the salesperson. Most of the complaints have happened in Internet service market, which contribute about 49% among all the misleading or deceptive complaints.

(C) Outcome of the Complaints (Table 6.6 – Table 6.10)

Among all the misleading or deceptive complaints against CTI/HKBN, 70% of them have found to be breach, which is the highest breach ratio among all the top six companies.

(D) Repeated Behavior

Repeated similar misleading or deceptive behavior has happened in ³

Fixed line service market:

1999(Advertisement, breach of Advertising Code)

2003 (Salesperson, no breach of 7M)

2003 (Advertisement, breach of 7M, HK\$50,000 financial penalty imposed)

→ *Repeated Breach M/D Conduct*

2005 (Advertisement, no breach of 7M)

2006 (Salesperson, no breach of 7M)

IDD service market:

1999(Advertisement, breach of Advertising Code)

1999(Advertisement, breach of Advertising Code) → *Repeated Breach M/D Conduct*

2000 (Advertisement, no breach of 7M)

2000(Advertisement, breach of Advertising Code) → *Repeated Breach M/D Conduct*

2000(Advertisement, no breach of 7M)

2000(Advertisement, breach of Advertising Code) → *Repeated Breach M/D Conduct*

2001(Advertisement, no breach of 7M)

2002(Advertisement, no breach of 7M)

2002(Advertisement, no breach of 7M)

2002(Advertisement, no breach of 7M)

2003(Advertisement, breach of 7M, written warning) → *Repeated Breach M/D Conduct*

2004(Advertisement, breach of 7M, written warning) → *Repeated Breach M/D Conduct*

Internet service market:

2000 (Advertisement, breach of Advertising Code)

2002 (Advertisement, No breach of 7M)

³ Year (Nature of Complaint, Outcome of Complaint, Remedy of Complaint)

2002 (Salesperson, breach of 7M, written warning)

2004 (Advertisement, no breach of 7M)

Top 4: PCCW-HKT

(A) Background Information of the Operator

In August 2000, PCCW has acquired Cable & Wireless HKT (originally The Hong Kong Telephone Company, formed in 1925) and the Group has acquired SUNDAY Communications Ltd in June 2005. The Group provides fixed line, mobile, IDD, and Internet services in the telecommunications sector in Hong Kong.

(B) Complaint Cases (Table 6.1 – Table 6.5)

The Group has 38 suspected misleading or deceptive conduct complaints in total throughout the years of 1999 to 2006 and 66% of them have been lodged by consumers. The Group has the most cases in 2002 and most cases have happened in IDD service market and 79% of total misleading or deceptive conduct complaints have been complaining about the advertisement.

(C) Outcome of the Complaints (Table 6.6– Table 6.10)

15 complaint cases, which is 40% among the total misleading or deceptive conduct complaints have been found to be breach, and for most of them only written warning is issued while no financial penalty has ever been imposed on PCCW. All the breach misleading or deceptive conduct complaints are about the advertisement.

(D) Repeated Behavior

Repeated similar misleading or deceptive behavior has happened in ⁴

Fixed line service market:

2001 (Advertisement, no breach of 7M)

2002 (Advertisement, breach of 7M, written warning)

2003 (Advertisement, no breach of 7M)

2003 (Salesperson, no breach of 7M)

2003 (Advertisement, breach of 7M, written warning) → *Repeated Breach M/D Conduct*

2005 (Salesperson, no breach of 7M)

Mobile service market:

1999(Advertisement, breach of Advertising Code)

1999(Advertisement, no breach of Advertising Code)

2001(Advertisement, breach of 7M, written warning) → *Repeated Breach M/D Conduct*

2001(Advertisement, no breach of 7M)

2002 (Advertisement, breach of 7M, no further action) → *Repeated Breach M/D Conduct*

IDD service market: ⁵

1999(Advertisement, breach of Advertising Code)

1999(Advertisement, breach of Advertising Code) → *Repeated Breach M/D Conduct*

1999(Advertisement, no breach of Advertising Code)

1999(Advertisement, no breach of Advertising Code)

2001(Advertisement, breach of Advertising Code) → *Repeated Breach M/D Conduct*

⁴ Year (Nature of Complaint, Outcome of Complaint, Remedy of Complaint)

⁵ Complaints before 2000 are complained against Hong Kong Telecom (HKT) instead of PCCW.

2001(Advertisement, breach of Advertising Code) → *Repeated Breach M/D Conduct*

2002(Advertisement, no breach of 7M)

2002(Advertisement, no breach of 7M)

2003(Advertisement, breach of 7M, written warning) → *Repeated Breach M/D Conduct*

2003(Advertisement, no breach of 7M)

2003(Advertisement, breach of 7M, written warning) → *Repeated Breach M/D Conduct*

Internet service market:

2000 (Advertisement, no breach of 7M)

2002 (Advertisement, breach of 7M, written warning)

2002 (Advertisement, no breach of 7M)

2004 (Salesperson, no breach of 7M)

2005 (Advertisement, no breach of 7M)

Top 5: Wharf T&T

(A) Background Information of the Operator

Wharf T&T is a member of The Wharf Group of companies which also owns i-CABLE Communications Limited. The Group has launched its IDD007 services in May 1996 in Hong Kong and has begun its residential fixed line services in December 1996.

(B) Complaint Cases (Table 6.1 – Table 6.5)

The Group has 34 suspected misleading or deceptive conduct complaints from 1999 to 2006, and 86% of them have been lodged by consumers. 23 of the suspected misleading or deceptive conduct complaints have concentrated in 2004 and these complaints are about the slamming activities, which are similar to the cases against Hutchison Group. The salesperson lied about the relationship with PCCW-HKT, such as saying that he/she has been appointed as the agent of PCCW-HKT to provide the services, or saying that he/she is the subtenant as principal tenant is PCCW-HKT, or saying that they have been

contracted to provide telephone service for particular buildings. They try to use cheaper plan to attract the consumers. The consumers have thought that they have no choice but to switch. The consumers have suffered by paying two companies for the service they consume.

(C) Outcome of the Complaints (Table 6.6 – Table 6.10)

83% among all the suspected misleading or deceptive conduct complaints have been found to be no breach. And all of the breach misleading or deceptive conduct complaints have been complaints about advertisement.

(D) Repeated Behavior

Repeated similar misleading or deceptive behavior has happened in ⁶

Fixed line service market:

2000 (Advertisement, breach of Advertising Code)

2001 (Salesperson, no breach of 7M)

2003 (Advertisement, breach of 7M, written warning) → *Repeated Breach M/D Conduct*

2004 (Advertisement, no breach of 7M)

2004 (Salesperson, case resolved)

IDD service market:

2000 (Advertisement, breach of Advertising Code)

2001 (Advertisement, no breach of 7M)

2002 (Advertisement, no breach of 7M)

2002 (Advertisement, breach of 7M, written warning) → *Repeated Breach M/D Conduct*

⁶ Year (Nature of Complaint, Outcome of Complaint, Remedy of Complaint)

Top 6: New World Telecommunications Limited

(A) Background Information of the Operator

New World Telecommunications Limited (NWT) is a member of New World Development Company Ltd. The group provides its fixed line services in July 1995 and IDD services in the telecommunications sector. New World Mobility provides its mobile services in August 1997.

(B) Complaint Cases (Table 6.1 – Table 6.5)

The Group has 32 suspected misleading or deceptive conduct complaints throughout the years 1999 to 2006 and 91% of them have been lodged by consumers. The Group gets the most complaints in 2003 which are all about the slamming activities, similar to the complaints against Hutchison and Wharf. The salesperson from NWT has lied about the fact that PCCW-HKT and NWT have been merged or PCCW-HKT has given all the lines of the building to NWT to operate and make the consumers believe that they have no choice but to switch. It has been claimed that there is a reduction in telephone services charge if they present their bills and sign the documents. Some of the consumers are elderly and the illiterate.

(C) Outcome of the Complaints (Table 6.6 – Table 6.10)

72% of the total suspected misleading or deceptive conduct complaints have been decided to no breach, where 9 cases have been found breach. All of them are complained about the misleading or deceptive advertisement.

(D) Repeated Behavior

Repeated similar misleading or deceptive behavior has happened in ⁷

Fixed line service market:

2003 (Salesperson, case resolved)

2004 (Advertisement, breach of 7M, HK\$30, 000 financial penalty was imposed)

IDD service market:

1999 (Advertisement, breach of the Advertising Code)

1999 (Advertisement, breach of the Advertising Code) → *Repeated Breach M/D*

Conduct

1999 (Advertisement, no breach of the Advertising Code)

1999 (Advertisement, breach of the Advertising Code) → *Repeated Breach M/D*

Conduct

2003 (Advertisement, breach of 7M, written warning) → *Repeated Breach M/D Conduct*

Key Messages from Analyzing the Misleading or Deceptive Conduct Complaints

Repeated misleading or deceptive behavior has been found in all these top six operators, and some of them have even repeated the breach misleading or deceptive behavior. These repeated behaviors may have been due to weak remedies mechanisms. For the repeated misleading or deceptive behavior, which OFTA has decided the complaints to be breach; some of the complaints have not been imposed heavier penalty, but just the same written warning, or even less. This definitely will hurt consumers' welfare due to the companies have repeated the same misleading or deceptive behavior and consumers have been misled again. This possibly shows there is an inadequate level of consumer protection.

⁷ Year (Nature of Complaint, Outcome of Complaint, Remedy of Complaint)

6. 2 Case study: “Slamming” Cases about NWT, Hutchison, Wharf and i-Cable

Introduction of competition would definitely bring benefits to consumers with lower prices and more choices. However, if some operators start to provide services into a competitive basic in the sector, and would like to attract customers in a misleading or deceptive way, such as “slamming” act, which broadly describes conduct that “tricks” consumers into acquiring telecommunications services they would not otherwise choose to acquire, this definitely would harm consumers benefit.

There are different kinds of government policies which help further liberalize and introduce competition in the market in order to benefit the social welfare. Type II interconnection is one of them, which is a regulator measure requiring a fixed carrier, normally an incumbent who has enjoyed a monopolistic position before market liberalization, to open up its copper-based customer access network to its competitors. The policy has been first introduced in 1995 when the local fixed carrier market is first liberalized. Its objective is to promote the telecommunications sector, encourage investment in network, facilitate effective competition in the telecommunications markets, and enhance consumer choice. The policy has been applied to the three new entrants at the time, namely Hutchison Global Communications Limited (HGC), Wharf T&T Limited (Wharf T&T) and New World Telecommunications Limited (NWT), with the incumbent, PCCW-HKT Telephone Limited (PCCW-HKT) obliged to provide interconnection.

(A) Background

In year 2003 to 2004, there are 152 consumers having lodged the complaints about the similar misleading or deceptive conducts against four different companies. Three of the companies are providing bundling services in fixed line service market and the other is providing broadband internet services in internet service market. This contributes 43% of total misleading or deceptive conduct complaints received by OFTA from 1999 to

2006. Under the Type II interconnection policy, which has been reviewed in January 2003, and the decision is announced in July 2004, three companies are providing local fixed telecommunication services on a competitive basis with PCCW. However, there are a lot of suspected misleading or deceptive conducts complaints happening in the same period of time. Consumers do not know much about the type II interconnection policy, under which more competitors are providing the services in the market. Under this lack of knowledge and information situation, they are easier to be tricked by the salesperson who sell their services with misrepresentation statement, such as their company is merged with their existing service provider, or there is a price reduction offer with the same company.

It is often only after the consumer's original service provider notifies them that their service is being switched to another operator that the consumers will realize what has really happened. At this point the consumers have no good choices. Either they may be required to pay an early contract termination penalty to their original service provider, or pay their new operator penalty if they try to cancel the contract they have been "tricked" into entering. Detailed discussion will focus the followings complaint cases.

(1) Complaints about Misleading or Deceptive "Slamming" Conduct by NWT sales people⁸

Since May 2003, OFTA has received 23 complaints from consumers, concerning alleged misleading or deceptive sales tactics by salesperson carrying out door-to-door sales activities in relation to NWT's residential telephone services. Some of the cases have started at the first place when there is a salesperson, who shows his staff identity card with a PCCW-HKT logo printed on it, and identifies himself as a representative of PCCW-HKT Telephone Limited, visits complainant's home and tells the customer that PCCW-HKT and NWT have merged and they are presently providing the complainant an additional choice. The provision of the services changes to NWT in name only, and does not have any changes in essence, including the telephone service and the telephone

⁸ Misleading or Deceptive Conduct Complaint, case reference T116/03

number. However, the monthly fee will be cheaper. The complainant says that the salesperson has copied her personal particulars on to a document and given her a copy of that document, which was a customer copy of an application form for NWT's residential telephone services. That has been completed using the complainant's information even the complainant emphasizes that she does not agree to switch her telephone service to NWT and she has clearly not signed any contract during her meeting with this salesperson. During the following two days, the complainant calls PCCW-HKT asking about the matter of its merging with NWT. PCCW-HKT staff tells her that there is no such arrangement. The complainant then makes a complaint to NWT immediately and requests NWT to look into the matter. Despite her actions, the complainant receives a letter from PCCW-HKT notifying her that her telephone service will be switched to NWT. She is told by NWT staff that she has entered into a one-year contract with NWT for the supply of residential telephone services.

Similar conducts have been found in other complaints where the salesperson of NWT claim PCCW-HKT gave all the lines of this building to NWT to operate, and since the complainant believes that the telephone lines of his building have been transferred to NWT to operate, he assumes he has no choice but to switch to NWT. He signs the document as requested without the salesperson going through the contents of the document.

Some other cases happen that the complainant, who is a customer of NWT's IDD009 service. The salesperson asks the complainant questions relating to the quality of service of IDD 009 and acquires the complainant's personal particular information and claims to be for record purposes only. The complainant has seen the salesperson written down his identity card number on a document and leaves without giving the complainant a copy of the document. And later, the complainant receives a letter from NWT informing him that his telephone line will be switched from PCCW-HKT to NWT. Similar conducts have been found in other complaints where the salesperson claims to have reduction in telephone service charges, if the complainant could provide the telephone bill to him and signature is required in order to enjoy the reduction in charges.

However, the complainant has later found out that she has entered into a new contract with another operator without the salesperson mentioning anything about such or explaining anything to the complainant. Some of the complaints are more than 70 years old or illiterate.

(2) Complaints about Misleading or Deceptive “Slamming” Conduct by HGC sales people⁹

During the 12 months from July 2003 to June 2004, OFTA has received 42 complaints from consumers concerning alleged misleading or deceptive sales tactics by salesperson carrying out door-to-door sales activities in relation to HGC’s residential telephone services. These conducts are similar to those NWT sales people, who claim that HGC cooperates with PCCW-HKT, or, PCCW-HKT and HGC become the same company. Or, the salesperson uses the charge reduction to lure the consumers to provide their identify cards so that the salesperson could write down their personal particulars in the contract and without informing the complaints that by that procedure, they have entered into a new contract without choices, and salesperson often requests customer’s signature for record purpose. Also, OFTA reports that some of the complainants are old and have poor eyesight.

(3) Complaints about Misleading or Deceptive “Slamming” Conduct by Wharf T&T sales people¹⁰

During the 10 months from September 2003 to June 2004, OFTA has received 22 complaints from consumers concerning alleged misleading or deceptive sales tactics by salesperson carrying out door-to-door sales activities in relation to Wharf T&T’s residential telephone services. These conducts are similar to those of NWT and HGC sales people. The salesperson claims that Wharf T&T has been appointed as the agent of PCCW-HKT to provide telecommunications services or Wharf T&T has been

⁹ Misleading or Deceptive Conduct Complaint, case reference T132/03 & T179/03

¹⁰ Misleading or Deceptive Conduct Complaint, case reference T194/03 & T140/04

contracted to provide telecommunications service for that building, leaving the complainant no choice but to switch to their fixed line telephone services.

