CONSUMER OMBUDSMAN
Norway

Members of the European Parliament

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Input to the proposed regulation concerning the European single market for electronic communications and to achieve a Connected Continent

1. Introduction

The Consumer Ombudsman refers to the proposal of the European Commission on a regulation concerning the European single market for electronic communications for achieving a Connected Continent of September 11 2013. (COM(2013) 627 final).

The Norwegian Consumer Ombudsman (CO) is an independent administrative body with the responsibility to supervise businesses' marketing, trade practices and contract terms, ensuring that they are in accordance with the Norwegian Marketing Control Act (MCA). The MCA implements the provisions in the Unfair Commercial Practices Directive and the Unfair Contract Terms Directive in Norway. The current Consumer Ombudsman is Ms. Gry Nergård, who took office 5 November 2010. The Consumer Ombudsman acknowledges the positive effects for both consumers and service providers of several of the suggested rules of the proposal. As will be further elaborated upon, measures such as consumption control and clear information on actually available download speeds will contribute to alleviate some of the consumer problems that are seen in the telecom-sector today.

The Consumer Ombudsman, has, however, been particularly engaged in limiting the use of locking-in mechanisms with consumers in the telecom market. Therefore, our comments in what follows will be primarily related to aspects of the proposed regulation that may increase the use of locking-in mechanisms in consumer contracts.

In addition, we have noticed that the Commission has proposed a regulation in which, in contrast with the current legislation, it will not be possible to have stronger national consumer protections than the ones in the Commission's proposal. This is unfortunate. As we will explain in what follows, a certain national leeway in the regulation of telecom contracts can contribute to a positive development of legislation, in the form of better rights for consumers and a market with less locking-in and greater mobility. This takes on added significance given that telecom services are constantly developing in line with technological advances. The ability to intervene quickly at a national level in order to prevent negative developments, such as contractual locking-in practices, will be of decisive importance, for the sake of both consumers and the overall competition in the market.

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Responses to new market practices by enforcement authorities are the basis for discussions on a European level on how the current, relatively flexible legislation on unfair contract terms should be applied. The authorities cooperate to ensure a dynamic, yet predictable market-wide consumer protection regime through cooperation, such as through the joint European Unfair Terms Strategy project in the Consumer Protection Cooperation (CPC) Committee.

As explained below, if the regulations are adopted in their present form, this will require changes to the current Norwegian Electronic Communications Act and practice under the Marketing Control Act, both of which will imply significant reductions in Norwegian consumers' protections. In recent years, the Commission has repeatedly stressed the need for strengthened consumer protections and rights, which makes it all the more unfortunate that some elements of the proposed new regulation on the European telecom market will have the exact opposite effect. The Consumer Ombudsman therefore perceives a clear need to draw attention to the negative effects of the proposal on consumers, and believes that changes should be made in this regulation before it is adopted.

If, nevertheless, a new regulation is affirmed through the EU legislative process, it should at least allow the ability to make exceptions in national legislation concerning e.g. the provisions on telecom contracts, so that today's level of consumer protections can be retained where applicable.

2. Locking-in clauses in telecom contracts

The Consumer Ombudsman has devoted significant resources to **limiting** businesses' use of binding periods, SIM locks, long cancellation notice periods and other locking-in mechanisms used in relation to consumers. These sorts of locking-in clauses present several disadvantages for consumers and the market in general. In the markets for telecom services, such as mobile telephony and Internet access, there are at times many actors, and competition for consumers is fierce. The available offers and price structures are always changing, and for the sake of both consumers and competition in the market, it is beneficial when an individual can take advantage of the offer that best suits his or her needs at the lowest possible price at any time. The use of binding periods, long cancellation notice periods, bundled sales and the like limits mobility in the market.

Given the complex and dynamic nature of the market, consumers who have been using a certain service may in time conclude that their initial choice of provider is no longer right for them, that another actor can supply a less expensive and/or better service. A consumer's reasons for purchasing a service can also change over time. Circumstances such as unemployment, illness or breakups in a relationship, which were unforeseeable when the contract was entered, can alter a consumer's financial situation, while others can mean the consumer no longer needs the service, as when moving to a new residence where the service cannot be delivered. It will be unfortunate for the consumer to have to continue paying for a service he or she can no longer use, not to mention more difficult for the consumer to grasp the full consequences of the contract the longer he or she is tied to it.

2.1 The use of lock-in periods in telecom contracts: Article 28 (1) of the proposal

In its supervision of standard contract terms and conditions, the basic view of the Consumer Ombudsman is that consumers should have the freedom to cancel all ongoing contracts for telecom services or other goods or services with no more than a month's notice. Accordingly, this is the main rule in many ongoing contractual relationships, such as Internet access, energy contracts, newspaper subscriptions and contracts for online streaming of music and video.

