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Date:

27.02.2009

Proposal for a Directive of the European Parliament and of the Council on consumer rights – Consultative round

We refer to the European Commission's proposal for a Directive concerning consumer rights (COD/2008/0196) and hereby present the Norwegian Consumer Ombudsman's view on the matter.

The Consumer Ombudsman is very sceptical to the proposal that has been presented by the European Commission for a new Directive in the area of consumer rights. Our main objection is that the proposal goes too far with respect to a total harmonisation of consumer contract law. In our opinion no real need for total harmonisation has been documented, nor do we agree with the Commission that the proposal is proportional. As far as we know, no proper consequence analysis has been carried out to shed light on any negative consequences this Directive might have for consumers.

The Consumer Ombudsman is of the opinion that EU consumer law should in general continue to be based on directives giving a minimum standard of harmonisation with a high level of protection. The higher the minimum level of protection, the fewer grounds there will be for Member States to deviate from the rules stipulated in the Directive.

The Directive's main purpose is to prepare the grounds for increased trade across borders in Europe, and e-commerce is primarily mentioned as the form of trade with the greatest potential for a significant increase in scope. If it is necessary to totally harmonise rules to achieve increased e-commerce, we believe it should be sufficient to harmonise certain specific rules that are suited to this type of harmonisation and that will have a direct effect on consumer willingness to participate in cross-border commerce. This could apply to, for example, provisions concerning the duration of the cooling-off period and the creation of a standard form stating the buyer's right to cancel certain purchase agreements within a defined time limit that it would be mandatory to send out. Another alternative is to harmonise several rules, but only rules concerning e-commerce. However, we prefer the first of these proposals: to harmonise a few specific key rules.

No documented need

The Commission uses as a basis for its proposal the fact that the differences in the Member States' consumer protection rules, made possible by current minimum standard Directives, in practice function as hindrances to commerce across national borders. The effect of the fragmented legislation is, according to the Commission, that businesses do not want to sell goods and services across national borders, and it is also claimed that it reduces consumers' opportunity to benefit from a larger selection and lower prices.

In the comments to the Green Book on revision of the consumer Directives, the EFTA States asked the Commission to document the need for totally harmonised rules. We cannot see that the Commission has responded to this request.

On the contrary, Eurobarometer 2008 shows that hindrances such as lack of access to the Internet, lack of confidence in sellers that one does not meet face to face, language difficulties and the lack of information about cross-border commerce make up the barriers. These are problems that are not necessarily solved by a total harmonisation of rules. Nor has it been documented that harmonisation of the legal framework will lead to comprehensive cross-border sales since 74% of the businesses in Eurobarometer 2008 responded that harmonised rules will result in little or no increase in their cross-border trade.

In our opinion this documentation is far from sufficient to show a real need for total harmonisation in such a large and important area of legislation.

Threatens existing and future consumer rights

The main problem with comprehensive total harmonisation as we see it is that it threatens both existing and future consumer rights. As we will point out numerous times in these comments, the proposed Directive entails a weakening of the rights of Norwegian consumers on several points. This will probably be a consequence in several other countries as well. Simultaneously, total harmonisation places a lid on the development of consumer law in Europe, and this is perhaps the most serious aspect of the proposal. The EU's consumer law has been developed with a background and experience from the Member State's respective legal systems. For example, it is easy to recognise elements from Norwegian law in several of the Directives. Even now, as this proposed Directive is presented, we recognise rules that are already present in several countries – rules that have been developed on top of the minimum standard Directives we have had until now. It is natural for rules to develop in step with changes in the markets and products. Perhaps rules will develop somewhat differently in different countries, on the basis of geographical and cultural differences. These rules will again provide inspiration for the possible development of EU legislation. This dynamic and need-based development of legislation is lost when a lid is placed on the development by means of totally harmonised regulations.

