

**For discussion
on 9 January 2012**

**Legislative Council Panel on
Information Technology and Broadcasting**

**Guidelines for the Implementation of Fair Usage Policy for the
Provision of Mobile and Fixed Broadband Services**

Purpose

This paper briefs Members on the “Guidelines for the Implementation of Fair Usage Policy for the Provision of Mobile and Fixed Broadband Services” (the “Guidelines”) issued by the Office of the Telecommunications Authority (“OFTA”) on 9 November 2011.

Background

2. Both mobile and fixed broadband data services have become very popular in Hong Kong. The number of fixed residential broadband users stood at 2 million in September 2011, representing a household penetration rate of 85%. For the mobile broadband market, with the proliferated use of smart phones and advanced mobile devices, the number of mobile users capable of accessing mobile data services has increased from 2.9 million in December 2007 to 7.7 million in October 2011. Over the same period, the growth rate of mobile data usage has increased even more dramatically, from 32 terabytes (“TB”) to 3,568 TB, representing an increase of more than 100-fold over a period of 46 months.

3. To cater for the needs of a broad spectrum of customers in a fiercely competitive market, service providers offer a variety of service plans for the choice of the consumers. Service plans which allow customers to enjoy “unlimited” usage are particularly popular, as customers may consume the services at will without having to worry that they may end up with a hefty bill. However, these “unlimited” usage plans are often subject to limitation, in the name of Fair Usage Policy (“FUP”), which is applied by service providers to ensure their customers

as a whole may have a fair opportunity to enjoy and access to their services and to prevent possible abuses by a small number of customers.

Problems with the Current FUP Implementation

4. Since December 2009, OFTA has received from time to time complaints about the application of FUP by mobile service providers¹. In order to better understand the views on FUP from the perspective of the users, OFTA commissioned a consultant in early 2010 to conduct a focus group study on, inter-alia, customer's attitude towards the implementation of FUP for mobile data services. Later in November 2010, OFTA conducted a survey of FUP implemented by local service providers. Coupled with the findings of the focus group study, OFTA has identified the following general problems with the current implementation of FUP -

Different Understanding and Non-uniform Application of FUP by Service Providers

5. Service providers have given different interpretations to their FUP. Some service providers apply FUP by restricting the access speed of customers whose data usage has exceeded a specified threshold; some apply FUP by restricting the access speed of some or all customers served by a radio base station when the number of customers served by that particular base station exceeds a certain number; and some service providers rely on their FUP to prohibit customers from using the services for such illicit purposes as sending or uploading illegal messages or content, or from endangering or interfering with the normal operation of their network facilities or services.

Broad Terms and Conditions

6. The FUP service conditions set out in the customer service agreements are usually worded in rather broad terms. Objective criteria which will trigger FUP are often not specified. Thus, customers often do not have any knowledge about the monthly usage allowance which will trigger FUP, the form of service restriction imposed and the degree to which service access will be restricted once FUP is triggered.

¹ OFTA also received similar complaints in the early 2000s when fixed broadband service emerged, but it has seldom received such complaints in recent years.

Lack of Understanding of FUP by Customers

7. Few customers have heard about FUP. They are generally not aware of the existence of FUP and they do not possess the necessary information to fully understand the relevant terms and conditions. Not unexpectedly, customers consider it unfair when a service provider takes action against them on grounds that they have breached FUP. Many customers who have subscribed to “unlimited” usage plan even feel aggrieved and consider that FUP should not be applied to them as by so doing their service can no longer be called “unlimited”.

Guiding Principles for the Implementation of FUP

8. With a view to addressing the above problems and to better protect consumer interests, OFTA launched a consultation exercise in December 2010 on the proposed Guidelines for service providers to follow in developing and implementing their FUP. After three rounds of consultation and having considered the views of the industry and user groups including the Consumer Council, the Telecommunications Authority (“TA”) promulgated on 9 November 2011 the Guidelines governing how service providers should implement their FUP for the provision of mobile or fixed broadband services. A copy of the Guidelines is at Annex.