Despite the fact that, from a consumer perspective, "open" markets are desirable in which consumers can freely switch providers without being hindered by binding periods, it is a reality that binding periods are widespread within certain industries or parts of industries. After thorough discussions, the Nordic Consumer Ombudsmen are in agreement that the use of binding periods should be reduced to no longer than six months in the case of telecom services. Reference is made to the joint statement of 29 March 2012.[1]

Despite the signals from the Nordic Ombudsmen that binding periods should be limited to six months, Section 2-4 of the Norwegian Electronic Communications Act established that binding periods in telecom contracts shall not exceed 12 months. In special cases up to a 24-month binding period can be used, but this is typically confined to cases that involve major investments and the like. In usual consumer contracts for telecom services, it also follows from administrative practice that binding periods shall not exceed 12 months. Reference is made to Section 6.3.3.3, first paragraph in the Industry Standards for Marketing and Terms and Conditions for Internet Access to Consumers,[2] as well as the agreement between the Consumer Ombudsman and mobile operators in 2004. According to the Industry Standard for Internet Access, it has also been agreed that as a main rule, contracts on Internet access shall be ongoing; see Section 6.3.2 of the Industry Standard.

Article 28 (1) of the proposed regulation provides for a binding period of up to 24 months. If this is adopted, consumer mobility in the Norwegian markets will be considerably diminished. This change is presumably mitigated somewhat by the last sentence of Art. 28 (1), where it is proposed that providers be required to offer end-users the possibility of entering contracts with a maximum 12 months' duration. The effect this mitigation will have for consumers appears questionable.

For one thing, there may be reason to question the way in which the proposed rule in the last sentence of Article 28 (1) should be understood. In the Consumer Ombudsman's view, a natural interpretation of the language used would imply a duty to offer ongoing contracts with a maximum 12 months' introductory binding period. It could, however, also be interpreted as a duty to offer a type of subscription that automatically expires after a maximum of 12 months from the date of contract entry. If the latter interpretation shall apply, the Consumer Ombudsman believes that the proposal will be highly impractical, given that consumers generally need telecom services to be on-going.

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[1] http://www.konsumentverket.se/Nyheter/Pressmeddelanden/Pressmeddelanden-2012/Nordiskt-KO-mote-Dags-att-begransa-bindningstiderna/ (in Swedish)

[2] http://www.forbrukerombudet.no/asset/3547/1/3547_1.pdf (in Norwegian); note that the industry standards had not been negotiated when the amendments to Section 2-4 of the Electronic Communications Act came into effect on 1 July 2013.

If it is the former interpretation that shall apply, the Consumer Ombudsman questions the degree to which such contracts will be attractive to consumers compared to those with up to a 24-month binding period. If stronger introductory incentives are given when a consumer is bound for up to 24 months, those contracts will be more attractive to many consumers than those with shorter lock-in periods and weaker incentives. The detrimental effects of lock-in periods described above will remain so regardless of the incentives offered, yet consumers may be more inclined to accept a longer lock-in period if they are given relatively stronger incentives to do so.

In the Consumer Ombudsman's view, the regulation's rule on maximum lock-in periods should be changed so that lock-in periods can be no more than six months.

Real financial benefit as compensation for the disadvantage represented by lock-in periods

According to Section 2-4, fourth paragraph, third sentence of the Norwegian Electronic Communications Act, if a provider uses a lock-in period in the contract, it must give the consumer a financial benefit. This is a legislative codification of legal and administrative precedent in relation to Section 22 of the Norwegian Marketing Control Act concerning unfair contractual terms and conditions. In order to not be considered unfair under Section 22 of the Marketing Control Act, the disadvantages lock-in periods represent to the consumer must be compensated with a corresponding benefit for the sake of balance between the parties' rights and obligations. The benefit often consists of subsidised hardware or a price discount on the service.

The Consumer Ombudsman finds no requirement on a benefit to the consumer in the proposed regulation that corresponds to the Norwegian requirement, and warns of the consequences to consumers if such a balancing requirement cannot be retained. Though the use of lock-in periods is beneficial to providers' long-term financial stability and helps them ward off competing offers in the market, as long as the consumer receives no corresponding benefits, the risk is that today's unfair terms and conditions may become tomorrow's standard way of dealing with consumers in the market.