Not a proportional solution

As mentioned above, we are of the opinion that it is far too drastic when, in order to promote cross-border trade and specifically e-commerce, such a large and key part of consumer legislation is totally harmonised. Most purchases will still take place locally, and in our opinion this does not provide a reason to weaken existing consumer rights for these purchases, or to take away from countries the opportunity to regulate these purchases in future. In this instance we would like to present a few examples from Norway:

a) Right to complain

The Directive will have great consequences for the consumer's opportunity to complain about defects in goods purchased. The absolute deadline for a complaint according to the Directive is two years, while this deadline is set to five years for a lot of products in Norwegian legislation. This means that Norwegian consumers will lose their right to a five-year complaint period in the case of purchases that are meant to last considerably longer than ordinary consumer goods, for example washing machines and sofas. Such consumer goods are usually purchased after the consumer finds a product that is of the appropriate size, colour, quality etc. in a shop in the local environment. We have difficulty understanding why the consumer should be denied this right in local trade because the Commission wishes to improve cross-border trade. The relative deadline for complaints would also be reduced from a minimum of two months to a maximum of two months, which means that the consumer will be obliged to react more rapidly if the goods are defective.

b) Terms for advance payment and rights in the case of delay

The Directive assumes that the consumer shall pay the purchase amount in advance. We would like to note that in general we advise Norwegian consumers against advance payment since the consumer is in such a case poorly protected against companies in liquidation or those practising fraud. It was also assumed in the preliminary work for the Norwegian Consumer Purchase Act that terms and conditions requiring the consumer to pay the (entire) purchase amount in advance according to the circumstances can be considered unreasonable. We are uncertain whether this can be maintained if there is a total harmonisation of the Unfair Contract Terms Directive.

According to the Norwegian Consumer Purchase Act, upon delayed delivery from the seller, the consumer has the right to retain the purchase amount, to demand performance, to demand cancellation upon significant delay and to claim compensation. The only right the consumer has according to the Directive is the right to demand that money paid is returned, something that will not be enough to ensure the consumer's interests or rights in the case of delay. It is first and foremost in the consumer's interest to receive the object, and as soon as possible. It cannot be assumed that the object will be available at the same price from another business. If Norway is not allowed to provide more remedies in the case of delays, consumer protection will be weakened. A business will be able to speculate in not delivering the goods, for example, if currency rates have fluctuated against it or if it has entered into better contracts with others and does not have enough goods to deliver to all those who have placed orders.

c) The consumers' position in case of defects

In the case of defective or deficient goods, the Directive provides the consumer with more recourse than in the case of delay. However, the Directive gives the seller and not the purchaser, as is the case according to the Norwegian Consumer Purchase Act, the right to choose between repair or replacement delivery. The Norwegian Consumer Purchase Act also gives the consumer the right to demand that a replacement object be put at his disposal at the seller's expense if the person concerned is prevented from using the object. This is a very practical rule, for example in the case of defects with respect to cars or mobile telephones. However, this practical rule is also taken away from the consumer in the proposal for a Directive. The right to a replacement object is more practical when the purchase is made locally than in the case of cross-border trade, and again we must ask if it is reasonable to take consumer rights that are recognised in local trade away in order to promote cross-border trade.

Loss of legislation as a relevant instrument

The Directive is a drastic intervention for individual Member States since national legislation will no longer be a relevant instrument to solve consumer problems that arise.

As an example, we would like to present a specific problem from Norway. In Norway, telemarketing has become widespread in recent years. At the same time we have received enquiries from many consumers who have experienced problems in connection with telemarketing. There are various problems such as receiving calls despite the person concerned having exercised their right to decline unsolicited telemarketing and the obligation of businesses to respect this right, aggressive sales methods and sales scams. These problems have led to the poor reputation telemarketing has acquired and to a lack of trust in telemarketers. The trade organisation has attempted to meet the problems that have arisen by developing industry-wide standards. However, many players choose to ignore the trade organisation and its standards, and exploit the competitive advantages to be had by operating with unfair commercial practices.