9. The guiding principles given in the Guidelines are set out below -

- (a) For service plans with the name simply described or promoted as “unlimited” 「無限」 without any qualifications, service providers shall not impose on or apply any forms of FUP to customers who have subscribed to such plans after the Guidelines have come into effect;
- (b) Service providers promoting service plans with the word “unlimited” included in the name thereof shall set out clearly in the advertising, marketing and sales materials the necessary qualifications if any form of FUP is applicable. The qualifications must be presented and be perceived in a clear and non-misleading manner, using the same font with the same size and presented in equal prominence and close proximity with the word “unlimited” wherever it appears in the advertising, marketing and sales materials;

- (c) Service providers shall set out in their websites, customer service agreements and related advertising, marketing and sales materials whether their plans are subject to FUP, the forms of FUP applicable etc;
- (d) Service providers shall clearly advise customers before any service contract is concluded whether their service plans are subject to FUP, and if so, the triggering mechanism and the forms of restrictions applicable;
- (e) Service providers may only restrict service level in such a manner that commensurate with what an average customer would normally perceive as a broadband service. The service shall not be suspended nor the download speed be capped below 128 kbps;
- (f) Service providers shall give customers sufficient notice before varying unilaterally the salient terms specified in the FUP;
- (g) FUP shall not be intermixed with provisions unrelated to fair use; and
- (h) Service providers shall provide advance notice to customers with excessive usage before triggering FUP, and provide detailed record of data usage upon request.

10. With a common set of implementation and disclosure standards, customers' understanding and awareness of FUP will be enhanced, and a degree of consistency across services will be maintained. Customers should then find it easier to comprehend what FUP represents to them, to compare the different offers available in the market and to make informed subscription decisions.

11. The Guidelines are issued under the Special Conditions of relevant licences. Service providers have to comply with the Guidelines on a mandatory basis in order to ensure their uniform application of FUP. Failure to comply with the Guidelines means a failure to comply with the licence conditions, and under section 36C of the Telecommunications Ordinance (Cap. 106) (the "Ordinance"), the TA may impose financial penalty of up to HK\$200,000 on licensees who fail to comply with the licence conditions on the first occasion, up to HK\$500,000 for the second occasion and up to HK\$1,000,000 for subsequent occasions. In addition,

any complaints of misleading or deceptive sales practice involving implementation of FUP may be investigated by OFTA under section 7M of the Ordinance.

Implementation of the Guidelines

12. To allow sufficient time for service providers to make the necessary preparation, the Guidelines will take effect about 3 months from their promulgation, i.e. on 13 February 2012. Service providers are required to comply with the guidelines on a mandatory basis for all new and renewed service contacts signed on or after 13 February 2012. The TA will closely monitor service providers' compliance with the Guidelines.

**Commerce and Economic Development Bureau
(Communications and Technology Branch)
Office of the Telecommunications Authority
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Annex

Guidelines for the Implementation of Fair Usage Policy for the Provision of Mobile and Fixed Broadband Services

Preamble

Under Special Condition 1.2(c) of the Unified Carrier Licence, Special Condition 13.1(c) of the Services-Based Operator Licence and Special Condition 15.1(c) of the Class Licence for Offer of Telecommunications Services, the Telecommunications Authority (“TA”) may issue guidelines for the purpose of providing practical guidance to the licensee in respect of the protection and promotion of the interests of consumers of telecommunications goods and services.

2. The Guidelines for the Implementation of Fair Usage Policy for the Provision of Mobile and Fixed Broadband Services (“the Guidelines”) are so issued by the TA to provide a set of guiding principles for fixed and mobile broadband network operators and service providers (hereinafter collectively referred to as “service providers”) to follow in developing and implementing their fair usage policy (“FUP”) for the provision of mobile and/or fixed broadband services.

3. The Guidelines will be reviewed and updated from time to time, in consultation with the industry, user groups and other stakeholders, if circumstances so require.

Implementation of FUP by Service Providers

4. Service providers’ declared objectives of implementing FUP are to (a) ensure their customers may have a fair opportunity to enjoy and access to their services and (b) prevent possible abuse or improper use of the network resources by certain atypical customers. Service providers typically implement FUP in three different ways, as described in paragraphs 5 to 7 below.

Imposing Usage Restriction on Atypical Customers

5. Some service providers impose usage restriction on atypical customers who have used the service excessively within a service period,

commonly a month. Once the usage of a customer exceeds the specified allowance or threshold, FUP will be triggered and the customer will be subject to various forms of service restriction for the remainder of the service period.