It is therefore the Consumer Ombudsman's view that the regulation should mandate a financial benefit to the consumer that makes up for the disadvantage of a lock-in period. In our view, this benefit should primarily consist of subsidised hardware (mobile phone, modem, DVR etc.). If the benefit can consist of a price discount on the service, it will be more difficult to calculate the size of the financial benefit the consumer is actually receiving, as explained in the following section, 2.2.

2.2. Cancellation and cancellation fees ("compensation"): Article 28 (2) of the proposal

In the first sentence, it is proposed that consumers shall have the right to cancel contracts with lock-in periods upon one month's notice after six or more months have gone by in the contract. No distinction is made between contracts with or without lock-in periods, and it appears thereby that the main rule could be that a lock-in period will apply for the first six months. This could considerably reduce mobility in the market compared with today.

As stated above, the basis of telecom service contracts in Norway is the delivery of ongoing services that can be cancelled by either side, and a prerequisite for contracts with binding periods is that the consumer is given a benefit. For most services, the cancellation period is no more than a month after the end of the current month.

In the assessment of unfairness of contracts with binding periods pursuant to Section 22 of the Marketing Control Act, it is important whether the consumer is able to exit the contract upon payment of a reasonable cancellation fee. The ability to exit contracts with binding periods upon paying a cancellation fee exists, in Norwegian practice, from day one of the contract, which diminishes the lock-in effect of contractual binding periods. With the cancellation fee, the provider is also compensated for the investment in the contractual relationship that at the outset made up for the consumer's disadvantage in being bound.

The Consumer Ombudsman believes that the regulation should allow consumers to cancel the contract regardless of how long it has been since the contract was entered. The first sentence of Article 28 (2) should therefore be changed by removing the last clause, "where six months or more have elapsed since conclusion of the contract".

Calculating the cancellation fee

The second sentence of Article 28 (2) provides guidance regarding the settlement between the provider and consumer in the event that the consumer cancels the contract. It is the Consumer Ombudsman's understanding that, corresponding to Norwegian practice, the proposal implies no cancellation fee shall be charged in cases where there is no subsidised hardware or residual value of benefits the consumer has been granted in return for being bound to the contract. In our view, this is a reasonable clarification.

However, the Consumer Ombudsman has reason to question the proposed manner of calculating a cancellation fee ("compensation"). The proposal reads:

> *No compensation shall be due other than for the residual value of subsidised equipment bundled with the contract at the moment of the contract conclusion and a* pro rata temporis *reimbursement for any other promotional advantages marked as such at the moment of the contract conclusion.*

Here it is unclear what is meant by "residual value of subsidised equipment". According to the Industry Standards for Internet Access (Section 6.3.3.4), the cancellation fee in the Norwegian market is calculated based on the value of the introductory subsidy given by the provider, and is gradually reduced over the course of the contract period. A cancellation fee that is too high can result in an unfair lock-in effect for the consumer and render the ability to cancel illusory.

Equivalent uncertainties pertain to "reimbursement for any other promotional advantages". Circumstances may render doubtful the real value of an advantage the consumer has received under the contract. If for instance data packages are offered in a mobile subscription as compensation for a binding period, it is a matter of some doubt whether this is a real financial benefit for which the consumer may reasonably be charged a fee upon cancellation, or whether in reality it is merely a change in price structure that the provider has chosen to call a "promotional advantage". Hardware can be similarly ambiguous: Is it

reasonable for a consumer to pay the "residual value" of a subsidised modem if the modem is rendered unusable when the contract is cancelled?

In the Consumer Ombudsman's view, it should be considered to include a clarification of how the basis for a cancellation fee shall be calculated. Clearer rules, such as those in the model we have negotiated with Norwegian telecom providers, will in our view be beneficial to businesses and consumers alike.

3. Unilateral changes and the right to terminate: Article 28 (4) of the proposal

Article 28 (4) grants the end-user the right to terminate a contract free of charge in the event the provider makes unilateral changes to it, as long as the changes are not exclusively beneficial to the end-user. The provider shall give sufficient notice to the end-user of all changes at least one month before the changes are due to take effect. The provider must inform the end-user of the right to terminate if he or she does not want to accept the new terms and conditions.

In the Norwegian Electronic Communications Act, which implements the USO Directive (2002/22/EC) that was changed by 2009/136/EC, the end-user who does not accept new contractual terms and conditions is allowed to cancel if changes are made that are not beneficial to the end-user.

The Consumer Ombudsman finds it natural that consumers be allowed to exit contracts in which the provider has made changes that are unbeneficial to them. After all, the conditions by which the consumer entered the contract may no longer apply once the provider has made changes. However, we would also like to advocate for a stricter regulation, one that applies especially to customers that have entered contracts with binding periods.