The Consumer Ombudsman has used a lot of resources to put a stop to the illegal activities that have occurred. It has taken a long time and in the meantime many consumers have suffered financial loss. In implementing the Unfair Contract Terms Directive, an assessment was made of the extent to which there was a need to set more stringent rules for telemarketing than those already found in Norwegian legislation, which to a great extent corresponded to the Distance Selling Directive and the Directive concerning unfair commercial practices. After a thorough assessment of consumer concerns and business interests in the case, the Norwegian parliament adopted specific, more stringent rules for telemarketing, designed to meet the specific problems that had arisen: changes were made to the regulations concerning the consumer's right to decline unsolicited marketing and the obligation of businesses to respect this right (to avoid calling despite "do not call" reservations), limits were set with respect to the time of day telemarketing may take place (so that calling is not seen to be too aggressive), and separate rules were made with respect to requirements for contracts to be entered into in writing (to prevent sales scams). At the same time, new rules concerning enforcement and sanctions were introduced which will make it easier and faster to stop illegal activity.

These rules must be repealed if the proposed Directive is adopted as a total harmonisation Directive. Nor will it be possible in future to make use of legislation as an instrument in this manner even if specific problems arise that legislation could contribute to solving.

Too great an encroachment on consumer contract law – with complex consequences

The Consumer Ombudsman supervises Norwegian rules concerning unfair contract terms, which among other things implement the Unfair Contract Terms Directive.

Total harmonisation of the Unfair Contract Terms Directive appears in our view to be the field where the worst arguments for total harmonisation are made. It is an area that is very discretionary and harmonisation encroaches indirectly into all consumer contract law. It is not possible to get a general view of the effects of harmonisation, and in our view it is completely unacceptable that the field be totally harmonised when there is no overview of the consequences.

The standard for assessment in the Directive is that terms shall be considered unfair if they "cause significant imbalances in the contractual rights and obligations of the parties to the detriment of the consumer". When the Directive draws up the list of "significant imbalances", the threshold for intervention is higher than that found in current Norwegian law. The Norwegian Supreme Court has stated in case 2006-01867 A (Østlandsk Autoberging AS vs The Norwegian State c/o the Ministry of Children and Equality) that it "normally should not require a particularly great imbalance" in order to intervene in the case of unfair contract terms in a context of public legislation, even though it "[can] not be sufficient that it is found the balance could have been better". Thus the proposal for a Directive entails a reduction of consumer protection in cases pertaining to unfair contract terms according to Norwegian law.

The black list and the grey list contain express terms that either always or presumably always are unfair. Although guidance with respect to what should be viewed as unfair terms is positive, we are of the opinion that these are not suitable for total harmonisation. Nor has Norway previously wanted to make the grey list in the current Directive on unfair terms into law. One of the disadvantages of such express lists is that there arises uncertainty about how terms that are similar to the listed terms but not worded in the same way should be considered. We see a danger that the harmonised lists will make it more difficult to intervene against terms after a general evaluation of unfairness.

As an example, we refer to point 1 d) of Annex III: "Contract terms, which have the object or effect of the following, are presumed to be unfair: allowing the trader to terminate the contract at will where the same right is not granted to the consumer". A business will be able to argue that the term that gives both parties equal rights to arbitrary termination is in consequence a fair term.

In our opinion, a term that gives both parties an equal right to terminate arbitrarily will also be unfair. The consumer will usually be interested in having a contract fulfilled as agreed. The fact that he also had the right to terminate the contract without reason would be little comfort for a consumer who does not receive the goods or services for which he has entered into a contract because the seller terminates the contract without reason. How invasive such a term would be for the consumer would of course vary depending on the type of service or goods, but in our opinion a term that gives the trader the right to arbitrary termination would generally be unfair *despite the fact that* the consumer is given the same right.