(4) Complaints about Misleading or Deceptive “Slamming” Conduct by i-CABLE sales people¹¹

During the 8 months from February to September 2004, OFTA has received 65 complaints from consumers alleging misleading or deceptive sales tactics by i-CABLE salesperson, involved in door-to-door/outdoor sales activities. The salesperson usually claims that there is a special offer with more TV channels, free internet and free IDD etc, for loyal Cable TV customers, which is bundled with i-Cable’s broadband internet service, in order to lure the consumers to enter their contracts. However, it turns out the some complainants find out that they have entered into a new internet service contract with i-Cable WebServe. Since these complainants are i-CABLE TV customers, they do not know the contract they are entering is a new contract for new internet service. Also, some of the complainants find out the so-called “free new TV channels” are just the broadband TV via Internet i-CABLE WebServe but not provided by i-CABLE TV. Some complainants find out that they can not access the so-called “free IDD services”.

(B) Outcome of These “Slamming” Conducts Complaints

After 12 months investigation with all these complaints, OFTA has adopted the same decision process. OFTA states in the outcome of the complaint cases that the operators have reviewed their compliance process and made recent improvements to their internal systems. OFTA is satisfied that the companies have correctly identified the problem area and addressed the specific concerns that have been raised. All outstanding disputes with individual complainants have been settled.

Also, these companies have funded a consumer awareness program. The program is foreshadowed in the TA’s report on mis-selling of fixed line services to Hong Kong

¹¹ Misleading or Deceptive Conduct Complaint, case reference T36/04

consumers.¹² and OFTA has opted that the companies' contribution exceeded any penalty that may have otherwise been imposed on them had the TA reached a concluded view that the cases listed above constituted a breach of section 7M. At last, the TA does not consider it necessary to form a conclude view on whether or not there is a breach of section 7M.

(C) Key message

(1) More than 150 Consumers have Suffered from the Slamming Conduct by the Operators but No Penalty Was Imposed on Any of These Operators

There are more than 150 consumers who have been involved with these slamming conduct complaints, and there may even have more consumers who have also suffered from these slamming conducts but have not complained to OFTA. However, OFTA decides to resolve the case with the reason that compliance program is reviewed and funding has been provided by these particular operators to the consumer awareness program. This shows that the consumers' welfare has not been fully protected, due to the fact that consumers are harmed in the first place and the companies still enjoy the fact that they do not breach any of the Ordinances. With reference to the 7M Guideline which is published by OFTA, these conducts are under the section of misrepresentations which states that "misrepresentations are incorrect or false statements and can be either oral or written or a combination of the two. There are many possible types of misrepresentation. In some cases, a misrepresentation may come about as a result of a statement or information which leaves out important facts or creates a false impression."¹³ According to the conducts of these operators discussed above, those statements made by the salespersons are misrepresentations where they have claimed their companies to be either merged or cooperated with PCCW-HKT, or they belong to

¹² Office of Telecommunications Authority (2005) "*Mis-selling of Fixed-line Telecommunications Services in Hong Kong*", Telecommunications Authority Report

¹³ "Guidelines on Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets, OFTA, May 21 2003

the same operator, which makes the consumers believe so and hence they are misled to enter into the contract.

However, there is clear statement from the Guideline under the section of the unlawful churn and slamming, states that, “it will be misleading or deceptive to misrepresent the nature of a particular transaction so, for example, a suggestion by a salesperson that a signature is required to “prove” the salesperson’s attendance is misleading or deceptive when in fact the signature authorizes the transfer of services” Also, there is a UK example which is stated under the section of unlawful churn and slamming in the Guideline, “for instance, in the UK a service provider seeking to persuade customers to switch telephony providers was found to have made misleading statements about its relationship with another service provider causing customers to switch providers.”¹⁴ Due to the Guideline is just voluntarily in nature, which lacks of effectiveness.

Also, the Guideline states that “Slamming” is the practice of changing a consumer’s telephone service without permission. To avoid misleading or deceiving consumers in this sway, licensees should obtain clear authorization from a consumer regarding any change of service provider. The authorization should be in writing or promptly confirmed in written. It is also important that consumers are told that they are being switched from one network to another. Licensees who do not inform consumers they are being switched to their network are engaging in slamming, conduct which the TA considers to be misleading or deceptive under section 7M”.¹⁵ The Guideline clearly states what would be considered as misleading or deceptive conduct under the section 7M, however, similar conducts are found in these “slamming” cases discussed above. OFTA states under the section of decision of TA: “TA does not consider it necessary to form a concluded view on whether or not a breach of section 7M can be established in individual cases noted here.”

¹⁴ “Guidelines on Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets, OFTA, May 21 2003

¹⁵ “Guidelines on Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets, OFTA, May 21 2003

Under the consideration of OFTA, those particular companies have funded a consumer awareness program and the funding could have exceeded any penalty that may have otherwise been imposed. The conducts are then not considered as breach. The operator could have found that they have not officially breached the Ordinance and OFTA's decision may imply that paying money could have settled their wrong-doing, which is not fair to consumers and other competitors. Only some complainants which have solid evidence could have been compensated. For those consumers, who have also suffered by misleading or deceptive conducts, they would not have a chance to be compensated and their welfare is not protected due to the difficulty to collect solid evidence.

(2) Consumers Lack Awareness of the Changes about the Structure and Policy in the Telecommunications Sector.

Type II interconnection has been reviewed and consulted in January 2003, however, due to the long history of HKT being the monopoly in the sector, consumers do not know about the local fixed carrier market has been liberalized and market is opened up for new competitors. Therefore, under the lack of awareness and knowledge situation, consumers may believe the words from the salespersons easily and fall into the tricks, especially for ordinary consumers who do know much about the network issue in the sector.

(3) Salesperson Out-sourcing Scheme

All of these slamming activities are found involved with salespersons, which have been hired by an independent agency, some of the workers may work for different companies at the same time, under the commission scheme. In order to get more consumers into the contracts, these out-sourced salespersons may use false statements to lure the consumers entering into the new contracts, hence earning more commission. The companies would like to use this out-sourcing scheme to save expenses without providing the salespersons the official staff benefits and welfare. As long as the salespersons could get more customers for them, they may not concern much about their conducts. And consumers,

who are lacking knowledge and information about the sector, would rely on the salespersons and believe what they are told, and have fallen into their tricks at last.

(4) Similar Case has happened in HKBN and Written Warning has been issued.¹⁶

From May 2002 to December 2002, OFTA has received 20 complaints about the misleading or deceptive conducts of HKBN salespersons, which are similar to those of NWT, HGC, Wharf T&T and i-CABLE, that the salesperson claims that HKBN has replaced other existing operators for providing broadband internet service to the particular building in collaboration with Housing Department, or the existing service by PCCW would merge with HKBN very soon, therefore the complainant has to register again and change to HKBN's service plan, or, PCCW-HKT has surrendered its monopoly and the telephone system of the whole of the complainant's building has been changed to HKBN. The salesperson states that everything remains unchanged but the charge would be lower in order to lure the consumers to enter the contracts. OFTA has decided that the conduct is in breach of section 7M, however, due to the reason of the conduct has happened before the 7M Guideline is issued and HKBN has taken remedial measures to rectify the breach of section 7M of the Ordinance. Therefore, only written warning to HKBN is appropriate to address the breach.

Almost exactly the same conducts and the same statements have been made by different companies, however, OFTA has made a decision that the case complaint against HKBN as breach and written warning is issued. However, the "slamming" cases of other companies, with more than 150 consumers have suffered, and they happened after the 7M Guideline is issued, OFTA decides it is not necessary to decide the conduct is breach or not. More consumers have suffered from other cases; however, not even warning has been issued to any of those companies. This not only shows the level of consumer protection is inadequate, but also, remedies mechanism is very inconsistent.

(5) The Effectiveness of the Voluntary Guideline

¹⁶ Misleading or Deceptive Conduct Complaint, case reference T181/02

The 7M Guideline has been issued on May 21 2003, and all these incidents have happened after the Guideline is issued. Since the guideline is voluntary in nature, these slamming cases prove that the effectiveness of this voluntary guideline is minimal. Obviously, the operators do not stick to the Guideline since it is voluntary in nature, and even the Guideline has stated every conduct in details and specifically, eventually, the operators still commit the misleading or deceptive conducts again.

6.3 Case study: Misleading or Deceptive Conduct Complaint about SmarTone¹⁷

(A) Background

In August 2006, TA has received a complaint in relation to a billboard advertisement posted by SmarTone-Vodafone, a mobile phone operator, at some fourteen separate locations in Hong Kong. The locations include the departure hall at Hong Kong International Airport, various Kowloon-Canton Railway (“KCRC”) stations and the pedestrian subway on Chater Road. The advertisement has carried SmarTone-Vodafone branding and depicted a simulation of an airport flight information board with the same rate of “\$3.8” alongside five overseas destinations, named in English. In some locations the accompanying written messages were in English, and in others, they are in Chinese (the “billboard advertisement”).

The complainant has also referred to a SmarTone-Vodafone advertisement published in the Oriental Daily News on August 4, 2006. This advertisement is basically the same as the billboard advertisement in appearance and layout. However, the one in the newspaper contains a reference, in Chinese, to a “Traveler” service with a roaming rate of \$3.8 per minute from the five destinations, available for a monthly subscription fee of \$38 (the “newspaper advertisement”). The complainant has alleged that the billboard advertisement has been misleading or deceptive by virtue of the omission of any reference to the requirement of a \$38 monthly subscription fee.

¹⁷ Misleading or Deceptive Conduct Complaints, case reference T66/06

(B) Outcome

OFTA has decided that the posting of the billboard advertisement without reference in it to the material terms and conditions which actually attach to the roaming rate of \$3.8 per minute, constitutes misleading or deceptive conduct in breach of section 7M of the Ordinance and that accordingly SmarTone-Vodafone should receive a financial penalty of HK100, 000 even the operator has taken the corrective actions by removing all the misleading or deceptive advertisement upon the complaint.

(C) Key message

Other Operators have Similar Behavior before but Less or No Penalty has been Imposed

(1) T156/04 R7 HUT3G¹⁸

A complaint from a consumer concerning a radio commercial broadcast on the Commercial Radio promoting, marketing and advertising HUT3G's 3G handset and service. The complaint has alleged that HUT3G do not include material terms and conditions of its offer in the radio commercial. OFTA has quoted the 7M Guideline section 3.11 "a licensee's silence or non-disclosure may amount to misleading or deceptive conduct where it is necessary to reveal relevant facts to prevent consumers from being misled" and section 3.12 "a licensee should, for example, disclose all material terms and conditions, including price, particularly in the case where a term or condition is stringent or the consumers might have made a different choice had he known about the term or condition." In this case, the TA is of the view that the requirement to sign on a 12-month HK\$183 monthly plan contract and the additional

¹⁸ Misleading or Deceptive Conduct Complaints, case reference T156/04

upfront payment is material and could affect the decision of the consumers. It is thus important for the licensee to bring potential customer's attention to the fact that there are attached terms and conditions to the purchase. However, OFTA accepts that HUT3G has attempted to bring to potential customers' attention to the terms and conditions by providing a sales hotline number to serve the same purpose and has decided that it is a marginal case. TA considers that the Radio Commercial is not misleading and hence not in breach of section 7M of the Ordinance.

(2) PCCW-HKT¹⁹

A complaint has received and handled by OFTA, the complainant has alleged that the leaflet by PCCW-HKT on its business telephone voice service, have not clearly spelt out and made available all the material terms of the promotion to the consumers. The TA has concluded that the leaflets are not in compliance with section 7M of the Ordinance and PCCW-HKT is deemed to have engaged in conduct in breach of section 7M of the Ordinance. Due to the fact that the operator has taken corrective actions in the case, only written warning is issued.

¹⁹ Misleading or Deceptive Conduct Complaints, case reference T141/03

Chapter 7

Level of Consumer Protection under the Competition Enforcement Mechanism

7.1 My Model: SCP Paradigm

My Model as discussed in Chapter 4 demonstrates that in order to assess the level of consumer protection in the telecommunications sector, the: structure, conduct, institutions, government policy, enforcement and appeal mechanism should all be examined as all of these factors ultimately directly and indirectly affect consumers interests. Therefore, in this section, I will discuss the general level of consumer protection in different telecommunications markets, including: fixed lined, mobile, IDD and Internet services markets. And for each market, I will generate the reasons which may trigger the high number of complaints situation mentioned earlier.

Figure 7.1

Structure-Conduct-Performance-Paradigm

7.2 Level of Consumer Protection in the Hong Kong Telecommunications Sector

(A) Fixed Line Market

Assessing Consumer Protection Level from Consumer Behavior in the Fixed Line Service Market

With reference to Appendix I, further liberalization and introduction of competition in 2000 and 2003 brought more service operators who provided even more services. Consumers benefited from lower monthly subscription fees and more innovative technology through the rapidly developing market within these years. Consumers also benefited from the implementation of number portability; consumers were free to switch their service operators while keeping their existing number.

However, with reference to the analysis of consumer protection cases from the Consumer Council in Table 5.2 in Chapter 5, more and more consumer complaints were against the fixed line service market compared with other service markets. Complaints in the fixed line service market nearly tripled in the year 2003. And with reference to the

complaints received by OFTA in Table 5.3, Table 5.4 and Table 5.5 in Chapter 5, consumers have lodged the most complaints about the misleading or deceptive conducts by salespersons in year 2003 and 2004 in fixed line service market. Most troubling is that complaints seem to center around a small subset of service operators. With reference to the case study of mis-selling cases earlier in this chapter, most of the suspected misleading or deceptive conducts happened in fixed line market, when the time the type II interconnection policy was implemented in the market in January 2003. The new competitors at that time contributed to the suspected misleading or deceptive conducts and more than 150 consumers suffered as a result. However, OFTA did not establish a breach or not breach decision. This is because future compliance programs were adopted by those particular operators, who also funded consumer awareness programs afterwards.

Multiple factors have made it easier for operators to commit more misleading or deceptive conducts in fixed line service market, including: the implementation of Type II interconnection policy in the market, more competitors providing services with further liberalization and competition in the market, advanced technology with bundling services, and the fact that consumers lack awareness of the changes in the market. Such rapid changes lead to increased consumers complaints about misleading or deceptive conduct during the same time period. But even though consumers lodged their complaints, it is hard for them to collect the solid evidence due to the salesperson and information problem (discussed in detail in the slamming conduct case study earlier in this chapter). These factors combined with the (1) complicated and asymmetric information problem, (2) changes of the structure and technology in the market, and (3) consumers lacking awareness of these changes have lead to more consumer dissatisfaction as indicated with the high number of misleading or deceptive conduct complaints in the market. Consumers may not have enough human resources to complain successfully against operators who have professional staff with expert knowledge and skills. The existing remedy mechanism does not seem strong enough to deter operators from repeatedly committing the same misleading or deceptive conducts over and over again. Repeated behaviors have been found in the fixed line service

markets proved by the analysis of misleading or deceptive conduct complaints of the telecommunications operators discussed above while consumer protection from the misleading or deceptive conducts seems to be far from adequate.