This situation was recently made relevant in a case that came before us in our regulatory work concerning the broadband services market. The business in this case reorganised its broadband portfolio from a range of different products to three different products. For a number of customers who had lock-in periods in ongoing contracts, this amounted to an unbeneficial change in the form of reduced speed or higher prices. The provider gave these customers the option of cancelling their contracts as a result of this unilateral change in the contract terms and conditions.

While providers derive benefit from contracts with a lock-in period in the form of long-term financial stability, customers' entry into such contracts is contingent upon the product being offered at the time of contract entry. To a customer, a contract with a lock-in period implies a certain security that he or she will not be forced into a less beneficial agreement over the course of the lock-in period.

Pursuant to the Marketing Control Act, the Consumer Ombudsman has used the principle that whenever unbeneficial changes are made to a contract with a lock-in period, the consumer shall continue to receive the service at the same or better quality and at a price that does not exceed the cost before the changes for the duration of the binding period. We believe that this should also be included in the regulation, so that providers are in fact required to adhere to contracts with mutual obligations they have entered with consumers for the duration of the lock-in period.

In addition, we would point out that the present formulation of the proposal takes little account for end-users whose alternatives in the market are few or non-existent. In some regions, consumers may not have a complete range of alternatives in the broadband services market, since only one type of regular access from one provider may be available, and mobile broadband will not be an adequate substitute for wired access.

Customers may not for instance have access to broadband via cable or xDSL in locales where fibre optic cables have been laid, and vice versa. This means that when the provider changes the speed or price of a service, the consumer may not always have viable alternatives if he or she does not accept the provider's new terms and conditions. In such cases, a clear-cut right to cancel would be an empty right, of little use to the consumer in the event of unilateral changes by the provider.

It may seem as if the proposal takes too much consideration for a strong nature of competition in certain regions. In Norway, a country with several operators that provide mobile services, consumers will be able to choose among all the available operators most of the time. The right to cancel in this market will therefore be a more viable option than for other telecom services.

Hence, there may be reason to differentiate between different markets in Article 28 (4), or for the regulations to allow exceptions from this rule at the national level.

Obligation to give notice and the assessment of a change's impact

When it comes to the sorts of changes that give the right to termination, it is unclear who will define what is considered "exclusively to the benefit of the end-user" and hence whether the end-user may terminate the contract. The word choice indicates that changes will be considered in relation to the individual end-user, not a customer group overall, making the assessment highly subject to discretion. The use of "exclusively" implies a low threshold for the right to cancel. The end-user will therefore be in a better position than the provider to determine whether a change is beneficial or not, making it important that the end-user understands at all times what the agreement with the service provider actually entails.

According to Section 2-4 of the Electronic Communications Act, the provider must notify the customer of changes to the contract, including termination. Section 6.7.2 of the Consumer Ombudsman's Industry Standards for Internet Access implies that notice shall be given for all changes of a certain importance to the consumer. In the Industry Standards, it is implied that any change to a consumer's rights and obligations will be of a certain importance.

In order for the end-user to be able to determine whether changes to the contract with a provider are exclusively beneficial, the changes requiring notification will be extensive.

The Consumer Ombudsman believes that it should be the end-user who determines whether a provider's change is exclusively beneficial or not. The end-user should therefore be notified of all unilateral changes of some importance.

4. Statement of the actually available download speed: Articles 25 and 26 of the proposal

According to Article 25 (1), providers of electronic communication shall provide information on the actually available data speed for downloading and uploading available to the end-user. According to Article 26 (2) b, this information shall also be stated in the contract with an end-user, together with actual speed ranges, speed averages and "peak-hour" speeds.

Regulating the market for broadband services, including mobile broadband, has revealed challenges when it comes to stating the actual speed, as it is subject to multiple variables. It is therefore highly significant for the consumer's ability to compare services that the speed actually presented reflects reality. This is especially true as the market develops and the prices different providers use gradually even out, making service quality—including speed and volume—all the more important as competitive parameters in the market. Particularly in the mobile market, we notice that actors are to a great extent already competing around speed and volume, and we believe this trend will continue.

As new concepts are introduced and used in marketing to give the impression of speed and quality, such as in current marketing of 4G networks, the way in which providers present the service can give consumers reason to expect faster speeds. When such concepts are used frequently in marketing, it is all the more important to state the speeds that lay behind them, so that consumers actually receive clear and unambiguous information on what they can expect from the product.