If, for example, a consumer has purchased a ticket to an airline flight, the consumer in most cases will sustain a loss if the airline at will terminates the agreement. Even if the airline terminates the contract in relatively good time before the journey, it could be difficult for the consumer to find an equivalent flight at an equivalent price. The closer to the time of departure, the greater the injury will be. Would a term concerning the airline's right to terminate the contract be unfair, even though the consumer has the same contractual right? Would it make any difference if more specific terms for the right to terminate are made, for example that "the contract may be terminated without further justification by each of the parties up to an hour before the flight is scheduled"? What about a week before departure? Can the right to cancel also be without compensation so long as the consumer is ensured the same right? There are many questions here, and our concern is that if the Unfair Contract Term Directive is fully harmonised in this manner, an issue such as this will be process-driving and unclear

until the EU court has expressed an opinion on it, and the court may actually come up with a result that could offer consumers less protection than they have today.

The starting point in Norwegian law is that contracts shall be honoured. With respect to consumer purchases in general, the seller has no right to terminate the contract. Only upon a material breach of the contract on the part of the consumer does the seller have the right to terminate the contract. Current contracts can in some cases be terminated by a business, but there is usually a requirement for reasonable grounds such as those that are found, for example, in Sections 9-5 of the Norwegian Tenancy Act. We feel that a total harmonisation Directive in this area will at best entail great uncertainty about the extent to which terms that lie outside the grey list's point 1 d) will be able to be found unfair.

Total harmonisation of unfair contract terms will also encroach indirectly on all national consumer legislation in a manner where an overview of the consequences will be difficult to obtain. In the Consumer Ombudsman's supervision of unfair contract terms, emphasis is placed on how corresponding conditions are regulated by law. Contract terms that are contrary to compulsory (mandatory) legislation will be unfair and illegal. Contract terms that are contrary to optional (non-mandatory) legislation will in the Consumer Ombudsman's view often be unfair since such legislation stipulates the usual solution or the solution the legislator thought best.

The question is to what degree terms contrary to Norwegian compulsory law will still be perceived as unfair when rules concerning unfair contract terms are totally harmonised. For example, will terms that exclude the consumer's right to enforcement damages, terms that exclude the consumer's right to retain compensation or terms that give shorter periods for complaint deadlines than five years (and which are thus contrary to compulsory rules in the Norwegian Act concerning the construction of housing) still be unfair if the Unfair Contract Terms Directive is totally harmonised? According to the grey list's point 1 a), contract terms are presumed to be unfair if they "exclude or limit the legal rights of the consumer". The question is whether this applies to all national legislation, or whether it just applies to legislation that is a result of EU Directives. If it applies to all national legislation, there will still be a great difference in what is seen to be unfair contract terms in the EU, and the argument for total harmonisation of this area to create equal legal conditions will thus disappear. If point 1 a) only applies to other EU legislation, this will affect national contract law in a far too invasive manner to be defended, cf. the example of the Act concerning construction of housing cited above. The proposed Directive is not proportional if it totally harmonises the consumer's rights in relation to unfair contract terms in all areas of life, including construction of housing on real estate, to promote cross-border trade.

For us as supervisory authorities it will be more difficult to set large cases in motion with comprehensive sets of contract terms to consider when we see that there is doubt as to how far Chapter 5 of the proposed Directive goes. Examples of large cases that we have handled in recent years are the contract terms of Ryanair and of iTunes. In both these cases, we were able by means of negotiations to change a number of terms, which in our view resulted in better rights for consumers. The Consumer Ombudsman received an award from the EU Commission for its work on the iTunes terms. We have reviewed these cases and are evaluating the extent to which we would have started the cases and how far we would have come in the negotiations if the Unfair Contract Terms Directive was totally harmonised as is proposed in the draft for the new Directive.