Recent newspaper reports show that misleading or deceptive conducts by salespersons are still happening in the sector. In the SingTao newspaper on November 27, 2006, more than 300 consumers in Kwan Ching District complained about salespersons from PCCW delivering misleading information about the merger between Hutchison and PCCW to lure consumers with a price reduction offer (conduct similar to the case study of slamming conducts from other operators). When these consumers attempted to contact the salesperson after finding out they have been misled, they found that the salesperson has already disappeared.¹

(B) Internet Market

Accessing Consumer Protection Level from Consumer Behavior in the Internet Service Market

With reference to Appendix I, under the liberalization of the Internet service market, consumers have been enjoying the advanced technology change of faster connection and transmission speeds. With introducing the broadband internet technology, the dial-up connection has been phasing out while the number of registered accounts for broadband access has been increasing dramatically from 2000 to 2006.

¹ SingTao Newspaper article “Misleading Telecommunications Services, Three Hundred Cases in Kwai Ching District” on November 27, 2006

Similar to the situation in fixed line service market, with reference to Table 5.2 and Table 5.6, consumer complaints in Internet service market has been increasing dramatically and it is the market with the most complaints among all other markets in the telecommunications sector. And with reference to the complaints received by OFTA (Table 5.4 and Table 5.5), most of the misleading or deceptive conduct complaints happened in Internet service market, making up around 38% of all complaints, mostly against conduct from sales personnel. Most complaints were lodged against a particular operator, discussed earlier in the slamming activities case study section. With reference to slamming conduct case study, most of the suspected misleading or deceptive conducts happened in Internet service market when type II interconnection policy was implemented in the market in January 2003 alongside advancing technology introduced in the market and its subsequent bundling services. Consumers have not yet gained the sophistication to comprehend the complicated information in the market. These factors have contributed to the suspected misleading or deceptive conducts and more than 60 consumers have suffered. However, OFTA has yet to establish a breach or not breach decision because future compliance programs have been adopted by those particular operators. Those particular operators have also funded consumer awareness program afterwards.

On Feb 26, 2007, a MingPao newspaper reported that the transmission speed (uploading and downloading) through broadband internet claimed by the service operators is often misleading. The newspaper's investigation revealed that the actual speed is no more than 30% of the claimed speed. Despite the large number of broadband users nowadays (approximately 1.7 millions registered users), due to technical difficulties, few methods exist for consumers to gather evidence showing that advertised transmission speeds do meet provided transmission speeds.² Given that most Internet service contracts are long-term, consumers have a right to know the true nature of the service provided prior to entering into any kind of contract. Prices for internet service may range from around \$129 to \$228 for monthly plan subscription, but the research done by MingPao states that price and speed are not positively related as operators claim. Consumers who demand high speed may tend to enter into the most expensive contracts (mainly because service providers' claim that the most expensive service plans offer the fastest connection speeds) may not always get what they are paying for. It is hard to protect consumers if OFTA does not disclose reliable information to the consumers concerning their Internet service provider, especially since consumers cannot testify to the actual speed with their limited knowledge and resources. Even though research has been done by OFTA, it refuses to disclose the information to the public because it fears that any disclosure of information may distort the competition in the market. This stance obviously does not prioritize consumer protection. Without this vital piece of information, consumers cannot truly make an informed decision, especially in the complicated, information centric, telecommunications sector. Three out of four main Internet operators do not make any promises to the transmission speed they claim (HKBN is the only exception). Although speed test have been conducted by an independent company for HKBN, it must be pointed out that the independent company was appointed by HKBN herself. As long as there is no truly independent research providing information to consumers, there is no protection for consumers about the information that Internet service providers disclose to the consumers. This lack of

² Mingpao News Article "*Shortcomings of Internet Services, Need for Consumer Protection*" on February 26, 2007

information in turn affects the decisions making ability of consumers entering into long-term contracts. Therefore, in terms of information disclosure, consumers do not get adequate protection in Internet Service market.

(C) Mobile Market

Accessing Consumer Protection Level from Consumer Behavior in the Mobile Service Market

According to the structure of the telecommunications sector in mobile market in Appendix I, implementation of the number portability plan allowed consumers to freely switch their service providers while keeping their existing numbers. Fierce competition generate lower subscription fee in mobile service market which benefited consumers. With reference to Figure 7.4, he mobile number portability plan was implemented on March 1 1999 in the mobile service market.

Source* OFTA

However, most misleading or deceptive conducts happened in the mobile service market in year 1999 due to the very same fierce competition. Operators committed different kinds of misleading or deceptive conducts in advertisements. Consumers lodged most of the complaints in the same time period with reference to Table 5.4; while the fierce competition may also have generated the cartel case in 2000. Also, repeated misleading behaviors have been found in the market, mostly in connection with the advertisements. The remedy mechanism does not adequately prevent operators from repeatedly committing the same misleading or deceptive conducts over and over again. Ultimately, consumers are the ones who suffer because of this behavior because the level of consumer protection is inadequate.

(D) IDD Market

Accessing Consumer Protection Level from Consumer Behavior in the IDD Service Market

With reference to Appendix, consumers enjoy the low fees of IDD calls through fierce competition allowing more consumers to enjoy the IDD service in Hong Kong.

However, due to the fierce competition, misleading or deceptive conducts have also occurred in IDD service market throughout the years according to Table 5.6. Operators have committed different kinds of misleading or deceptive conducts in advertisements. Also, repeated behaviors have been found in IDD service market, mostly in connection with the advertisements. Due to the fact that the remedies mechanism do not prevent the operators from repeatedly committing the same misleading or deceptive conducts, consumers have suffered by the repeated behaviors of the particular operators because the level of consumer protection is inadequate.

7.3 Reasons behind the Inadequate Level of Consumer Protection

The role of competition policy in the supply of telecommunication services is to bring consumer benefits. An increase in the number of service providers in the telecommunications market results in a wider range of choices for consumers to choose from. Competition among services providers also results in lower prices for high-demand services. If the competitive system is to serve the needs of consumers, then it can be argued that the consumers need to be protected from deception or injury while being provided with adequate price and performance information. Consumer Protection is therefore an important ingredient of an effective overall approach to competition.

Inadequate Level of Consumer Protection due to the several Reasons:

1) Information Problem: Asymmetric and Complicated Information in the Telecommunications Sector

In analyzing the consumer protection cases, most complaints received by OFTA are related to consumer interests, mainly on the misleading or deceptive conducts of the operators in fixed line and Internet service markets. Misleading or deceptive information is delivered by either salespersons or the operator's promotional advertisements. As in most cases, consumers bring forth complaints which occurred prior to entering into new

contracts, for example inadequate information provided by the salesperson, omission of material terms and misrepresentation statements are made by the salespersons.

In order to establish a misleading or deceptive conduct complaint case for OFTA to investigate, complaints must also be accompanied by adequate evidence. Due to the difficulty of technical and information problem, consumers very often are not able to provide such evidence even if have been misled. The telecommunications sector is unique because it has become a basic utility service that most people consume. It is also a sector full of complicated information with fast changing technology, which is hard for consumers to digest prior to entering into service contracts. Also, most contracts in the telecommunications service sector are on a long-term basis without a “cooling-off” period scheme in Hong Kong. Once the consumers have been misled by the information from the advertisement or salesperson, they are bound to have long-term suffering. Therefore, correct and reliable information is of the utmost importance for consumers in the telecommunications sector and the best preventative measure to protect consumers from misleading or deceptive conducts.

However, due to the asymmetric and complicated information problem in the telecommunications sector, consumers wishing to lodge a complaint to OFTA may not be able to provide solid evidence. Or sometimes, those misled consumers may not even realize they have been misled by the operators’ advertising or salespersons’ conduct. A newspaper in Hong Kong recently reported that the actual transmission speed is much slower than the claimed transmission speed in the Internet service market. However, there is no way for consumers to provide solid evidence to make a successful complaint. Consumers lack the technical know-how and/or human resources to gather such evidence. Consumer protection may be quite inadequate in terms of information accessibly and reliability.

Similar complaints were found on July 2, 2002. One complaint states that a door-to-door salesperson from HKBN promotes broadband Internet service to the complainant and emphasizes that HKBN could provide dedicated 10Mbps broadband internet service.

Upon installation, the speed was unreasonably slow, even slower than a 56kbps dial-up access. The complainant then calls HKBN service hotline to check the speed problem and is told that the circuit is not a dedicated line, rather it is a shared one. The contract is 18-month long and includes bylines for an early termination fee to cover the installation charge. However, TA found that there was insufficient evidence showing that the information provided by the salesperson concerned was misleading and therefore the complaint could not be established.³

With these consumer complaint cases, we can see that the level of consumer protection is relatively low while the amount of inadequate and fraudulent information delivered to the affected consumers remains unacceptably high. With the absence of class action, consumers do not have enough resources to make fair complaints against the operators. The asymmetric power between the operators and leaves the individual consumer with a huge disadvantage when considering the long and hard suing process. To make matters worse, consumers must also rely on OFTA to decide whether the complaint is in breach of the Ordinance or not.

2) Consumers Lack Awareness of the Changes in Government Policy, the Advanced Technology and the Structure of the Telecommunications Sector

With reference to the huge number of consumer complaints about the slamming conducts during 2003 and 2004, consumers were found to lack awareness of the structural changes in the sector. Very often, consumers are clueless about the the monopoly providing residence services in the fixed line market, the implementation of the Type II interconnection policy, and the new bundling package through the advanced technology. This ignorance makes the consumer more vulnerable to misleading or deceptive conduct of salespersons.

³ Misleading or Deceptive Conduct Complaint, case reference T181/02

3) Lack of Effectiveness of the 7M Guideline with its Voluntary in Nature in Practice

Most of the misleading or deceptive conduct complaints lodged by consumers are about the slamming conducts of particular operators in fixed line and Internet service markets. All these happened after OFTA issued the 7M guideline on May 21, 2003. The Guideline detailed what specific kinds of conducts were considered misleading or deceptive and advised operators not to engage in such practices. However, the 7M Guideline is only voluntary. With reference to the complaint cases received by OFTA, operators continue to commit misleading or deceptive offences with or without the guideline. The 7M Guideline alone does not protect the consumers in the least bit.

According to a recent newspaper article, the same slamming conducts were used by another operator in the sector in November 2006, with more than 300 consumer complaints altogether. The repeated behavior shows the effectiveness of the voluntary in nature 7M Guideline was relatively ineffective. The guideline calls for operator funded consumer awareness programs and publication of “mis-selling” reports. It outlines 9 Best Practice Indicators for a good salesperson and details kind of conduct should be avoided by the salesperson. However, since the 7M Guideline lacks any legal power, it did little to prevent misleading or deceptive conducts. Consumers were still harmed in the end.⁴

The spirit of the Statement of How Complaints Related to Sections 7K to 7N of the Telecommunications Ordinance uses an “ordinary reasonable” person’s behavior as a benchmark⁵. When considering if any case is in breach, the ordinance asks whether a reasonable person in the same situation would be hurt or harmed under the suspected misleading or deceptive conduct. Here, definition of a “reasonable person” becomes all the more important when deciding whether the complaint is in breach or not. However, none of these terms - “reasonable person” or “ordinary consumers” - have ever been

⁴ SingTao Newspaper article “Misleading Telecommunications Services, Three Hundred Cases in Kwai Ching District” on November 27, 2006

⁵ “How Complaints Related to Sections 7K to 7N of the Telecommunications Ordinance are Handled by OFTA, OFTA, December 28, 2005

clearly defined in the Guideline.⁶ Despite this, still uses this guideline to handle complaints and in deciding whether or not a case has breached.

When investigating the misleading or deceptive conduct complaints, OFTA would form an opinion as to whether a “reasonable person” would be misled or deceived by the licensee’s conduct. Section 2.15 of the Guideline states 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 TA 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. With this, evidence may not be necessary in order to decide a complaint to be breach. However, in practice, evidence seems to be a crucial factor in order to establish the breach cases. Often complainants may not be able to provide evidence due to information and technical difficulties, and OFTA has concluded these cases as not breach cases due to insufficient evidence. Obviously, OFTA has not applied the stated principles when they investigate those complaints.

Another unique situation aroused when complaints were brought to OFTA by two competitors in the market, not consumers. Competitors lodge complaints due to misleading or deceptive conducts by other competitors which may distort the level-playing field. One such complaint argued that service operators should disclose information for both download and upload speed, not just the traditional download speed. This is because consumers may also want data on upload bandwidth when making a decision. However, OFTA claimed that “in the absence of strong evidence that ordinary

⁶ “Misleading or Deceptive Conduct Guideline”, OFTA, May 21, 2003, section 2.11 “A “reasonable person” is an ordinary member of the target audience of the conduct; that is a person at whom the conduct is directed. If, for example, a licensee runs an advertising campaign in the local newspaper, the target audience (and, accordingly, the care required of the licensee to ensure the “reasonable person” in the target audience is not misled or deceived) may be different from the target audience and the care which is required of a licensee when offering a service to large corporate customers. In other words, the level of comprehension expected, and therefore the stand of care required by the licensee, will differ depending on the target audience.”, and “Ordinary consumers can usually be taken to have some knowledge of the product or service they are buying and to be able to read simple terms and conditions. However, if products are new or complex, knowledge cannot be assumed and consumers will most likely require more or clearer information about the product or service.”

consumers view broadband upload speed as a critical or even important issue in their choice of a broadband service, the case does not accept”.

OFTA seems to protect consumers only in a passive manner. In the complaint mentioned above, OFTA decided that the complaints were not established because “the complainant’s claims are essentially technical and in terms of genuine consumer interest ring hollow in the absence of actual consumers’ complaints.”⁷ But because such complaints have not harmed consumers directly, OFTA places a lower priority on such cases because it assumes such a complaint does not reflect consumer interest. Consumers often lack access to vital information in the markets and often may not even realize a problem exists. Listening to the complaints lodged from one service provider against another is one way to bridge the information gap of consumers. However, the lack of attention on competitor versus competitor cases makes improving the situation nearly hopeless.

OFTA should play a pro-active role in protecting consumers. This stance will allow OFTA to realize that the telecommunications sector is full of complicated information and technical difficulties. Consumers often may not be able to personally lodge the complaints due to many reasons. OFTA can protect consumer interests proactively, by addressing the problems before consumers even complain about them. OFTA’s current light-handed regulatory policy may not be able to protect the consumers from misleading or deceptive conducts.

With reference to the most serious financial penalty complaints discussed in the case study above, similar misleading or deceptive conducts may generate different kinds of outcomes and remedies. With no clear definition of “reasonable person” and “ordinary consumers” and no clear principle adopted in practice to decide breach or no breach of the 7M Ordinance, it is easier for operators to play with the unclear principles at the cost of consumer welfare.

⁷ Misleading or Deceptive Conduct Complaint, case reference T73(b)/05

4) Remedies Mechanism may not be Strong Enough in Practice

With reference to the analysis of consumer protection cases, most complaint outcomes only resulted in a written warning or advice requiring the particular operators to correct their wrong-doing. Such remedy mechanisms do not seem strong enough as repeated behaviors have been found in all of the service markets in the telecommunications sector. This practice could perpetuate due to the lenient remedy mechanisms. Recent news articles show that the same slamming conducts of salespersons, which represent most of the misleading or deceptive conduct complaints in fixed line and internet service markets from 2003 to 2004, is still happening in the telecommunications sector from other operator, this time more than 300 consumer complaints have been received by Kwai Ching District Union. This shows that the remedies in the slamming conducts cases are not strong enough. The same misleading conduct simply happens again year after year.⁸

In the internet service market, internet service providers always use the statement of “exclusively enjoy 10Mbps broadband service” to attract the consumers. However, one of the complaints points out that such a claim is actually a misleading statement and OFTA decided this is a breach of section 7M of the Ordinance and a written warning was issued. The warning explicitly stated that in the future, operators should be aware of this kind of statement in their advertising.⁹ However, the recent newspaper article shows that until this day, internet service providers still use these kinds of misleading statements to advertise their transmission speed.