Applying Traffic Control Measures

6. Some service providers apply traffic control measures, in part or in whole of their networks, across the board to all customers or across the board to all customers of certain non-time-critical and bandwidth-hungry services (e.g. peer-to-peer services) which may consume a lot of their network resources. When traffic control measures are triggered, the access speeds for such services will be reduced even though there is no congestion in the network. Such measures are usually applied during peak usage periods so as to ensure the resources deployed for the support of basic services (such as browsing and email) will not be unduly affected by the non-time-critical bandwidth-hungry services.

Suspending or Terminating Illicit Use of Customers Services

7. Some service providers rely on their FUP to prohibit customers from using the services for illicit purposes (such as sending or uploading illegal messages or contents), or from endangering or interfering with the normal operation of their network facilities or services.

Problems with the Current FUP Implementation

8. Service providers offer a variety of service plans to cater for the needs of a broad spectrum of customers in a fiercely competitive market. Service plans which are marketed as “unlimited” usage plans have become popular in recent years. However, these “unlimited” usage plans are often subject to limitation, in the name of FUP.

9. Beginning in 2007, with the proliferation of smart phones and the explosive growth in mobile data services, the Office of the Telecommunications Authority (“OFTA”) has received from time to time customer complaints, particularly from those “unlimited” usage plan customers, about the application of FUP by mobile service providers. OFTA received similar complaints in the early 2000s when the fixed broadband service emerged, but such complaints have become rare in recent years.

10. In order to better understand the views on FUP from the perspective of the users, OFTA commissioned the Social Science Research Centre of the University of Hong Kong to conduct a focus group study on customer behaviour relating to mobile data usage and their attitude towards the implementation of FUP for mobile data services. Four different categories of mobile data users² were interviewed in February and March 2010.

11. In November 2010, OFTA conducted a survey of FUP implemented by service providers. OFTA finds that all mobile service providers³ implement FUP, and a few fixed service providers adopt such a practice⁴. It also transpires that FUP implemented by service providers are of varying scopes and for vastly different purposes. Coupled with the findings of the focus group study, OFTA has identified several problem areas with the current implementation of FUP in Hong Kong as outlined in paragraphs 12 to 17 below.

Different Understanding and Non-uniform Application of FUP by Service Providers

12. Service providers have given different interpretations to their FUP. Some service providers restrict the access speed of atypical customers only (see paragraph 5), while others apply traffic control measures (see paragraph 6). Some service providers rely on their FUP to prohibit customers from using the services for such illicit purposes as sending or uploading illegal messages or contents, or from endangering or interfering with the normal operation of their network facilities or services (see paragraph 7).

Broad Terms and Conditions

13. The FUP service conditions set out in the customer service agreements are usually worded in rather broad terms. Objective criteria which will trigger FUP are often not specified. Thus, customers often do not have any knowledge about the monthly usage allowance which

² These four groups of mobile data users are (a) users of services mainly for email and messaging; (b) broadband services users; (c) users subscribing to limited usage plan; and (d) users subscribing to unlimited usage plan.

³ Mobile broadband data services in the market are currently provided by all 3G mobile network operators and a few mobile virtual network operators.

⁴ This may be because most fixed service providers provide dedicated access connections (such as Ethernet and Digital Subscriber Line) for individual users. The service providers do not have concern about constraint in capacity, as users need not share their connections and they therefore do not need to compete for bandwidth and resources in the last mile of the access networks.

will trigger FUP, the form of service restriction imposed and the degree to which service access will be restricted once FUP is triggered.

Lack of Understanding of FUP by Customers

14. Few customers have heard about FUP. They are generally not aware of the existence of FUP and they do not possess the necessary information to fully understand the relevant terms and conditions. Not unexpectedly, customers consider it unfair when a service provider takes action against them on the grounds that they have breached FUP. This often leads to customer dissatisfaction and complaints.

Impact of FUP Implementation on Customers

15. Service providers may invoke FUP and apply service restriction to such an extent which would effectively render the service not useable. Many customers who have subscribed to “unlimited” usage plan feel aggrieved and consider that FUP should not be applied to them as by so doing their service can no longer be called “unlimited”.