Summary

No need has been documented for such a comprehensive totally harmonised Directive. The proposal threatens both existing and future consumer rights. The proposal is not proportional: it far exceeds what is needed to achieve the objective which is increased cross-border trade in general and especially in Internet commerce. The Member States lose national legislation as a relevant instrument in several key areas of consumer law. The Directive also encroaches far too strongly on national contractual law, with the complex consequences this will have.

The Consumer Ombudsman's proposal

In our view, Directives in the area of consumer rights should generally be based on minimum standard Directives. The level of protection should be so high that it gives all Member States a good level of minimum protection. Certain parts of the Directives can eventually be totally harmonised. The totally harmonised rules must be specific rules that are easily understood and recognised by consumers and which therefore actually will contribute to creating greater trust in commerce across borders. For example, rules concerning the duration of the cooling-off period and a common form stating the buyer's right to cancel certain purchase agreements within a defined time limit will be of interest for total harmonisation. At the most, only the rules for e-commerce should be totally harmonised.

Yours faithfully

Bjørn Erik Thon
Consumer Ombudsman

Annex:

The effect of harmonising the rules on unfair contract terms – case studies

Chapter V of the Commissions proposal for a Directive on Consumer Rights regulates and harmonises the rules on unfair contract terms. Annex II and III to the Directive contains lists of terms considered unfair in all circumstances (Article 34, cf. Annex II – the black list) and terms presumed unfair (Article 35, cf. Annex III – the grey list). If the term is not covered by any of these Annexes, the term can be considered unfair pursuant to Article 32 of the Directive provided the term “contrary to the requirement of good faith, [...] causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.”

The Unfair Contract Terms Directive, 93/13/EC, contains a similar provision in Article 3 and an Annex with terms which may be regarded as unfair. Since the Unfair Contract Terms Directive is a minimum harmonisation directive, Norwegian rules on unfair contract terms are currently affording consumers greater protection. According to the Marketing Control Act of 1972 (MCA) Section 9a, contract terms used in consumer contracts can be prohibited if they are considered unfair on consumers and if general considerations call for such a prohibition. When determining whether the terms and conditions of a contract are unfair, emphasis shall be placed on the balance between the rights and obligations of the parties and on whether the contractual relationship is clearly defined or not. It is the overall balance of the contract which is assessed. Even though the individual term cannot be deemed unfair, the totality of all the contract terms can be found unfair and in breach of Section 9a.

The Norwegian Supreme Court (case 2006-01867 A) has stated that MCA Section 9a does not require a substantial imbalance for a term to be found unfair. However, the Court said it is not sufficient that the term could be more balanced. If a term is contrary to mandatory legislation, it will always be considered unfair. Terms which deviate from non-mandatory legislation, commercial codes, guidelines or established market practises will in many cases be presumed unfair under the MCA Section 9a.

The proposed Directive on Consumer Rights will not allow Member States to implement rules giving consumers greater protection than what is envisaged under the Directive. Consequently, the provision as suggested in the proposed Directive will lead to a reduction of the protection afforded to Norwegian consumers since terms that are not significantly imbalanced can no longer be deemed unfair. To illustrate the consequences of reducing consumer protection against unfair contract terms, I will in the following go through three cases where the Norwegian Consumer Ombudsman has used the MCA Section 9a. I will give a brief assessment of how these cases might be solved under the new Directive. At the outset I would like to emphasise that the case studies are not intended to give a complete picture of all terms we have deemed unfair. This is only intended to give an idea of the impact of the proposal on Norwegian consumers in relation to three specific cases.

1. iTunes

In cooperation with consumer authorities from Member States, the Norwegian Consumer Ombudsman initiated infringement procedures against iTunes Music Store (iTunes) for non-compliance with the Marketing Control Act Section 9a in 2006.¹ There were a number of terms in iTunes Terms of Service (ToS) that was deemed unfair. I will go through the most

¹ For more information on the case against iTunes, see <http://www.forbrukerombudet.no/index.gan?id=490&subid=0>

important terms discussed and assess possible consequences of the proposed Directive on Consumer Rights.