With reference to the misleading or deceptive conduct complaints in fixed line and internet service markets, most of the complaints in these two service markets resulted in no penalty imposed on any of the particular operators. Instead, “correcting mechanisms” were adopted by the operators after the offense and they have funded consumer

⁸ SingTao Newspaper article “Misleading Telecommunications Services, Three Hundred Cases in Kwai Ching District” on November 27, 2006

⁹ Misleading or Deceptive Conduct Complaint, case reference T125/03

awareness programs in the future. This may imply paying money to fund the future program to settle the wrong doing by the operator. This practice does not seem to make consumer protection a first priority. Meanwhile, consumers continue to be the first ones harmed.

OFTA considers the future compliance program to be a mediating factor of the penalty. However, with reference to the misleading or deceptive conduct complaints against PCCW, OFTA claims that whether a case is breach or not does not depend on the subsequent “correcting mechanism” to be done by the operator. Eventually, written warning was issued to PCCW regarding the misleading or deceptive conduct in a leaflet advertisement by its sales agency.¹⁰ Also, in another case, OFTA claims that “TA has never accepted that misleading representation made in one medium or at one time can be remedied by information provided in other media or at other times, this reflects the general view that initial misleading or deceptive representations cannot be cured or corrected for section 7M purposes by subsequent acts or mechanism.”¹¹

Since many misleading or deceptive conduct complaints are made in connection to salespersons, OFTA has considered whether it is the responsibility of the consumers or salesperson to proactively read and understand the information about the statement of the advertisement or claims the salesperson has made. In one of the cases, OFTA claims that “even though the salesperson might not have clearly explained about this orally, a reasonable person in the complaint position would have made particular reference to the printed information and sought explanation from the salesperson of its meaning”.¹²

However, in the SmarTone case (with reference to the 7M Guideline), OFTA stated that “a licensee should, for example, disclose all material terms and conditions, including prices; this is particularly the case where a term or condition is particularly stringent or the consumers might have made a different choice had he or she known about the term or condition”. In another other case, OFTA claimed that “in the telecom industry,

¹⁰ Misleading or Deceptive Conduct Complaint, case reference T141/03

¹¹ Misleading or Deceptive Conduct Complaint, case reference T7/05

¹² Misleading or Deceptive Conduct Complaint, case reference T31/06

however, free offers of various kinds are relatively commonplace. Moreover, it is not for consumers to double check the viability of such offers from the service providers' perspective-only that they understand the implications of accepting such offers on their own circumstance".¹³

In yet another case, OFTA stated that "in any case, being the handling person of the subscription, the salesperson must be taken to have full notice of the information written on the form."¹⁴ Sometimes, even the consumers have been repeatedly assured or confirmed about the material and terms that under their conception while in other cases salesperson did not mentioned about the material terms at all.¹⁵ Also, whenever the complaint becomes a marginal case, the benefit always fall into the operator side. This is because that particular operator has exposed the deficiencies or future compliance program has been reviewed.^{16 17} In the telecommunications sector, full of complicated information, is a fast changing sector in terms of technology improvement. However, consumers have few methods to access this information. Consumers can only rely on themselves. Consumers should be protected by an institution which safeguards them against misleading or deceptive conducts of operators.

5) Salesperson Problem

With reference to the analysis of consumer protection cases, most of the misleading or deceptive conduct complaints have been against salespersons. Only a small percentage of them have been found to be breach. One of the reasons may be due to the out-sourcing scheme, which makes it harder for consumers to find evidence against the salespersons. Sales personnel are under the commission basis, and in order to make more transactions, they may commit misleading conducts or skip the explanation of the material terms or conditions to the consumers. However, after the complaint has been lodged with OFTA, the particular salesperson may be difficult to find because they were

¹³ Misleading or Deceptive Conduct Complaint, case reference T130/05

¹⁴ Misleading or Deceptive Conduct Complaint, case reference T31/06

¹⁵ Misleading or Deceptive Conduct Complaint, case reference T31/06

¹⁶ Misleading or Deceptive Conduct Complaint, case reference T31/06

¹⁷ Misleading or Deceptive Conduct Complaint, case reference T156/04

hired by an independent salesperson agency and not a contracted employee of the telecommunications operators. These salespersons are transient and often leave their current job. Without the salesperson in question appearing before trial, OFTA claims that not enough evidence can be collected to find the salesperson's conduct to be breach. Under this situation, there is no way to protect consumers from the misleading conducts of the salespersons.

With reference to the slamming conducts case studies in the section earlier, OFTA has decided not to establish the complaints breaching the Ordinance because operators have reviewed their compliance program and funded the consumer awareness program. The result of the program has been recorded in the "mis-selling" report on March 29, 2005, listing the 9 Best Practice Indicators of the salesperson and what kind of misleading or deceptive conducts should the salesperson avoid. However, repeated misleading or deceptive conducts from the salesperson have still been found in the telecommunications sector with reference to the news article. It shows that the light-handed approach of OFTA and the voluntary nature of the Guideline may not be enough to protect consumers or prevent repeated consumer suffering from the same misleading or deceptive conducts.¹⁸

¹⁸ SingTao Newspaper article "Misleading Telecommunications Services, Three Hundred Cases in Kwai Ching District" on November 27, 2006

Chapter 8

Explaining the Frequency of Complaints: A Regression Study

8.1 Introduction

In this chapter of the paper, I present a simple econometric model in an attempt to examine the effect of the structure, conduct and performance of the operators in the telecommunications sector in Hong Kong, on the frequency of misleading or deceptive conduct complaint received and handled by OFTA.

8.2 Data Source

The data about the structure, conduct, performance of the operators in the telecommunications sector in Hong Kong are collected from the annual report and the financial presentation from different service providers in fixed line, mobile, International Direct Dialing (IDD) and Internet service markets from 1999 to 2006.

8.3 Empirical Model

I present the function as:

$$y = f(x_1, x_2, x_3, x_4, x_5), \quad (8.1)$$

where

y = *Complaint Ratio*

x_1 = *Number of Competitors in the Market i in Year t*

x_2 = *Number of Subscribers of Service Operator j in Market i in Year t*

x_3 = *Market Share of Service Operator j in Market i in Year t*

x_4 = *Number of Months which Service Operator j has been Providing Service in Market i in Year t*

x_5 = *A Dummy Variable of Main Business Market of the Operator j in Year t*

and Interact it with the Competition Measure

For operator j in market i in year t and the equation is:

$$\text{Complaint Ratio}_{jit} = \frac{\text{Number of Complaints about Operator } j \text{ in Market } i \text{ Received in Year } t}{\text{Number of Subscribers of Operator } j \text{ in Market } i \text{ in Year } t}, \quad (8.2)$$

where *Complaint Ratio* is a measure of the frequency of complaints received and handled by OFTA.

The dependent variable y in my model is the ratio of complaint measured by the number of misleading or deceptive complaints received and handled by OFTA against operator j in market i over the number of subscribers of operator j in market i , and by equation with log-linear specification is: ¹

$$\begin{aligned} \ln(\text{Complaint Ratio}_{jit}) = & \beta_0 + \beta_1 \ln(\text{Level of Competition}_{it}) \\ & + \beta_2 \ln(\text{Operator Size}_{jit}) \\ & + \beta_4 \ln(\text{Operator Age}_{jit}) + T + u_{jit} \end{aligned} \quad (8.3)$$

The first independent variable is competition, which is measured by number of competitors in market i in year t . Operator size is measured either by number of subscribers or market share for operator j in market i in year t . The last independent variable is operator age, which is measured by the months of operator j providing services in market i in year t . The independent variable T is the time trend effect, which appears to be non-linear, so I use three different ways to input the time trend effect into the model, for the first way, only the time trend linear variable would be input into the model. Second is input the time trend linear variable with a policy dummy, where

¹ Log-linear specification allows for non-linear relationship between the original variables.

dummy=1 before the apparent turning point and =0 after the turning point.² The last way is to use the year dummy instead of the time trend linear variable.

$$\begin{aligned} \ln(\text{Complaint Ratio}_{jit}) = & \beta_0 + \beta_1 \ln(\text{Level of Competition}_{it}) \\ & + \beta_2 \ln(\text{Operator Size}_{jit}) \\ & + \beta_4 \ln(\text{Operator Age}_{jit}) + T + \text{InteractionTerm}_{jit} + u_{jit} \end{aligned} \quad (8.4)$$

$$\text{InteractionTerm}_{jit} = \text{Main Business of Operator } j \text{ in Year } t * \ln(\text{Level of Competition}_{it}) \quad (8.5)$$

Another regression model is also considered in order to explore more about the effect of competition on service quality in the main business market. Regression model 8.4 basically is the same as the regression model 8.3, as the three different ways of considering the time trend effect are also inputting into the model. However, regression model 8.4 shows whether there is an additional incentive or disincentive to mislead consumers in an operator's main line of business, as opposed to not-so-important market, due to the reputation effect or "too much to lose" consideration. Therefore, the regression model 8.4 includes an interaction term, which is a dummy variable of main business market of the operator j among all the business markets operator j is providing services in, and interact it with the competition measure, which is the number of competitors in market i in year t .³ Summarized descriptive statistics are presented in Table 8.3.1 and Table 8.3.2.

² Since OFTA has streamlined its complaints handling procedures, for most of the complaints, they would just refer to the particular operators, which may be the reason of decreasing number of misleading or deceptive conduct complaints after 2003.

³ The main business dummy is equal to unity if the service is the operator's main line of business; otherwise, it is equal to zero.

Table 8.1 Descriptive Statistics⁴

Independent Variables	Observations	Mean	Std. Dev.	Min	Max
Incomplainratio	120	0.01423	0.0543	0.0000	0.4855
Incompetition	120	3.6259	1.7232	1.3863	5.5490
Insubscribers	120	13.0368	1.1725	7.3778	15.0683
Inmarketshare	120	0.1459	0.1124	0.0006	0.5631
Inoperatorage	120	4.0416	0.6375	2.0794	5.1120
Main Market	120	0.5833	0.4951	0.0000	1.0000
Interaction Term	120	1.9686	2.1394	0	5.5491

Table 8.2 Correlation Matrix

Independent Variables	ln competition	ln subscribers	ln marketshare	ln operatorage	Main Market	Interaction Term
Incompetition	1.0000					
Insubscribers	-0.1438	1.0000				
Inmarketshare	0.1404	0.7455	1.0000			
Inoperatorage	-0.1898	0.4341	0.0722	1.0000		
Main Market	-0.1732	0.5251	0.3546	0.0360	1.0000	
Interaction Term	0.3491	0.3105	0.3424	-0.1051	0.7810	1.0000

⁴ $\ln(\text{complainratio})$ and $\ln(\text{marketshare})$ are calculated as $\ln(\text{complainratio}+1)$ and $\ln(\text{marketshare}+1)$ respectively.

8.4 Results

Estimation (8.3) is by ordinary least squares multiple log linear regression model and the results are shown in the following tables. Results of regression model with the time trend linear variable are shown in Table 8.3 and Table 8.4. Different robust methods have been used in the model. For instance, using different measures of operators' size, this shows in both Table 8.3 and Table 8.4, putting either number of subscribers or market share in the model as the measures of operators' size.⁵ Besides, another robust method is taking or not taking cluster company effect, which shows in Table 8.3, is without taking cluster company effect in the regression model, and Table 8.4 is with taking cluster company effect in the model.⁶ Table 8.5 and Table 8.6 show the result of the regression model with both the time trend linear variable and the policy dummy variable. Table 8.7 and Table 8.8 show the result of the regression model with using the year dummy in the model. The result in Table 8.5 and Table 8.6, and Table 8.7 and Table 8.8 are different, as Table 8.5 and Table 8.7 are without taking cluster company effect and Table 8.6 and Table 8.8 are taking cluster company effect.

⁵ Two different measures of operator's size would not be included in the same regression model, since there appears to be a high degree of multicollinearity between two of the explanatory variables, with the correlation between these two variables is $r=0.75$ with reference to the Table 8.2 Correlation Matrix.

⁶ Taking cluster company effect into account means one company may provide service in more than one market, single company may be correlated as it appears in different markets, cluster company effects means taking this effect into account.

Table 8.3 Regression Result without Cluster Company Effect ⁷

Independent Variables				
Competition	0.0732 (2.49)**	0.0618 (1.90)*	0.0791 (2.88)***	0.5873 (1.95)*
Subscribers	-0.0278 (-5.51)***		-0.0272 (-5.51)***	
Market Share		-0.0897 (-2.03)**		-0.9085 (-2.07)**
Operator Age	-0.0087 (-0.95)	-0.0195 (-1.97)*	-0.0056 (-0.75)	-0.0212 (-2.79)***
Trend	0.0018 (0.59)	-0.0009 (-0.26)		
M1 ⁸	-0.0447 (-2.57)**	-0.0045 (-0.26)	-0.0438 (-2.53)**	-0.0045 (-0.27)
M2	-0.2665 (-2.56)**	-0.2151 (-1.88)*	-0.2863 (-2.92)***	-0.2047 (-1.91)*
M3	-0.2703 (-2.58)**	-0.1905 (-1.66)	-0.2874 (-2.86)***	-0.1812 (-1.66)*
Con	0.2821 (3.45)***	-0.0109 (-0.16)	0.2575 (3.68)***	-0.0016 (-0.03)
Observations	120	120	120	120
R-square	0.3408	0.1919	0.3387	0.1914

NOTE: The dependent variable are the logarithm of complaint ratio which is calculated by misleading or deceptive conduct complaints divided by number of subscribers for particular operator in particular market.

*, ** and *** indicates t statistics with significant level of 10%, 5% and 1% respectively.

⁷ Due to the data limitations, the sample size in the regression model is 120, which is different from the total number of 354 misleading or deceptive conduct complaint cases OFTA have handled from 1999 to 2006.

⁸ M1 means fixed line service market, M2 means IDD service market, M3, means Internet service market, and Con means the mobile service market.

Table 8.4 Regression Result with Cluster Company Effect⁹

Independent Variables				
Competition	0.0732 (2.39)**	0.0618 (1.91)*	0.0791 (2.74)**	0.5873 (2.24)**
Subscribers	-0.0278 (-2.17)*		-0.0272 (-2.08)*	
Market Share		-0.0897 (-2.38)**		-0.9085 (-2.42)**
Operator Age	-0.0087 (-1.41)	-0.0195 (-1.37)*	-0.0056 (-0.82)	-0.0212 (-1.28)
Trend	0.0018 (1.57)	-0.0009 (-0.43)		
M1	-0.0447 (-1.38)	-0.0045 (-0.27)	-0.0438 (-1.37)	-0.0045 (-0.27)
M2	-0.2665 (-2.41)**	-0.2151 (-1.90)*	-0.2863 (-2.72)**	-0.2047 (-2.21)*
M3	-0.2703 (-2.21)*	-0.1905 (-1.68)	-0.2874 (-2.43)**	-0.1812 (-1.89)*
Con	0.2821 (1.81)	-0.0109 (-0.22)	0.2575 (1.62)	-0.0016 (-0.03)
Observations	120	120	120	120
R-square	0.3408	0.1919	0.3387	0.1914

NOTE: The dependent variable are the logarithm of complaint ratio which is calculated by misleading or deceptive conduct complaints divided by number of subscribers for particular operator in particular market.