Relevance between Illegal Use and Fair Use

16. As mentioned in paragraph 12 above, some service providers include other prohibitive provisions on illegal usage under the umbrella of FUP. When customers are found to have used the service “illegally” (e.g. intentional spreading of virus or hacking), their service accounts may be suspended or terminated by the service providers on the grounds that they have breached the terms and conditions of FUP. This begs the question on the relevance between *fair* usage and *illegal* usage.

17. There are occasions when a service provider may need to terminate the service of a customer in order to safeguard the provision of its service or the integrity of its network. There may also be occasions when a service provider is requested by a law enforcement agency or a third party to terminate the service of a customer whom has been found to use the service in a way that infringes the law or the right of that third party (e.g. dissemination of obscene or copyright infringement content). The TA considers that such concerns, albeit legitimate ones in their own right, are not relevant to FUP and should be dealt with under terms and conditions separate and distinct from FUP.

Guiding Principles for the Implementation of FUP

18. With a view to addressing the problem areas, the TA has, following consultation with the industry and user groups, decided to promulgate the Guidelines governing how service providers should implement their FUP for the provision of mobile or fixed broadband services to all customers, individual and business users alike. While the problems identified in this document pertain more to mobile services, in the interest of consistency and on equity grounds, the Guidelines are applicable equally to both fixed and mobile services providers.

19. In promulgating the Guidelines, the TA is minded that on the one hand, based on a common set of guiding principles developed jointly by the regulator, user groups and the industry, service providers will be able to develop and apply FUP in a broadly uniform manner. This will enhance customers' understanding and awareness and maintain a degree of consistency across services. On the other hand, to foster competition and to encourage innovation in the highly developed and rapidly expanding broadband services market, the guiding principles should provide sufficient flexibility so as to enable service providers to differentiate their services from those of their competitors. With these considerations in mind, the TA has formulated the following guiding principles –

Principle 1 – Application of FUP

20. For local data service plans with the name simply described or promoted as “unlimited” 「無限」 (hereinafter includes any synonym which carries the same meaning of “unlimited” 「無限」) without any qualifications, service providers shall not impose on or apply any forms of FUP to customers who have subscribed to such plans.

21. For international data roaming service plans with the name simply described or promoted as “unlimited” 「無限」 without any qualifications, service providers shall ensure that their overseas roaming partner(s) will not impose on or apply FUP to such service plans.

22. Service providers seeking to promote or offer service plans with the word “unlimited” 「無限」 included in the name thereof shall also provide in the same set of advertising, marketing and sales materials the necessary qualifications if any form of FUP is imposed or applicable.

Some permissible examples are “unlimited email service plan⁵” and “unlimited plan for data usage up to X GB⁶”. The qualifications must be presented and be perceived in a clear and non-misleading manner, using the same font with the same size and presented in equal prominence and close proximity with the word “unlimited” wherever it appears in the advertising, marketing and sales materials. Under no circumstances shall such service plans be marketed or promoted as “unlimited plan” or “unlimited” without any qualifications. Also, any such qualifications shall not be displayed in a disjointed manner or in a different part of the advertising, marketing and sales materials, or in a different set of the advertising, marketing and sales materials altogether. The same principle applies to the promotion of such plans in the website of the service providers.

Principle 2 – Transparency of FUP for Local Data Services

23. Service providers shall set out in their websites, the customer service agreements and related advertising, marketing and sales materials whether their local usage plans are subject to FUP, the forms of FUP that will be applied as well as the applicable qualifications as required under Principle 1 above. Such information must be presented and be perceived in a clear and non-misleading manner.

24. Service providers may implement FUP under a service plan for the purpose of controlling or restricting a customer from consuming network resources above a specified usage allowance or threshold (see paragraph 5 above) on condition that, during the sale and the promotion of the service plan, service providers have provided explicit information to customers about (a) the specified data usage allowance or threshold under the service plan, (b) the service charge for the data usage before the usage allowance or threshold is reached and (c) the restrictive measures that will be taken when the FUP is triggered, i.e. the download access speed for the remainder of the monthly service period after the usage allowance or threshold is reached.

⁵ Subscribers to this service plan are entitled to send and receive emails, including their attachments, without any limitation and restriction.

⁶ Service providers offering such a service plan shall not under any circumstances trigger FUP which may affect the quality of the offered data service (such as reducing the speed of the service and restricting access to certain services) if the customer has not reached the specified usage allowance of “X GB”. Since the objective of FUP is to ensure the fair use of network resources among customers, service providers should set the parameters of their FUP (including the value of “X”) such that the majority of customers will not be unduly affected.