Choice of law

iTunes ToS stated that the applicable law was English. Since the service provided at iTunes.no was exclusively marketed to Norwegian consumers and the use of English law would make the consumer's rights and obligations more uncertain, the term was deemed unfair.

According to the Regulation on law applicable to contractual obligations, 593/2008/EC, Articles 6.1 and 6.2, Norwegian law would apply to the iTunes ToS since consumers would be deprived of protection provided him by Norwegian law if English law was deemed applicable. Terms making the traders law the choice of law or terms not in accordance with national or community law are neither considered unfair in all circumstances nor presumed unfair according to the Annexes to the Consumer Protection Directive. Consequently, it must be established that the term causes a significant imbalance in the parties' rights and obligations. In this assessment it shall be taken into account whether the term is expressed in "plain, intelligible language and be legible", cf. Articles 32.2 and 31.1. It could be argued that the term is unfair, since it would make the consumers' rights and obligation under the contract difficult if not impossible to understand for the average Norwegian consumer. However, it is not clear whether such a term would be deemed unfair under the new Directive.

Unilateral change of terms

iTunes ToS stated that iTunes could unilaterally change the terms. Pursuant to Annex III points 1 k) and l) of the proposed Directive this would be presumed unfair.

Limitations on liability

iTunes ToS contained broad limitations on liability for damages caused by the iTunes programme. The term was found unfair because it was not in accordance with basic principles of contract law.

Pursuant to the Directive Article 35, cf. Annex III point 1 a), contract terms are presumed unfair if they exclude or limit "the legal rights of the consumer vis-à-vis the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations". The Danish version of the Directive, require that the consumers legal rights have a statutory basis.

In Norway consumers have no statutory contractual rights in relation to downloaded digital products. The first question is whether Annex III point 1 a) should be interpreted as requiring statutory basis for consumer's rights. This is unclear if you compare the wording of the English and Danish version. It is also unclear whether national legal rights are sufficient or whether the national legal rights must be based on community law to be considered unfair.

If a statutory basis is required, the second question is whether the term "causes a significant imbalance in the parties' rights and obligations" pursuant to Article 32 of the Directive. Since the term basically exempted iTunes from all liability, the term could be deemed unfair. However, in negotiating the term with iTunes with the legislative backdrop of the Consumer

Protection Directive and without the strong consumer protection legislation the MCA provides, the result would have been materially different as the aim would be to amend the term so that it would no longer be considered significantly unfair.

Use of non-interoperable technology

The iTunes ToS stated that music downloaded from iTunes could only be accessed and played on iTunes authorized products (PCs with the iTunes programme or Apple products, e.g. the iPod). iTunes used technology (a type of Digital Rights Management called FairPlay) to make it a difficult and cumbersome process to play songs downloaded from iTunes on competitors players, for instance from Creative. Both the term in the ToS and the technology used to enforce this term was deemed unfair.

It is important that technology can be deemed an unfair contract term pursuant to the proposed Directive. If not, vendors can circumvent the prohibition by implementing technology which enforces unfair contract terms even though the term itself is prohibited and removed from the contract.

The practise of tying a consumer to one particular vendor through contract or technology is neither unfair *per se* nor presumed unfair according to the proposed Directive. Consequently, the term would have to cause a significant imbalance to be prohibited. It could be argued that using technology and contract terms that ties consumers into purchasing products from one particular company, cause a significant imbalance in the contract. However, I would be hesitant to pursue this case under the proposed Directive because of the increased threshold of considering a term unfair.

2. Ryanair

In cooperation with consumer authorities in Sweden, Denmark and UK, the Norwegian Consumer Ombudsman initiated infringement procedures against Ryanair for non-compliance with the MCA Section 9a in 2003. There were a number of terms in Ryanair's Conditions of Carriage (CoC) that was considered unfair. In the following I will go through the most important terms.