Along the same lines, and particularly within the mobile market, the speeds that can actually be offered will vary, and with it of course the speed consumers can actually receive. If consumers are to navigate the market and select the offer that is best for them, it is important that they receive information on the real speeds it is actually possible to achieve, both in the contract and prior to contract entry. It is therefore positive that a duty to inform consumers of the actual speed will be part of the regulation.

In addition, Article 26 (2) a states that with any data volume limitations, information must be given on speeds and prices beyond the included data allowance, along with clear information about any bandwidth throttling and how this affects the service. This corresponds to the Consumer Ombudsman's guiding principles in regulating the mobile market, and helps consumers make informed choices.

5. Control of consumption: Article 27 of the proposal

Article 27 (1) requires providers to offer the end-user the chance to check his or her ongoing consumption free of charge. The end-user shall specify a financial limit, and the provider shall ensure that consumption does not exceed it without the end-user's consent. According to Article 27 (2), the provider shall inform the end-user when (i) 80% of the limit has been reached, (ii) how to continue to use the service once the limit has been reached, and (iii) the extra costs this will involve.

The Consumer Ombudsman is in favour of a consumption control determined by the end-user, and finds it very positive that consumers can now often choose the safety mechanisms they wish to tie to their subscriptions.

Clear consumption limits of which the consumer is aware allow him or her to use telecom services with the certainty that the expenses thereby will never exceed those limits. The wide

popularity of the various package subscriptions show that consumers care about safety and predictable expenses. In the Consumer Ombudsman's view, a self-imposed upper financial limit can provide some remedy to consumers who have received unexpectedly high mobile phone bills.

The Consumer Ombudsman would nevertheless point out that consumers can still be surprised by high bills resulting from purchases made through a mobile phone. To the extent that consumers can make payment transactions that are not covered by the consumption limit in their telecom service subscriptions, it is important that they are not given the incorrect impression that the consumption limit for the telecom service applies for the payment services.

6. Discrepancies in the service: Article 28 (5) of the proposal

Article 28 (5) states that any significant and non-temporary discrepancy between the service actually provided and that indicated by the provider in accordance with Article 26 shall be considered as non-conformity of performance for the purpose of determining the end-user's remedies.

In the Consumer Ombudsman's view, it is positive to establish the end-user's right to claim remedies from the provider for any discrepancies. Nevertheless, we wonder whether the choice of words here is too strict in comparison with current law. Significant discrepancies will normally provide grounds for cancellation under Norwegian law, but even when non-conformities are not significant, a consumer can claim remedies in the form of e.g. price reductions. It therefore becomes problematic if such basic and well established rights can only be claimed for significant non-conformities. In this respect, we point to that discrepancies that are temporary, but of a certain significance, can also amount to non-conformity, not simply those that are non-temporary.

The Consumer Ombudsman finds therefore that the proposal does not preserve the basic rules of the law of sales and of consumer sales, and that it should instead be established that discrepancies that are not insignificant will provide grounds for determining remedies in accordance with national law.

7. Net neutrality: Article 23 of the proposal

Article 23 (1) states that the end-user, through his or her Internet connection, shall be able to freely distribute and access information and content, run programs and use services of their choice. This basic rule is limited in that service providers may enter contracts on "specialised services"; see Article 23 (2).

In Norway, a working group led by the Post and Telecommunications Authority drew up a set of principles for net neutrality.[3] Section 3 of the principles states:

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[3] "On Net Neutrality: Principles for Neutrality on the Internet" (in Norwegian): http://www.npt.no/teknisk/internett/nettn%C3%B8ytralitet/nettn%C3%B8ytralitet/_attachment/970?_ts=13837541127

Internet users have the right to an Internet connection free of discrimination with respect to the type of application, service and content and regardless of whether they are the sender or receiver.

The view of the Consumer Ombudsman is that the proposal's opening for specialised services seems to weaken the right to an Internet connection free of discrimination as formulated in Norway's principles on net neutrality. Furthermore, it is somewhat unclear what can potentially be considered a "specialised service". This in turn implies uncertainty regarding the continuance of net neutrality for the end-user, and the scope of a possible restriction on net neutrality.

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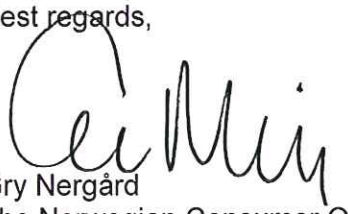
To conclude, the Norwegian Consumer Ombudsman has been active in regulating unfair terms in consumer contracts in the telecom services market. We have through our work in this sector gained valuable enforcement experience that we now urge the members of the European Parliament to take into consideration assessing the proposed regulation.

Best regards,



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