*, ** and *** indicates t statistics with significant level of 10%, 5% and 1% respectively.

⁹ The R-square may seem to be relatively lower, however, after including the year dummy; the R-square improves a lot.

Table 8.5 Regression Result without Cluster Company Effect

Independent Variables		
Competition	0.0660 (2.20)**	0.0547 (1.64)
Subscribers	-0.0278 (-2.14)***	
Market Share		-0.0900 (-2.03)**
Operator Age	-0.0099 (-1.08)	-0.0208 (-2.08)**
Trend	0.0042 (1.12)	0.0016 (0.39)
Policy Dummy	-0.0159 (-1.07)	-0.0158 (-0.96)
M1	-0.0434 (-2.48)**	-0.0031 (-0.18)
M2	-0.2421 (-2.28)**	-0.1909 (-1.62)
M3	-0.2462 (-2.29)**	-0.1666 (-1.41)
Con	0.2928 (3.56)***	-0.0005 (-0.01)
Observations	120	120
R-square	0.3474	0.1985

NOTE: The dependent variable are the logarithm of complaint ratio which is calculated by misleading or deceptive conduct complaints divided by number of subscribers for particular operator in particular market.

*, ** and *** indicates t statistics with significant level of 10%, 5% and 1% respectively.

Table 8.6 Regression Result with Cluster Company Effect

Independent Variables		
Competition	0.0660 (1.83)*	0.0547 (1.44)
Subscribers	-0.0278 (-2.14)*	
Market Share		-0.0900 (-2.44)**
Operator Age	-0.0099 (-1.66)	-0.0208 (-1.55)
Trend	0.0042 (1.31)	0.0016 (0.43)
Policy Dummy	-0.0159 (-1.12)	-0.0158 (-1.12)
M1	-0.0434 (-1.29)	-0.0031 (-0.18)
M2	-0.2421 (-1.88)*	-0.1909 (-1.44)
M3	-0.2462 (-1.75)	-0.1666 (-1.25)
Con	0.2928 (1.90)*	-0.0005 (-0.01)
Observations	120	120
R-square	0.3474	0.1985

NOTE: The dependent variable are the logarithm of complaint ratio which is calculated by misleading or deceptive conduct complaints divided by number of subscribers for particular operator in particular market.

*, ** and *** indicates t statistics with significant level of 10%, 5% and 1% respectively.

Table 8.7 Regression Result without Cluster Company Effect

Independent Variables		
Competition	0.0698 (2.14)**	0.0552 (1.52)
Subscribers	-0.0279 (-5.44)***	
Market Share		-0.0905 (-2.00)**
Operator Age	-0.0083 (-0.989)	-0.0189 (-1.85)*
M1	-0.0436 (-2.39)**	-0.0021 (-0.12)
M2	-0.2544 (-2.21)**	-0.1917 (-1.50)
M3	-0.2574 (-2.22)**	-0.1665 (-1.63)
Y1	-0.0026 (-0.09)	0.0095 (0.31)
Y2	0.0124 (0.48)	0.0288 (1.01)
Y3	-0.0117 (-0.50)	-0.0006 (-0.02)
Y4	0.0059 (0.26)	0.0152 (0.61)
Y5	0.0154 (0.71)	0.0209 (0.86)
Y6	0.0169 (0.77)	0.0183 (0.75)
Y7	0.0063 (0.29)	0.0057 (0.23)
Con	0.2893 (2.90)***	-0.0185 (-0.20)
Observations	120	120
R-square	0.3663	0.2192

NOTE: The dependent variable are the logarithm of complaint ratio which is calculated by misleading or deceptive conduct complaints divided by number of subscribers for particular operator in particular market.

*, ** and *** indicates t statistics with significant level of 10%, 5% and 1% respectively.

Table 8.8 Regression Result with Cluster Company Effect

Independent Variables		
Competition	0.0698 (2.03)*	0.0552 (1.61)
Subscribers	-0.0279 (-2.15)*	
Market Share		-0.0905 (-2.32)**
Operator Age	-0.0083 (-1.38)	-0.0189 (-1.65)
M1	-0.0436 (-1.33)	-0.0021 (-0.13)
M2	-0.2544 (-2.08)*	-0.1917 (-1.60)
M3	-0.2574 (-1.91)*	-0.1665 (-1.40)
Y1	-0.0026 (-0.25)	0.0095 (0.82)
Y2	0.0124 (0.61)	0.0288 (1.07)
Y3	-0.0117 (-1.02)	-0.0006 (-0.06)
Y4	0.0059 (0.48)	0.0152 (1.39)
Y5	0.0154 (1.69)	0.0209 (1.79)
Y6	0.0169 (1.09)	0.0183 (1.22)
Y7	0.0063 (0.73)	0.0057 (0.87)
Con	0.2893 (2.02)*	-0.0185 (-0.36)
Observations	120	120
R-square	0.3663	0.2192

NOTE: The dependent variable are the logarithm of complaint ratio which is calculated by misleading or deceptive conduct complaints divided by number of subscribers for particular operator in particular market.

*, ** and *** indicates t statistics with significant level of 10%, 5% and 1% respectively.

Estimation (8.4) is by ordinary least squares multiple log linear regression model and the results are shown in the following tables. Different robust methods have also been used in the model, which is the same as the estimation (8.3). With inputting the interaction term variable into the regression model, results are shown from Table 8. 9 and Table 8.10, with the time trend linear variable is input into the regression model. Table 8.11 and Table 8.12 show the results of using both the time trend linear variable and policy dummy in the regression model. Table 8.13 and Table 8.14 are the regressions result with using the year dummy in the model. Each pair of tables are different with each other as the former one is without taking the cluster company effect and the later one is taking the cluster company effect.

Table 8.9 Regression Result without Cluster Company Effect

Independent Variables				
Competition	0.0732 (2.49)**	0.0618 (1.90)*	0.0787 (2.86)***	0.5871 (1.94)*
Subscribers	-0.0278 (-5.51)***		-0.0283 (-5.56)***	
Market Share		-0.0903 (-1.99)**		-0.9115 (-2.02)**
Operator Age	-0.0087 (-0.95)	-0.0194 (-1.91)*	-0.0041 (-0.53)	-0.0211 (-2.74)***
Interaction Term		0.0002 (0.06)	0.0022 (0.87)	0.0001 (0.03)
Trend	0.0018 (0.59)	-0.0009 (-0.27)		
M1	-0.0447 (-2.57)**	-0.0042 (-0.24)	-0.0418 (-2.39)**	-0.0044 (-0.25)
M2	-0.2665 (-2.56)**	-0.2156 (-1.87)*	-0.2894 (-2.95)**	-0.2048 (-1.90)*
M3	-0.2703 (-2.58)**	-0.1906 (-1.65)	-0.2865 (-2.85)***	-0.1810 (-1.65)
Con	0.2821 (3.45)***	-0.0117 (-0.17)	0.2619 (3.73)***	-0.0019 (-0.03)
Observations	120	120	120	120
R-square	0.3408	0.1919	0.3431	0.1914

NOTE: The dependent variable are the logarithm of complaint ratio which is calculated by misleading or deceptive conduct complaints divided by number of subscribers for particular operator in particular market.

*, ** and *** indicates t statistics with significant level of 10%, 5% and 1% respectively.

Table 8.10 Regression Result with Cluster Company Effect

Independent Variables				
Competition	0.0732 (2.49)**	0.0618 (1.92)*	0.0787 (2.71)**	0.5871 (2.20)*
Subscribers	-0.0278 (-5.51)***		-0.0283 (-2.14)*	
Market Share		-0.0903 (-2.52)**		-0.9115 (-2.59)**
Operator Age	-0.0087 (-0.95)	-0.0194 (-1.25)*	-0.0041 (-0.57)	-0.0211 (-1.22)
Interaction Term		0.0002 (0.08)	0.0022 (2.43)**	0.0001 (0.04)
Trend	0.0018 (0.59)	-0.0009 (-0.50)		
M1	-0.0447 (-2.57)**	-0.0042 (-0.22)	-0.0418 (-1.30)	-0.0044 (-0.23)
M2	-0.2665 (-2.56)**	-0.2156 (-1.94)*	-0.2894 (-2.72)**	-0.2048 (-2.22)*
M3	-0.2703 (-2.58)**	-0.1906 (-1.68)	-0.2865 (-2.43)**	-0.1810 (-1.66)*
Con	0.2821 (3.45)***	-0.0117 (-0.21)	0.2619 (1.62)	-0.0019 (-0.03)
Observations	120	120	120	120
R-square	0.3408	0.1919	0.3431	0.1914

NOTE: The dependent variable are the logarithm of complaint ratio which is calculated by misleading or deceptive conduct complaints divided by number of subscribers for particular operator in particular market.

*, ** and *** indicates t statistics with significant level of 10%, 5% and 1% respectively.

Table 8.11 Regression Result without Cluster Company Effect

Independent Variables		
Competition	0.066 (2.20)**	0.0548 (1.64)
Subscribers	-0.0288 (-5.57)***	
Market Share		-0.0910 (-2.00)**
Operator Age	-0.0080 (-0.84)	-0.0206 (-2.01)**
Interaction Term	0.0022 (0.87)	0.0003 (0.11)
Trend	0.0041 (1.08)	0.0016 (0.38)
Policy Dummy	-0.0166 (-1.11)	-0.0159 (-0.96)
M1	-0.0412 (-2.33)**	-0.0026 (-0.15)
M2	-0.2472 (-2.32)**	-0.1915 (-1.62)
M3	-0.2467 (-2.30)**	-0.1665 (-1.41)
Con	0.2941 (3.57)***	-0.0017 (-0.02)
Observations	120	120
R-square	0.3519	0.1986

NOTE: The dependent variable are the logarithm of complaint ratio which is calculated by misleading or deceptive conduct complaints divided by number of subscribers for particular operator in particular market.

*, ** and *** indicates t statistics with significant level of 10%, 5% and 1% respectively.

Table 8.12 Regression Result with Cluster Company Effect

Independent Variables		
Competition	0.066 (1.84)*	0.0548 (1.44)
Subscribers	-0.0288 (-2.16)**	
Market Share		-0.0910 (-2.64)**
Operator Age	-0.0080 (-1.24)	-0.0206 (-1.39)
Interaction Term	0.0022 (2.34)**	0.0003 (0.15)
Trend	0.0041 (1.30)	0.0016 (0.44)
Policy Dummy	-0.0166 (-1.16)	-0.0159 (-1.10)
M1	-0.0412 (-1.23)**	-0.0026 (-0.13)
M2	-0.2472 (-1.91)**	-0.1915 (-1.46)
M3	-0.2467 (-1.77)**	-0.1665 (-1.25)
Con	0.2941 (1.84)*	-0.0017 (-0.03)
Observations	120	120
R-square	0.3519	0.1986

NOTE: The dependent variable are the logarithm of complaint ratio which is calculated by misleading or deceptive conduct complaints divided by number of subscribers for particular operator in particular market.

*, ** and *** indicates t statistics with significant level of 10%, 5% and 1% respectively.

Table 8.13 Regression Result without Cluster Company Effect

Independent Variables		
Competition	0.0704 (2.16)**	0.0553 (1.52)
Subscribers	-0.0290 (-5.51)***	
Market Share		-0.0924 (-1.99)**
Operator Age	-0.0061 (-0.63)	-0.0186 (-1.77)
Interaction Term	0.0025 (0.97)	0.0005 (0.19)
M1	-0.0412 (-2.24)**	-0.0013 (-0.07)
M2	-0.2617 (-2.26)**	-0.1931 (-1.51)
M3	-0.2594 (-2.23)**	-0.1666 (-1.30)
Y1	0.0001 (0.03)	0.0104 (0.34)
Y2	0.0150 (0.58)	0.0295 (1.02)
Y3	-0.0096 (-0.41)	-0.0001 (-0.00)
Y4	0.0079 (0.35)	0.0158 (0.63)
Y5	0.0181 (0.82)	0.0215 (0.88)
Y6	0.0191 (0.87)	0.0188 (0.77)
Y7	0.0078 (0.35)	0.0061 (0.25)
Con	0.2875 (2.88)***	-0.0216 (-0.23)
Observations	120	120
R-square	0.3720	0.2195

NOTE: The dependent variable are the logarithm of complaint ratio which is calculated by misleading or deceptive conduct complaints divided by number of subscribers for particular operator in particular market.

*, ** and *** indicates t statistics with significant level of 10%, 5% and 1% respectively.

Table 8.14 Regression Result with Cluster Company Effect

Independent Variables		
Competition	0.0704 (2.05)*	0.0553 (1.30)
Subscribers	-0.0290 (-2.18)*	
Market Share		-0.0924 (-2.49)**
Operator Age	-0.0061 (-0.98)	-0.0186 (-1.43)
Interaction Term	0.0025 (2.39)**	0.0005 (0.24)
M1	-0.0412 (-1.26)	-0.0013 (-0.07)
M2	-0.2617 (-2.13)*	-0.1931 (-1.64)
M3	-0.2594 (-1.96)*	-0.1666 (-1.40)
Y1	0.0001 (0.08)	0.0104 (0.94)
Y2	0.0150 (0.79)	0.0295 (1.22)
Y3	-0.0096 (-0.75)	-0.0001 (-0.00)
Y4	0.0079 (0.64)	0.0158 (1.65)
Y5	0.0181 (1.70)	0.0215 (1.66)
Y6	0.0191 (1.18)	0.0188 (1.21)
Y7	0.0078 (0.84)	0.0061 (0.88)
Con	0.2875 (1.90)*	-0.0216 (-0.40)
Observations	120	120
R-square	0.3720	0.2195

NOTE: The dependent variable are the logarithm of complaint ratio which is calculated by misleading or deceptive conduct complaints divided by number of subscribers for particular operator in particular market.

*, ** and *** indicates t statistics with significant level of 10%, 5% and 1% respectively.

I estimate the complaint ratio to the structure, conduct and performance of the operators in the telecommunications sector in Hong Kong. I summarize here some of my key findings.

For the log linear regression model, it is generated that:

- i) More competition, which in terms of more competitors has a positive effect on the frequency of misleading or deceptive conduct complaints and the effect, is statistically significant.
- ii) Number of the service subscribers in particular service market has a negative effect on the frequency of misleading or deceptive conduct complaints and the effect is statistically significant. Thus, small operators tend to receive more complaints about misleading or deceptive conduct.
- iii) The period of particular service operator providing services in corresponding market, has a negative effect on the frequency of misleading or deceptive conduct complaints and the effect is statistically significant. Newer operators tend to receive more misleading or deceptive conduct complaints.

8.5 Conclusion

With the simple regression model, it has showed that, more competition in the market is more likely to trigger misleading or deceptive conducts resulting in increased complaints, also, smaller operators with smaller number of subscribers or lower market share, are more likely to generate consumer complaint regarding misleading or deceptive conducts. Besides, newer operators are more likely to commit misleading or deceptive conducts. Also, with taking the interaction term into the regression model, results are shown that more misleading or deceptive conduct happened in the main business market of the operator than the sub business markets under the over-competitive environment, which can be explained that the operators care more about subscribers number in their main

business in order to maintain its reputation in their main business market and to trade off the service quality. Since there is a lack of econometric analysis on complaint cases in the telecommunications sector, therefore, my econometric study could provide an insight, which is to generate a pattern of structure, conduct and performance, on the misleading or deceptive conduct complaints.