Compensation for delays or cancellations

Ryanair's CoC denied consumers any compensation for delays or cancellations in direct violation of the Norwegian Aviation Act and the Montreal Convention.² This term could be presumed unfair pursuant to the proposed Directive Article 35, cf. Annex III point 1 a), which covers terms that exclude consumer's legal contractual rights. As mentioned earlier, point 1 a) does not clearly state which types of legal rights it covers, whether the rights need a statutory basis and whether the statutory basis should be national and/or community legislation.

Damaged luggage

According to the CoC consumers were not entitled to compensation for minor damages or damages to unsuitably, perishable or fragile luggage. The term was considered not in accordance with the Norwegian Aviation Act and the Montreal Convention. Under the proposed Directive Article 35, cf. Annex III point 1 a) it could be presumed unfair.

² Regulation 261/2004/EC was not in force at the time

Use of personal data

Ryanair's CoC allowed Ryanair to use personal data for other aims than to carry out the transport agreement, notably marketing of certain ancillary services, without an explicit permission from the passenger. This practise was not in accordance with the Norwegian Data Protection Act.

Violations of mandatory law are neither presumed nor considered unfair in all circumstances pursuant to the Directive. Annex III point 1 a) covers limitations or exclusions on the consumers' contractual rights in case of the trader's nonconformity, but not other rights such as for instance the right of protection of personal data.

Consequently, it must be established that the term causes a significant imbalance to the parties' rights and obligations for it to be considered unfair under the proposed Directive. Major breaches of the Data Protection Act would certainly be covered by the proposed Directive. Other breaches could however be considered not to cause a significant imbalance in the contract and could potentially be permitted under the proposed directive.

Extension of validity in case of illness or death

Ryanair's CoC denied passengers an extension of the tickets validity if the passenger was prevented from travelling due to illness or death to the passenger or the passenger's immediate family. This term was not in accordance with IATA's Conditions of Carriage points 3.2.1.3 and 3.2.1.4 which gave the passenger a right to extend the validity of the ticket in case of such an event.

Non-compliance with standard-form contracts issued by professional bodies are neither presumed nor considered in all circumstances unfair according to the Annexes to the proposed Directive. Under the proposed Directive, it would have to be established that the term caused a significant imbalance in the parties' rights and obligations. According to the CoC, Ryanair could cancel the flight and extend the validity of the ticket or make a refund for any reason. Not giving the passenger the same right in case of illness or death might be deemed a significant imbalance under the new Directive.

Penalties and fines and debit/credit card mandates

According to the CoC, Ryanair reserved the right to charge the passengers debit or credit card for any fines Ryanair was required to pay because of the passengers' failure to comply with travel requirements. In addition to the fine a fee of GBP 50 would be imposed for recharging the passengers' credit card.

This term is neither presumed nor considered unfair in all circumstances according to the Annexes to the proposed Directive. It is an open question whether the broad payment requirement or the fee of GBP 50 to recharge the debit or credit card causes a significant imbalance.

3. SAS

The Consumer Ombudsmen in Sweden, Denmark and Norway jointly initiated negotiations with the Scandinavian air carrier SAS in 2001 because the airline's Conditions of Carriage (CoC) was not in accordance with Scandinavian unfair contract terms legislation. SAS was singled out because it is a major airline in Scandinavia. Other airlines used similar terms and we subsequently initiated talks with them. There were a number of terms in SAS' CoC that was considered unfair. In the following I will go through the most important provisions and give a brief assessment under the proposed Directive on Consumer Rights.

Name change

SAS' CoC did not allow passengers to change names on purchased tickets. The term was considered unfair because it did not allow consumers to limit their loss in case the consumers were unable to travel. Any costs incurred by the airline because of the name change could be recovered through an administration fee.