25. Service providers may implement FUP by applying traffic control measures (see paragraph 6 above), and in such cases they shall publish on their websites the following information so as to enable their customers to have better understanding on any service restrictions –

- (a) the conditions for triggering the traffic control measures; and
- (b) the type of the service restrictions imposed when the traffic control measures are triggered.

Service providers shall, as far as practicable, give reasonable notice to customers of the above by publishing the aforesaid information on their websites in advance of implementation.

Principle 3 – Potential customers duly informed during sales and promotion

26. To ensure customers may have adequate knowledge about what they may expect to get from the services and in order that customers may make informed purchasing decisions, service providers shall clearly advise customers during the sale and promotion of the service plans and before the conclusion of any service contract whether their service plans are subject to FUP. If they are subject to FUP, service providers shall explain to the customers and draw their attention to and make sure that they are aware of, before the contract is concluded, the criteria that will trigger the FUP and the restrictive measures that will be taken once the FUP is triggered, including the information as set out in Principle 2. For the avoidance of doubt, Principle 3 applies to all kinds of sales and promotions including those conducted over the telephone or other telemarketing channels.

Principle 4 – Restrictive measures must be reasonable and proportionate

27. Service providers shall not terminate or suspend the service if the usage of the customers concerned has exceeded the specified allowance or threshold. In addition, service providers shall not reduce the service level of the customers to such an extent which would significantly degrade the service standard and quality.

28. For the purpose of FUP, service providers may restrict the service level in such a manner that commensurate with what an average customer would normally perceive as a broadband service. In this regard, if the restriction is applied in the form of reduced access speed for local data services, the download speed shall not be capped below

128 kbps. In setting this cap, the TA notes that as the service speed depends on a number of extraneous factors (such as radio propagation conditions and the response of the end application servers), even if the access speed is not capped below 128 kbps, customers may still experience a download speed of less than 128 kbps on certain occasions.

Principle 5 – Service providers to give sufficient notice to customers before varying unilaterally the salient terms specified in the FUP

29. Usage allowance and the restrictive measures to be taken after FUP is triggered are essential features of the service contract between the customer and the service provider. These could be the major considerations underlining the customers' decision on whether or not to subscribe to a particular service plan. Service providers shall refrain from varying unilaterally these terms during the tenure of the service contract.

30. If a service contract includes provisions empowering the service provider to unilaterally vary any of its terms or conditions in the FUP, the service provider shall give not less than 30 days' prior notice to the affected customers before effecting the change, by reasonable means having regard to the nature of the change and its likely impact on customers. If such unilateral variation of the terms or conditions in the FUP will result in a substantial and adverse impact on the service that a customer has acquired, the service provider shall permit the customer to terminate the contract by notice of no more than 15 days prior to the change coming into effect without the customer incurring any charges of any kind in respect of that termination. Service providers shall not impose service fees or penalty fees on customers for the remaining contract period arising from such early termination of a contract.

Principle 6 – FUP shall not be intermixed with provisions not related to fair use

31. Service providers shall include only terms and conditions pertaining to fair usage (i.e. with the objective of not affecting other normal customers so that the latter may have a fair opportunity to enjoy and access to the services) under the FUP. Terms and conditions which deal with service usage outside the confines of FUP, including provisions related to illegal usage and unsolicited electronic messages, shall be separate and distinct from the FUP provisions and put under other headings in the customer service agreements.

Principle 7 – Service providers to provide advance notice to atypical customers with excessive usage before triggering FUP; and to provide, upon request by customers, detailed record of data usage

32. If the local usage of the customers is found (a) approaching the specified allowance or threshold or (b) to have exceeded the specified allowance or threshold for a service period and the service providers will trigger the FUP for the remainder of that service period, the service providers shall notify the affected customers in advance before taking action to reduce the service level. Upon request by customers who have been subject to FUP, the service providers shall provide the detailed and customer-friendly records of data usage within a reasonable period to the customers for verification, provided that these records pertain to data usage within the preceding three months. Service providers may levy a reasonable administrative charge for retrieving and issuing such records.

**Office of the Telecommunications Authority
9 November 2011**