Chapter 9

Policy Implications and Recommendations

According to the findings from analyzing the consumer protection cases in the telecommunications sector, most consumer complaints are in relation to misleading or deceptive conducts. Misleading or deceptive conducts can have serious economic consequences, especially when directed towards large audiences or when they take place over a long period of time. They can affect both competitors who are engaging in honest promotional efforts as well as consumers who use their services. Therefore, consumers need additional protection against misleading or deceptive conducts of operators in the telecommunications sector. However, consumers are unable to make use of their rights due to the lack of awareness and/or ignorance. In order to remedy this helpless position, it is necessary to adopt measures to safeguard the interest of consumers. The following are possible solutions I propose to address the perceived problems discussed in chapter 7. These measures may be best suited for the unique situation in the telecommunications sector in Hong Kong, a highly competitive sector where operators are often looking for new and innovative ways to market their services to consumers.

9.1 Policy Implications and Recommendations

Behavioral Problem

A) Enhance Information Accessibility, Availability, and Validity

From analyzing the consumer protection cases, most consumer interests' complaints received by OFTA related to misleading or deceptive conducts of the operators in fixed line and Internet service markets. Most often, misleading or deceptive information was delivered by either the salesperson or the operator's own promotional advertisements. Also in many cases, consumers already have complaints prior to entering into new contracts. These complaints include inadequate information, omission of material terms and misrepresentation statements made by the salesperson.

Also, asymmetric information problem is found in such a complicated and fast changing telecommunications sector. Therefore, information disclosure becomes the key consumer protection mechanism, especially as the telecommunications sector become increasingly complex and diverse. Consumers also have difficulties lodging complaints because they lack or cannot provide the evidence necessary to successfully contest a complaint case.

One way to protect consumers from the misleading or deceptive conducts of operators is to enhance information validity. This can empower consumers and prevent consumers from being misled. Government could require that operators disclose certain information beyond the traditional material terms and conditions. The additional information might include information about the service provider itself or the services they provide, etc. Knowing these facts beforehand could affect consumers' decision-making.

Analyzing the complaint cases also revealed that less educated and busy consumers are more likely to be misled. This may due to the high information costs and low incentives problem. Less-educated consumers may have a more difficult time understanding the complicated information within contract terms while well-educated consumers may have low incentives to fully understand the contract terms. OFTA should pay special consideration to this high information cost problem. For instance, OFTA could provide easier information for less educated consumers. Also, immediate and quick tips should be provided for busy consumers in order to address the high information cost and low incentive problem.

Given the strong level of information asymmetry, OFTA and the Consumer Council have played an important role in providing information to consumers, helping consumers make the right personal decision. However, unlike the Consumer Council, OFTA usually delivers information on internet, a strategy whose effectiveness seems to be relatively low.¹ Therefore, OFTA should complement the Consumer Council by

¹ The reason for relatively low effectiveness is that not so many people would check out OFTA website very often due to the high information cost and low incentive problems mentioned above.

publishing more information for consumers and delivering it in different ways. For example, they could distribute handy pamphlets and information guides to consumers, or report the information via news channel on television and radio.

For professional people with resources, OFTA could be an agency to help consumers to disclose technical and complicated information. One example is publishing the actual transmission speed of Internet service from each Internet service provider; information which consumers would not be able to obtain themselves. OFTA could perform an important role to enhance information availability in this sense. All the information should be easily accessible to consumers through different channels such as newspaper and TV media. Flyers could also be distributed to the residential areas in order to enhance the information accessibility. Government should be more proactive in promoting efficient regulation in order to protect consumers. Besides empowering consumers by allowing them to obtain more information about the services they consume, they could become a proactive medium checkers to keep track of misleading or deceptive conduct by operators.

B) Consumer Education and Increase Consumers Awareness of the Changes in the Sector

From the consumer protection cases analyzed, most consumers have suffered from misrepresentation statements made by the salesperson (such as the fabricated mergers or cooperation news about the operators) or the particular new competitor being the only service provider the consumers can use at their buildings (forcing consumers to switch service providers if they move into a new residence). These conducts became more commonplace when new competitors start providing residential services to consumers. Consumers are misled easily, often because consumers are not familiar with the changes of the telecommunication sectors, including the change of technology, structure and the government policies in the telecommunications sectors. Information in the telecommunications is also not open and transparent enough; consumers therefore know less about the sector and are then easily misled.

Therefore, increasing consumers' awareness of all these changes is important in the prevention of operator malpractices. Consumers could obtain this kind of information through education. OFTA should provide more education programs to consumers. Even though the Consumer Council has been trying to educate consumers, without the help of OFTA, the sophisticated and detailed information would not be delivered to consumers in an effective fashion.

Consumer education is important. Government is responsible for checking the information that operators deliver, but with educated consumers, a second deterrent exists to prevent malpractices from operators. Consumers have a right to be educated and a right to be heard. Consumers should know their rights and have the ability to exercise them. They should not depend on the good sense of businessmen; they should attend trainings arranged by OFTA or the Consumer Council. Due to the reasons that most consumers may not have time to attend the training program, volunteers could play an important role here. By allocating volunteers to attend the education program and promote the information to the consumers. Consumer activists should be invited to speak to the volunteers on consumer rights and explain the remedies available under the ordinances to protect them. This is also a good way to make use of the volunteers who would like to devote their time and effort to the community.

The competition approach does not simply require the market to be competitive, but also calls on notions of transparency to make the market truly sensitive to consumer demands. This requires information to be provided to consumers and consumers to be educated in order to enable them to utilize this information.

C) Announce to Public on a Regular Basis about the Number of Consumer Complaints

In 2003, OFTA had received a relatively large number of complaints. To mitigate this problem, OFTA decided to refer the complaints back to the particular operators. This practice may have come about because OFTA is a regulator, and handling complaints

may not be their primary function or concern. Since 2003, OFTA's practice of back referral of complaints to operators has left consumers without an independent association to represent their interest with legal power and lodge complaints to the operators. An independent body with legal power and a strong stance backing consumer interests is needed. Even though the Consumer Council has done a lot for consumers, due to the lack of legal and investigative power, it is no more than a mediator between the consumer and the operator. The Consumer Council and OFTA are not statutory disputes authority. Under the existing system, consumers lodge their complaints individually; there is no class action in Hong Kong. Also, when consumers raise their complaints, they may not have enough information or resources to challenge the service providers. An effective regulator of the markets, equipped with the resources and proper enforcement powers, lawsuit funds, and access to decision-makers, is required to ensure that consumers are protected and their concerns are timorously addressed. Therefore, in order to enhance the level of consumer protection, an independent body, which is empowered to represent the consumers to lodge complaints and have professional knowledge about the telecommunications sector, is very much needed.

On the other hand, consumers should have the right to know more about the sector. OFTA should publicize the number of complaints about misleading or deceptive conducts of each of the operators on a regular basis on their website or even in newspaper or media channels so consumers can know more about which operators are engaging in misleading or deceptive conducts in the markets. Under publicity scheme, not only consumers will be benefited by knowing more about the sector, the competitors in the sector, who always play fair with the rules, could benefit as well. This scheme would deter the malpractices from the "bad" operators. The 'name and shame' policy currently employed by the OFTA is effective as OFTA simply publishes the statement and does not widely inform the public.

D) Salesperson Training and Enhance the Operators' Responsibility of the Salesperson

Through analyzing the detailed complaint cases, complaints against the salespersons dominated most of the complaints, possibly reflecting the principal agent problem. Under such a cut-throat competitive environment, sales recruitment policy is the most efficient and effective way to compete with other operators. Some operators may want to be “honest” to the consumers, however, due to the lower cost of hiring salespersons from agencies rather than employing them directly, they would choose to maintain the out-sourcing scheme in order to lower their operating cost. This could account for the reason that operators do not attempt to hire only “honest” salespersons to gain competitive an advantage over others.

Operators should be responsible for their salespersons' conducts even they are hired by independent agencies. The salespersons are helping the operator with their business, therefore salesperson conduct is related to them. Operators cannot just walk away from the responsibility for the salespersons' behaviors and conducts.

Also, there is a lack of staff training for the salespersons employed by the independent agency. More training programs should be provided for these salespersons; even they are hired under commission scheme. There should be a balance policy that once they commit any form of misleading or deceptive conducts, their commission would be taken back, in order to maintain a well-behaved atmosphere.

Besides, a new section should be added to the contract to officially outline in black and white the promises the salesperson makes and promotional special offers they provide to the consumer. The new section in the contract should require both salesperson and consumer signatures. This suggestion could enhance the confidence of consumers in trusting the salesperson. Also, if any side has future disagreements or arguments, this section of the contract helps to provide the solid evidence.

The suggestion to provide more training to salespersons requires that such training programs explain, in detail, what kind of conduct should be avoided during the selling process. The program should also clearly state the consequences for committing such offenses. OFTA should require all salespersons follow the guidelines, or else they will receive a penalty from OFTA as well. But due to the voluntary nature of such training programs, the effectiveness is relatively low and the misleading or deceptive conduct of salespersons continue to occur. Therefore, the most effective way is to empower the training guideline is to make the training mandatory in order to prevent the same malicious conduct from repeatedly occurring.

E) Cooling-off Period should be Introduced in the Telecommunications Sector

The Telecommunications sector is unique since it is a widely used service that most Hong Kong residents consume. However, the sector is full of complicated information with fast changing technology. Consumers often have difficulty digesting the information prior to entering a service contract. And without adequate information, consumers are easily misled. Since most telecommunications service contracts are long-term without a “cooling-off” period scheme in, once consumers are misled by the information from the advertisement or salesperson, they are subject to long-term suffering as well. Therefore, correct, reliable, and easily digestible information is important for consumers in the telecommunications sector in order to protect consumers from misleading or deceptive conducts.

“Cooling-off period” is designed to protect consumers from high-pressure sales techniques, provide a time period for consumers to reflect upon the agreement, eliminate any contracts closed under forced, unclear or even misleading circumstances. Consumers should have the right to ‘free to dissolve’ the contract when unfair treatment was used in the selling process or a valid reason exist for contract termination. Another factor which affects long-term contracts is that by the time the contract period ends, the service charge may be much higher under the old versus the new contract terms. This is because of some operators’ policy when a consumer’s contract ends, instead of cutting

the services, operators charge the “original” price of the services without notifying the consumers. In this case, many consumers may need to pay a much higher fee eventually.

In Australia, the Victorian Fair Trading Act provides a 10-day cooling-off period for both door-to-door and telemarketing contracts. With door-to-door sales, the 10-day period commences from, and includes, the day on which the agreement is made. With telemarketing contracts, the time for the cooling-off period is from, and includes, the day on which the consumer receives the agreement document. Within this period, the contract can be rescinded by mutual consent and the contract deemed void.² Also, in 2005, the Australian Communications and Media Authority (ACMA) registered three industry codes that will bring about the introduction of “cooling off” periods for sales of certain telecommunications services. The new cooling-off rules will apply underlining the fact that both providers and their consumers have a vested interest in maintaining fairness in their dealings with one another.³

Therefore, the cooling-off period could give consumers more time to consider their purchasing decisions. If the consumer is not satisfied with the services offered by their new provider, they have the option of having their old services restored without penalty during the cooling-off period.

F) Strengthen the Enforcement Mechanism in Practice, treating Misleading or Deceptive Conducts as part of the Competition Policy and Empower it as a Law

With consumer protection cases analyzed, enforcement mechanism may not be strong enough to deter the misleading or deceptive conducts from the telecommunications service operators. Most consumer complaints cases concerning the slamming conducts of the operators happen after the 7M Guideline was issued (detailing what kinds of conducts operators should avoid) and the consumer awareness program (funded by the particular operators). Repeated behaviors are found after all the guideline or programs

² Telecommunications Industry Ombudsman (2005) “State Laws must be heeded”, TIO Talks Issue 35

³ Australian Communications Industry Forum (2004), “Working to Ensure Fair Trading” Australian Communications Industry Forum Webpage <http://www.acif.org.au>

have been issued and adopted in the sector, proving the ineffectiveness of the Guideline and the program. This could be the reason that the Guideline and the code of practice issued by OFTA are all voluntary in nature, with no legal power. Therefore, the Guideline should be empowered, with clear principles stated and adopted, and implemented while handling complaints.

Also, making misleading or deceptive conducts a legal provision should be considered. Setting fair game rules is not distorting the market but ensuring the playing field is level for consumers as well as competitors. Whilst not devaluing the role competition policy plays in providing consumer benefits, some countries have gone as far as explicitly recognizing the importance of regulation in ensuring consumer protection in a liberalized telecommunications markets.

Therefore, the existing competition policy in the telecommunications sector should include the provision on misleading or deceptive conducts, including the slamming conducts. Involving provision for the misleading or deceptive conducts into a legal law is one of the methods to improve quality and accuracy of marketplace information and discourage deceptive marketing practices.

In Australia, slamming in the telecommunications sector, which refers to the practice of switching consumers to another carrier without their permissions, is illegal. While high pressures selling tactics, especially when used on vulnerable or disadvantaged consumers, place operators at risk of breaching the Trade Practices Act⁴

In Canada, competition is enforced by an independent law enforcement agency. The Competition Bureau contains provisions addressing false or misleading representations and deceptive marketing practices in promoting the supply or use of a product or any business interest. All representations, in any form, that are false or misleading in a

⁴ “The Fair Call Guide For Consumers”, Australian Competition & Consumer Commission, Australia 2004

material respect are subject to the Act. If a representation influences a consumer to buy or use the product or service advertised, it is material.

The Act contains both civil and criminal “misleading advertising” provisions. The civil provision prohibits representations to the public for the purpose of promoting products or business interest that are false or misleading in a material respect. The criminal provision, which is substantially similar, provides that a misleading representation may be criminal if made intentionally (i.e. “knowingly or recklessly”)⁵.

A court or the Competition Tribunal may order a person engaged in misleading advertising to cease the conduct, and/or publish a corrective notice and/or pay an “administrative monetary penalty” of up to \$50,000 (\$100,000 for corporations). Criminal penalties include unlimited fines (in the discretion of the court) and/or imprisonment.⁶

On the part of government, consumer protection is a responsibility to be undertaken in the general interest of society. Enforcement of various laws and amending existing law to protect consumer interests should be considered a fundamental government function. Representations of consumer groups should also be associated with the policy-making bodies set up by government. In order to improve the level of consumer protection in the telecommunications services sector, a comprehensive competition policy and authority should meet the benchmarks of: independence, openness, accessibility, fairness, public accountability and effectiveness. These benchmarks have been posited as appropriate measure of the utility of complaint handling arrangements.

⁵ Competition Act, paragraph 74.01(1)(a) Under Civil Provisions “False or misleading representations”, Competition Bureau, Canada <http://www.competitionbureau.gc.ca>

⁶ Competition Act, section 52 Under Criminal Provisions of “False or misleading representations” Competition Bureau, Canada <http://www.competitionbureau.gc.ca>

Structural Problem

As illustrated in the regression study, more competition in the market generates more misleading or deceptive conducts in the telecommunications sector. An overly competitive market can trigger operators into mislead consumers in order to survive; smaller operators and newer operators are more likely to have misleading behavior as well. Therefore, ensuring the number of competitors in the market are at an optimal level could help prevent over-competition in the market, and hence to increase the level of consumer protection. However, it may be hard for the Government to determine the optimal number of competitors in the telecommunications sector while provoking a controversial argument at the same time.⁷ Therefore, through protecting consumers from the misleading or deceptive conducts of the operators, the level of competition could be maintained at a more efficient level. Adequate consumer protection can drive out inefficient competitors, ensuring healthy and fair competition between well-behaved competitors. Introducing competition and liberalizing the markets alone in the telecommunications sector may not be enough to protect consumers. Strengthening consumer protection regulation along with liberalization could constitute a safeguard against the misleading or deceptive conduct of operators; hence ensuring vigorously and effective competition in the telecommunications sector.