This term is neither considered unfair in all circumstances nor presumed unfair according to the Directive. Consequently, it must be established that the term causes a significant imbalance to the parties' rights and obligations for it to be considered unfair under the proposed Directive. Whether denying consumers a right to change names on airline tickets causes a significant imbalance, is questionable.

Subsequent changes in air fare

According to the CoC, the price of the ticket was calculated after the ticket was ordered. In principle, the term enabled SAS to charge a higher price for the ticket after the purchase was made.

This term can be presumed unfair under Annex III to the Directive points 1 g) and 1 k) which covers unilateral change of terms or price increases by the trader.

Use of personal data

Similar to Ryanair's CoC, SAS reserved the right to transfer passengers' personal data to "ancillary services". Even though this provision was contrary to mandatory national law, the Norwegian Data Protection Act, cf. point 2.3, it is not considered unfair in all circumstances nor presumed unfair according to the Directive. Consequently, the term would have to cause a significant imbalance to the parties' rights and obligations to be considered unfair. Whether this term is of such a nature that it causes a significant imbalance is uncertain.

Check-in time

According to the CoC, SAS would not be liable for any loss or expense incurred due to passengers' non-compliance with the applicable check-in deadline. This term was deemed unfair as it exempted SAS from all liability even in cases when SAS caused the passengers failure to check-in at the right time, for instance if SAS organised the entire trip without ensuring sufficient time for transfers to connecting flights.

Under the proposed Directive, the said term would neither be considered unfair in all circumstances nor presumed unfair according to the Annexes. It could be argued that the

term causes a significant imbalance to the parties' rights and obligations; however, this is not clear.

Compensation for delays or cancellations

In case of delays or cancellations, the CoC only gave passengers the right to get a refund or a new ticket. This was not in accordance with the Nordic aviation legislation and the Warsaw convention which gives consumers certain mandatory contractual rights when travelling by air. This provision would be presumed unfair under the Directive Article 35, Annex III point 1 a).

4. Conclusion

Our work in the iTunes case contributed to the amendment of the terms and technology used so that iTunes no longer ties the consumer to use Apple products to enjoy music downloaded from the largest online provider of music. In relation to the cases against SAS and Ryanair, our work led to substantial amendments in the above mentioned terms. In all these cases, the Consumer Ombudsman negotiated and reached balanced solutions to the benefit of consumers. This would not have been possible without the strong statutory backdrop provided by the Norwegian Marketing Control Act. Under the proposed Directive I could have taken initiatives in relation to some of the provisions, however, because of the increased threshold in finding a term unfair, it would be more difficult to reach balanced solutions.

Companies are constantly introducing new terms and conditions. This is partly due to the simplicity in applying, amending and adding terms in an online shopping environment. The black and grey lists introduced in the Directive do not provide the flexibility needed to tackle new and unfair contract terms. The examples are few and narrowly defined. There will be a wide range of unfair terms falling outside the scope of the lists. Introducing such lists will make it more difficult to bring infringement procedures against terms not mentioned in any of the lists. On the other hand, when introducing total harmonisation Directives it is important that the precision of the wording in the Directive is on such a level that it leads to a harmonised European legal framework. In my view the proposed regulation on unfair contract terms is too vague to provide the legal certainty needed to create a uniform practice in this area. For these reasons it is my firm belief that introducing a total harmonisation Directive is not the appropriate way to tackle unfair contract terms in a rapidly developing area such as this.

If the new Directive is adopted in its current wording, the Consumer Ombudsman will no longer have the strong legislative support to negotiate properly balanced standard-form contracts with companies such as Apple, Ryanair and SAS. The proposed Directive will probably lessen the ability for the Consumer Ombudsman to reach balanced compromises when negotiating with businesses. The increased threshold for finding a term unfair, the uncertainties in the application of the Directive, the introduction of a grey and black list will potentially have negative impacts on our ability to combat unfair contract terms.