9.2 Conclusion

All the suggestions and recommendation proposed in this Chapter are beneficial to society. They complement each other and cannot be ranked in order of importance. Effectiveness may be further enhanced as they are all implemented. Some of the proposed solutions could also be implemented in other sector of similar nature and with similar sales policy, i.e. such as the broadcasting sector. As paid television has become more popular nowadays and the service nature is similar to the telecommunications

⁷ Conceptually, competition could maintain an optimal level when operators are operated at the minimum efficiency scale given the market demand. However, optimal number of licenses is hard to be determined in practice in my regression model. I have tried to apply another regression model in order to find out the optimal number of competitors in the market. But due to data limitation, the results do not show that it is statistically significant. Detailed results are attached in Appendix II

service, the proposed recommendations may help prevent the consumers against the malpractices generated from the service providers.

Chapter 10

Conclusion

10.1 Concluding Remarks

Introduction of competition in the telecommunication sector will benefit consumers; however, fierce competition may actually harm consumers. Due to fierce competition, competitors may undertake certain misleading or deceptive conducts in order to lure consumers to consume their services. This contradictory relationship not only harms consumers, it also negatively impacts well-behaved competitors. Hence the social welfare is distorted because some competitors chose not to play by the rules.

In order to ensure an effective and efficient competition policy, consumer protection should also be considered. The competition policy in the telecommunications sector in Hong Kong has thus far been effective as measured by its highly competitive and highly liberalized nature. However, a highly competitive and liberalized marketplace alone may not provide adequate consumer protection. The objective of competition policy should also enhance consumer interests. Ensuring that the policy allows both benefits and protections for consumers to coexist will generate a more effective competition policy. Therefore, a comprehensive review is needed in order to see whether there is sufficient protection for consumers. This is also why examining the consumer protection level in the telecommunications policy under the existing competitive market is so crucial, especially since Hong Kong is considering the introduction of a general competition law. Future policy will benefit from the real world lessons learned from the telecommunications sector.

One of the oddities of competition policy literature is the degree to which it neglects the aspect of consumer interest. It is true that policies designed to enhance and maintain competition place consumers' benefit into their consideration. Thus one can see competition as a device for keeping prices down, placing pressure on profit margins and by stimulating productive efficiency and technological changes. On a greater scale, one

can also see competition as an ingredient necessary for the achievement of overall optimum allocation of resources. In these senses, competition does conceive the consumer as the main ultimate beneficiary. Nevertheless, the assumption in conventional literature that if the government creates conditions of effective competition through legal enforcement, then consumers can safely enter the marketplace is inadequate, or at least incomplete. The truth is, competitive market conditions alone cannot fully protect consumers, additional policies on top of efficient competition can more completely protect consumers.

However there are differences of opinion as to how much additional protection the consumer needs. One extreme sees the consumer as a wretched victim of companies' marketing manipulations, constantly bombarded with largely persuasive advertising messages, which are sometimes misleading or even untrue. In the telecommunications sector, most consumer-related complaints fall under misleading or deceptive conduct. These considerations raise the research question of how the consumer is going to be protected under the existing mechanism and whether or not there is adequate protection for consumers in the telecommunications sector.

In Hong Kong, the number of consumer complaints in the telecommunications sector today has dramatically increased threefold since 2000, higher than any other sector in Hong Kong. According to the consumer-related complaints received and handled by OFTA, most of the complaints pertained to misleading or deceptive conduct. The high level of consumer complaints in the telecommunications sector may indicate that there is a high level of consumer dissatisfaction within the telecommunications sector. In order to assess whether the level of consumer protection and consumer welfare under the competitive market in the telecommunications sector is adequate or not, consumer complaints were examined to identify the problem areas in the sector. Lessons can be learned from past mistakes so that future legislation governing this area will be better adapted to cope with the needs of the consumers.

From the Structure-Conduct-Performance model used in my study, through examining the structure, conduct, and consumer behavior in each of the markets in the telecommunications sector, the level of consumer protection in the telecommunications sector is seen to be relatively low. Complaints of misled consumers in the telecommunications sector are so widespread that it is the largest single cause of complaints. Slamming conducts of salespersons in the telecommunications sector is the usual problem and bundling services are also found in the markets. In order to enhance consumer protections, training for the salesperson is a must, especially those hired under an independent agency. Operators are still responsible for the salesperson conduct even though they are employed under an out-sourcing scheme.

Policies should be put in place to deter operators from committing repeated offenses, such as publishing the number of consumer complaints of the operators on a regular basis. An independent body should be empowered to represent consumers and aid in matters such as lodging complaints against operators. This independent body should also make it easier for the active and well-equipped consumer to make an informed decision by providing information and ensuring operator transparency. Although the removal of barriers to a single market in the telecommunications services is now more or less complete, information provision is one of the areas seen by consumers to be deficient. More concern should be placed on remedying situations when consumers lack information, professional advice or have difficulties comparing various services and products. Lack of information hampers competition, an area of particular concern when addressing consumer misgivings. Consumer education is an important key step to enhance consumer awareness in the fast changing telecommunications sector in Hong Kong.

A “cooling-off” period scheme should be introduced in the telecommunications sector to give consumers a choice to terminate contracts if they are dissatisfied with the services or find that they have been misled by the operators. This situation is not uncommon because it is difficult for the consumers to digest the large amount of information presented while entering service contracts. The cooling-off period scheme is important

in the telecommunications sector because telecommunications services rely heavily upon after-sale services. Once the consumers have been misled, they are stuck in contracts for a long period of time. Therefore, protecting consumers from misleading or deceptive conducts upfront should be made a priority.

Empowering the enforcement mechanism and making misleading or deceptive conduct as one of the provisions in competition policy is the most efficient way to deter misleading or deceptive conducts. Since the existing Guideline or Codes of Practices are all voluntary in nature, they do not have any legal power in practice. Also, empowering the Misleading or Deceptive Conduct Ordinance with stronger penalties imposed in practices will prevent similar misleading or deceptive conduct from happening again. Moreover, all information delivered to consumers is required to be valid under the empowered Ordinance. Correct and reliable information is important for consumers in the telecommunications sector to decrease the chances of consumers being misled.

After examining the misleading or deceptive conduct complaints, it was found that more competition and allowing new operators into the market both generated more misleading or deceptive conduct complaints. Two hypotheses have been proposed to explain this phenomenon. A regression model has been conducted to examine how competition affects the frequency of misleading or deceptive conduct complaints received and handled by Office of the Telecommunications Authority in four markets: fixed line telephone services, mobile phone services, IDD services, and Internet services. The effects of operator size in terms of service subscribers and market power have also been analyzed. Results from the regression analysis reveals that more competition in the market tends to trigger more misleading or deceptive conduct, which in turn leads to increased complaints. Also, smaller operators, with smaller numbers of subscribers or lower market share, are more likely to generate consumer complaints regarding misleading or deceptive conduct. Newer operators are also more like to cause misleading or deceptive conduct.

Hong Kong telecommunications sector is highly competitive, however analysis of the complaint cases and the regression study reveal that an overly-competitive telecommunications market generated more misleading or deceptive conducts. Operators compete with one another on price, at the expense of service quality. In order to lure consumers, operators mislead consumers in order to survive under the cut-throat competition within the sector. Non-quality competition is widespread in today's telecommunications sector. In order to maintain healthy and vigorous competition in the telecommunications sector, competition policy should address the structural problems, i.e. to determine the optimal number of licensees in order to maintain the optimal competition level in the telecommunications sector. Conceptually, in natural monopoly industries such as telecommunications, the optimal level of competition requires balancing economies of scale and having sufficient competition. However, it may be hard to determine an optimal competition level in practice, especially since it is not even if an optimal level of competition exists or not. Therefore, protecting consumers from misleading or deceptive conducts could eliminate the inefficient operator, allowing only efficient and well-behaved operators to survive in the sector. This ensures fair and effective competition. With the difficulty of determining the optimal number of licensees in the telecommunications sector, enhancing and setting standards for sufficient consumer protection in itself can maintain a more efficient level of competition. Regulating conduct in this manner also drives out less efficient competitors as a result of market forces. This then justifies the integration of consumer protection into competition policy.

10.2 Future Study

Ensuring adequate consumer protection is not only important in the telecommunications sector, it is also crucial to other sectors as well, especially with the possibility of a future general competition law in Hong Kong. Few systematical studies exist which examine the level consumer protection in the telecommunications sector. My study gives insight on the current level of consumer protection under such a competitive market in the telecommunications sector by examining the complaints in the sector and conducting a

regression analysis to assess what factors attribute to the misleading or deceptive complaints (few studies have included such regression analysis before). In particular, the issue of over-competition is raised. Due to the limitation of the availability of data, relatively small observations were inputted in my regression model. A more sophisticated and complicated regression study could be done with more resources and power to obtain the data from the operators and the Government. With more data and resources, it may be easier to conduct a regression study to determine an optimal level of competition in the telecommunications sector. On the other hand, similar studies could be done in the future, not only in regards to the telecommunications sector, but also for any other sectors in Hong Kong. Comparative studies among telecommunications sectors in different countries could also be done to produce more insights.

Appendix I

Structure in the Telecommunications Sector¹

(A) Fixed Line Market

(1) No. of Competitors in the Market Over the years

Source* OFTA

Prior to 1995, Hong Kong Telephone Company Limited (HKTC) has been the only telecom operator in Hong Kong providing local and international telephone services. In June 1995, with the expiry of the local telephone franchise, the Office of Telecommunications Authority (OFTA) has decided to open up the market and introduce competition. Three new fixed telecommunications network service operators (New world telephone limited, New T&T Hong Kong limited and Hutchison communications limited) start to provide services in competition with the incumbent operator in 1995. Three more licenses have been issued to Towngas Telecommunications Fixed Network Limited, Hong Kong Broadband Network Limited,

¹ "Telecom Milestones" from OFTA website www.ofta.gov.hk

and SmarTone Services Limited to provide the service in the market in 2000. In 2003, CM TEL (HK) Limited, TraxComm Limited and HKC Network Limited have acquired their licenses to provide fixed line services as well in 2003. In 2005, a license has been issued to Hong Kong Cable Television Limited as well. And today, ten wireline-based local fixed telecommunications network services (FTNS) operators and one wireless-based local FTNS operators are providing local fixed line service in Hong Kong.

(2) Barriers to entry

The local fixed-line telephone market has been deregulated, following the expiry of franchise of the former Hong Kong Telephone Company limited for local telephone service. After lengthy negotiation with the Government in March 1998, Hong Kong Telecom International has surrendered its exclusive license for provision of certain external telecommunication circuits and services eight years earlier than the scheduled expiry in 2006 in return for a cash compensation of HK\$6.7 billion.

Further liberalization of the telecommunications market has been in 2000 with the award of licenses to new wireless local FTNS operators, external facilities-based FTNS operators and a hybrid fiber-coaxial cable based FTNS operator.

In January 2002, the TA has announced details on the implementation of the policy to fully liberalize the FTNS market from January 1, 2003 with no pre-set limit on the number of licensees to be issued.

Full liberalization of the telecommunications market has been in 2003 and further competition is introduced with more fixed telecommunications operators licensed to provide services from January 2003. 58% of residential fixed-line telephone users have more than one service operator to choose from, the telecommunications market was fully liberalized. Further competition is introduced with more fixed telecommunication operators licensed to provide service from January 2003.

The government has announced in July 2004 that Type II interconnection obligation at exchange level would be fully withdrawn by June 30, 2008. In the run up to June 30, 2008, the withdrawal would be implemented on a building-by-building basis and will apply to buildings already connected to at least two self-built customer access networks. The number of households covered by at least two self-built customer access networks has increased to 76% of the total number of households in October 2006.

(3) Change in Technology

Hong Kong's local telephone network has been fully digitalized in 1993 and the first calling number display service has been introduced in HKTC's fixed network in December 1996. Full portability of fixed telephone numbers has been achieved using the database approach in 1997 where users could switch networks without having to change their numbers; direct exchange line services are available to business and residential customers from Hutchison Communications in January 1997. In 2002, the development of competition in this sector has been facilitated through the implementation of local loop unbundling (LLU or Type II Interconnection in Hong Kong) which is more advanced in Hong Kong and which has made significant progress in furthering the LLU process in recent years. LLU has facilitated market entry and helped to increase the level of competition in the local fixed market in Hong Kong. Also, the local fixed network operators are required to facilitate fixed number portability, which enables consumers to switch to another local fixed operator without having to change their telephone numbers.

(4) Institution Affects the Structure in the Fixed Line Service Market

Different government policies would affect the structure of telecommunications sector. For example, by issuing more licenses in the telecommunications market in 2000 would further liberalize the market. Implementation of Type II interconnection in 2002 help more competitors to provide services in the market and let the residential fixed-line telephone users have more than one service operator to choose from. In order to enhance the competition in the market, more licenses have been issued in the fixed line service

sector in 2003. Also, OFTA has announced its decision in Jan 2005 to lift the prior-approval requirement on PCCW-HKT Telephone Limiter's prices via the issue of a new Fixed Carrier License, shifting from the ex ante to the ex post regulation approach. The lifting of the prior-approval requirement has given the company greater flexibility in responding to market competition.

(5) Performance in the Fixed Line Service Market

As a result of open competition in the local FTNS market and the active network rollout by new fixed network operators since 1995, there are 71 per cent of residential households who are able to enjoy an alternative choice of local fixed network operators at the end of September 2005. It is expected that the future will keep growing as the operators continue to roll out their networks. As at June 2006, there are over 3.8million exchanges lines. The telephone density is 92 lines per 100 households or 54.5% by population, which is among the highest in the world.²Also, the monthly subscription fee for residential telephone services has decreased around 20% in 2003 upon full liberalization in the market. There is some good performance in the market after liberalization and introduction of competition, with different levels of technology introduced in the market.

² Key Telecommunications Statistics from OFTA, OFTA www.ofta.gov.hk

(B) Internet Market

(1) No. of Competitors in the Market Over the years

Source* OFTA

In 1993, the first internet service provider licensed to provide commercial internet services in Hong Kong. There were 159 licensees to provider internet service in Hong Kong in 1999 with a rapid increase to 258 in 2001, however, there was a drop of service providers in 2003 and kept decreasing in the number and today, there is 180 licensed service providers are providing the service in the Internet service market.

(2) Barriers to entry

In January 2000, the telecommunications market has been fully liberalized after the liberalization of the external facility-based market. More licenses have been issued in the market, joining the competition.

(3) Change in Technology

In 1998, broadband internet access services have been launched in Hong Kong. In 2001, cable-based external FTNS operator Asia Global Crossing Hong Kong Limited announces that its submarine cable “east Asia crossing” has landed Hong Kong. In January 2001, cable-based external FTNS operator China Unicom International Limited has completed its overland cable between Hong Kong and mainland China and has launched services in the first quarter. Asia Pacific cable network 2 has landed Hong Kong in February same year, connecting the mainland chain, Hong Kong, Japan, Korea, Malaysia, The Philippines. In December, the capacity of external telecommunications facilities, namely the cable and satellite systems, has recorded a tremendous increase in the year from 18Gbps to 235Gbps. The increase in bandwidth has been mainly attributed to the new submarine cable capacity brought in Hong Kong by the cable-based external FTNS operators. Networks have covered 99% of Hong Kong's residential buildings in 2002. HKBN Ltd has announced a plan in November to launch the high speed symmetric 100Mbps and 1000 Mbps residential broadband services in 2004.

(4) Institution Affects the Structure in the Internet Service Market

Institution through government policy has affected the structure of the market. A class licensing regime regulating the resellers of telecommunications services has been introduced in September (year). The number of households which are covered by at least two self-built customer access networks have increased to 76% of the total number of households in October 2006.

(5) Performance in the Internet Service Market

Broadband Internet access services are very popular in Hong Kong. All the local fixed network operators are allowed under their licenses to provide broadband services. The data access sector in Hong Kong is competitive, especially in the corporate sector, which has a large number of broadband service providers. There are currently 180 ISPs in

Hong Kong, a significant increase from 1 in 1993 to 124 in 1997. Internet traffic volumes have increased significantly with traffic via broadband networks reaching approximately 28,000 Terabits in December 2002. There has, however, been a gradual decline in the amount of data traffic carried via PSTN networks, i.e. narrowband internet access, with minutes of use reaching 355m in December 2002 from approximately 14.5% and a household penetration rate of 42%. In terms of broadband subscribers, the residential market share accounts for by the incumbent are approximately 54%. As of November 2006, more than 1.73 million consumers have been using broadband services with speed up to 1000 Mbps (Megabits per second), accounting for over 24 per cent of total population. In the residential market, more than 68 per cent of the households are using broadband service. Internationally, Hong Kong's broadband penetration rate is among the highest in the world. In addition, Hong Kong's broadband services are very affordable.³

³ "Report on the Effectiveness of Competition in Hong Kong's Telecommunications Market: An International Comparison", OFTA, June 2003, Spectrum Strategy Consultants 2003

(C) Mobile Market

(1) No. of Competitors in the Market Over the years

Source* OFTA

In 1996, six personal communications services (PCS) licenses for provision of mobile phone network service have been issued to Hutchison Telephone Company Limited, Mandarin Communications Limited, New World PCS Limited, Pacific Link Communications Limited, P Pus Communications Limited and Peoples Telephone Company Limited. Mobile phone subscribers then have exceeded 1 million. Peoples Telephone Company Limited has launched its PCS in January 1997. New World and Hutchison have joined the competition in the PCS market in March same year. P Plus Communications and Mandarin Communications have launched their PCS services in June and Pacific Link has launched its PCS service in July same year also. CSL has acquired Pacific Link Communications and mobile phone subscribers have exceeded 2 million in 1997.

In March 1998, P Plus Communications Limited, one of the six PCS operators, has been acquired by SmarTone Telecommunications Holdings Limited. In 2001, licensing for third generation mobile service has completed in October with the award of licenses to four successful bidders: HKCSL Limited, Hutchison 3G HK Limited, SmarTone 3G Limited and Sunday 3G HK Limited. In accordance with the 3G regulatory framework, the network licenses are required to open up at least 30 percent of their capacity for use by non-affiliated Mobile Virtual Network Operators (MVNO) and/or content and service providers. Hutchison 3g Hong Kong Limited has launched the first third generation mobile service in Hong Kong in January 2004. The government has decided in November to grant the nine incumbents GSM and PCS licenses providing 2G mobile services. New Mobile Carrier Licenses are for a period of 15 years after the expiry of their existing licenses between 2005 and 2006. SmarTone 3G Limited and HKCSL Ltd have launched their 3G services in December 2004. SUNDAY 3G (Hong Kong) Limited has launched its 3G services in June while PCCW Ltd has purchased a majority share of SUNDAY Communications Limited in June 2005. In 2006, a joint venture company, CSL New World Mobility Limited has been created in April to own two mobile telephone operators, New World PCS Limited and Hong Kong CSL Limited.

(2) Change in Technology

SM digital mobile phone services have been launched in Hong Kong in 1993. In 1995, world's first CDMA public mobile phone service has been launched in Hong Kong, and mobile penetration rate reaches 10%. Hutchison Telephone has launched its GSM and CDMA services in June and October in 1995 respectively. Full digitalization of mobile service has begun fully digitalized in 1998, and analogue mobile phone service has been completely phased out with implementation of mobile number portability in 1999.

In 2000, inter-operator mobile short messaging services have been launched and Hong Kong has entered the new era of the third generation (3G) mobile services with the award of 3G licenses to four successful bidders in 2000. In 2001, Asia's first commercial mobile multimedia messaging service has been launched in Hong Kong. In December 2001, inter-operator short message service has been launched by all six mobile network

operators, allowing customers to send short messages to other customers even they are in different networks. In 2002, First MMS has been launched in Hong Kong by HKCSL in April and inter-operator multi-media messaging service has been launched by mobile network operators in December, allowing customers to send multi-media messages to customers in different networks.

(3) Institution Affects the Structure in the Mobile Service Market

Mobile service market has been further liberalized when the government decides in November to grant the nine incumbents GSM and PCS licenses providing 2G mobile services. New Mobile Carrier Licenses are for a period of 15 years after the expiry of their existing licenses between 2005 and 2006. SmarTone 3G Limited and HKCSL Ltd have launched their 3G services in December 2004.

(4) Performance in the Mobile Service Market

With absence of barrier to entry, the Hong Kong Government has sought to encourage a high level of competition in the Hong Kong mobile sector. In 1984, three licenses for cellular service provision have been issued with a fourth license subsequently issued in 1992. In 1996, a further six PCS licenses have been issued. Two of the PCS licenses have been issued to existing mobile licenses, making the total number of mobile operators to eight. Subsequent consolidation in Hong Kong has taken the number of mobile network operators to six and in 2001 OFTA has issued four 3G licenses.

Competition in the market, has, however, been further developed through the development of Mobile Virtual Network Operators (“MVNOs”). There are currently six MVNOs active in Hong Kong and OFTA has provided a framework for 3G MVNO access that ensures that 3G network operators must provide at least 30% of their network capacity to non-affiliated MVNOs. The introduction of mobile number portability service on March 1, 1999 has further promoted the competition among the mobile network operators as it allows consumers to retain their telephone numbers when they

switch to other mobile network operators. This has significantly reduced a barrier that a subscriber may have faced when switching between mobile service providers.

Given the high level of competition, Hong Kong has a more fragmented sector where no mobile operator accounts for more than 30% of the market. Also, Hong Kong has by far the highest mobile penetration rate at the end of 2004. The decline in mobile prices between 1997 and 2002 was the highest in Hong Kong. With reference to the report on the Effectiveness of Competition in Hong Kong's Telecommunications Market: An International Comparison in June 2003, Hong Kong has been also the most affordable market for mobile calls in 2004. By November 2006, the number of mobile service subscribers has been boosted to 9.4 million, representing one of the highest penetration rates in the world at about 134.5 per cent. Among these 9.4 million subscribers, 2.2 million are 3G service consumers.⁴

Other than basic voice services, data services such as short messaging, mobile internet services, all sorts of download services, multimedia services, video call services and mobile TV services are commonly available anywhere, anytime and are increasingly popular among consumers.

⁴ Key Telecommunications Statistics from OFTA, OFTA website <http://www.ofta.gov.hk>

(D) IDD Market

(1) No. of Competitors in the Market Over the years

In 1998, agreement has been reached between the Government and Hong Kong Telecom on early termination of their exclusive license, paving the way for the introduction of competition in the external telecommunications services and facilities market in 1999 and 2000 respectively. The number of Licensed Service Providers of external telecommunications services is 183 in 2000, and it has increased to 210 in 2002 and today, it reaches 249 licensed service providers in 2006.

Source* OFTA

(2) Barriers to entry

In 1998, agreement has been reached between the Government and Hong Kong Telecom on early termination of their exclusive license, paving the way for the introduction of competition in the external telecommunications services and facilities market in 1999 and 2000 respectively. In 1999, with market liberalization of the telecommunications

services provided by external telecommunications services (ETS) providers, the external telecommunications services market has been liberalized with effect from Jan 1.

(3) Change in Technology

Following the landing of several submarine and overland cable systems in 2001, the external connectivity of Hong Kong has significantly enhanced. And in 2002, the external connectivity of Hong Kong has reached nearly 900 Gbps.

(4) Performance in the IDD Service Market

The use of IDD services in Hong Kong has grown rapidly. On a per capita basis, Hong Kong has generated the largest amount of IDD traffic in the world in 2004 and experienced the largest increase in IDD traffic from 1998 to 2004. Hong Kong's international services market has been liberalized from January 1, 1999 and the international facilities market from January 1, 2000. As of January 2007, there are 6 satellite-based External FTNS licensees and 21 cable-based External FTNS licensees. In addition, there are 251 External Telecommunications Service (ETS) licensees in Hong Kong. The introduction of competition has been associated with a substantial increase in the use of international services with the number of outgoing international direct dial minutes per person, increasing from approximately 290 in 1998 to nearly 520 in 2001. The new entrants have been able to rapidly gain market share and the market share accounted for by the incumbent is now less than 30%.⁵

Competitive pressure has been maintained in Hong Kong's international services sector. IDD market concentration has remained stable between 2002 and 2004. Hong Kong has recorded one of the largest increases in international bandwidth (from 13, 712Mbps to 53, 058Mbps) and bandwidth per capita (from 2.0kbps/captia to 7.6kbps/capita) in the

⁵ Key Telecommunications Statistics from OFTA, OFTA Website <http://www.ofta.gov.hk>

samples from 2002 to 2004.⁶ Also, in the year ended June 2006, the volume of outgoing and incoming traffic for telephone calls has been 6,097 million minutes and 2,161 million minutes respectively. Competition has resulted in a substantial reduction in IDD call rates and improved quality of services.⁷

⁶ “Report on the Effectiveness of Competition in Hong Kong’s Telecommunications Market: An International Comparison”, OFTA, June 2003, Spectrum Strategy Consultants 2003

⁷ Key Telecommunications Statistics from OFTA, OFTA www.ofta.gov.hk

Appendix II

Non-linear Estimations

1) Empirical Model

For operator j in market i in year t and the equation is:

$$\text{Complaint Ratio}_{jit} = \frac{\text{Number of Complaints about Operator } j \text{ in Market } i \text{ Received in Year } t}{\text{Number of Subscribers of Operator } j \text{ in Market } i \text{ in Year } t}, \quad (\text{A. 1})$$

where *Complaint Ratio* is a measure of the frequency of complaints received and handled by OFTA.

The dependent variable y in my model is the ratio of complaint measured by the number of misleading or deceptive complaints received and handled by OFTA against operator j in market i over the number of subscribers of operator j in market i , and by equation with non-linear specification is:

$$\begin{aligned} \text{Complaint Ratio}_{jit} = & \beta_0 + \beta_1(\text{Level of Competition}_{it}) \\ & + \beta_1(\text{Level of Competition}_{it})^2 \\ & + \beta_2(\text{Operator Size}_{jit}) \\ & + \beta_4(\text{Operator Age}_{jit}) + T + u_{jit} \end{aligned} \quad (\text{A. 2})$$

The first independent variable is competition, which is measured by number of competitors in market i in year t . The following variable is measured by the square of number of competitors in market i in year t . Operator size is measured either by number of subscribers or market share for operator j in market i in year t . The last independent

variable is operator age, which is measured by the months of operator j providing services in market i in year t . The independent variable T is the time trend effect.

2) Results

Estimation (A.2) is by ordinary least squares multiple log linear regression model and the results are shown in the following tables. Results of regression model with the time trend linear variable are shown in Table Appendix Table 1 and Appendix Table 2.

Appendix Table 1 Regression Result without Cluster Company Effect¹

Independent Variables				
Competition	0.0041 (1.11)	0.0048 (1.28)	0.0028 (0.81)	0.0032 (0.94)
Competition Square	-8.80e-06 (-0.98)	-0.0001 (-1.16)	-5.61e-06 (-0.67)	-6.87e-06 (-0.82)
Subscribers	-9.81e-09 (-0.93)		-1.24e-08 (-1.22)	
Market Share		-0.0702 (-1.61)		-0.074076 (-1.70)*
Operator Age	-0.0001 (-0.54)	-0.0001 (-0.57)	-0.0003 (-1.46)	-0.0741 (-1.58)
Trend	-0.0042 (0.59)	-0.0046 (-1.08)		
M1 ²	0.0102 (0.49)	0.0116 (0.59)	0.0066 (0.32)	0.0098 (0.50)
M2	-0.4386 (-1.24)	-0.4953 (-1.39)	-0.3131 (-0.95)	-0.3474 (-1.06)**
M3	-0.3995 (-1.13)	-0.4561 (-1.29)	-0.2811 (-0.85)	-0.3147 (-0.96)**
Con	0.0135 (0.54)	0.0128 (0.53)	0.0186 (0.76)	0.0170 (0.71)
Observations	120	120	120	120
R-square	0.1328	0.1460	0.1256	0.1370

NOTE: The dependent variable are the logarithm of complaint ratio which is calculated by misleading or deceptive conduct complaints divided by number of subscribers for particular operator in particular market

*, ** and *** indicates t statistics with significant level of 10%, 5% and 1% respectively

¹ Due to the data limitations, the sample size in the regression model is 120, which is different from the total number of 354 misleading or deceptive conduct complaint cases OFTA have handled from 1999 to 2006.

² M1 means fixed line service market, M2 means IDD service market, M3, means Internet service market, and Con means the mobile service market.

Appendix Table 2 Regression Result with Cluster Company Effect³

Independent Variables				
Competition	0.0041 (1.73)	0.0048 (1.87)*	0.0028 (1.79)	0.0032 (2.12)*
Competition Square	-8.80e-06 (-1.64)	-0.0001 (-1.84)*	-5.61e-06 (-1.38)	-6.87e-06 (-0.73)
Subscribers	-9.81e-09 (-1.94)*		-1.24e-08 (-2.22)*	
Market Share		-0.0702 (-2.04)*		-0.0741 (-2.19)*
Operator Age	-0.0001 (-1.30)	-0.0001 (-1.52)	-0.0003 (-1.15)	-0.0741 (-1.23)
Trend	-0.0042 (-0.87)	-0.0046 (-0.92)		
M1	0.0102 (1.07)	0.0116 (1.20)	0.0066 (0.49)	0.0098 (0.72)
M2	-0.4386 (-1.76)	-0.4953 (-1.85)*	-0.3131 (-2.13)*	-0.3474 (-2.39)**
M3	-0.3995 (-1.73)	-0.4561 (-1.82)*	-0.2811 (-2.00)*	-0.3147 (-2.27)**
Con	0.0135 (0.73)	0.0128 (0.67)	0.0186 (0.81)	0.0170 (0.74)
Observations	120	120	120	120
R-square	0.1328	0.1460	0.1256	0.1370

NOTE: The dependent variable are the logarithm of complaint ratio which is calculated by misleading or deceptive conduct complaints divided by number of subscribers for particular operator in particular market

*, ** and *** indicates t statistics with significant level of 10%, 5% and 1% respectively

³ The R-square may seem to be relatively lower, however, after including the year dummy; the R-square improves a lot.

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