# Summary of memorandum

## About the Inquiry

As technology has advanced, the mobile telephone has come to be used for much more than simply making and receiving telephone calls. Today, the mobile telephone is used to surf the internet, order various kinds of goods and services, make payments and other forms of money transfers, etc.

One model for the payment of goods and services is that the consumer places a call or sends a text message (SMS) at a higher rate, called premium services. Payment is made later via the telephone bill or by the telecommunications provider deducting the amount from the consumer's prepaid card. This memorandum examines and analyses the legal position of consumers when making purchases of this kind.

An increasingly common phenomenon is for consumers to purchase and download software applications (apps) via their mobile telephones or tablet computers. This type of contract differs from premium services in that consumers normally do not pay for apps via their telephone bill, but rather by using a credit card linked to the consumer's account in the marketplace offering the apps (e.g. App Store or Google Play). Since many of the issues examined in this memorandum are relevant in this type of contract, the Inquiry has extended its examination to also include consumer protection when purchasing apps.

The Inquiry considers that, on the whole, consumer protection in this area is good. However, certain areas have been identified where measures are needed – in some instances in the

form of a new act and otherwise through measures based on applicable law.

## Concluding electronic contracts

Entering into contracts over the telephone can entail some difficulties for the consumer due to the limitations inherent in communicating by means of a telephone. This memorandum considers the regulations on concluding electronic contracts. A generally functioning self-regulation of the market, combined with a relatively extensive regulation under market law of the duty of business operators to provide information in purchasing situations, means that consumer protection in this area is relatively good. However, there is no rule sanctioned under civil law for cases where a business operator has not made clear that an order entails a payment obligation. Implementation of the Consumer Rights Directive (2011/83/EU) will fill this gap. The Inquiry therefore considers that the basic consumer protection when entering into electronic contracts will be satisfactory.

It is an increasingly common phenomenon that organisations collect contributions for charitable purposes via premium rate calls and premium SMS services. In these cases, the donation is not completed until the telephone bill is paid. The question has therefore arisen of whether a donation pledge via an SMS message should be made binding for the donor. The Inquiry considers that such is not the case. Freedom from obligation is entirely in line with intent of the Gifts Act, and in the Inquiry's opinion there is no cause to change this arrangement.

## Subscriber responsibility for orders and payments of others

A subscriber has certain legal rights to block their telephone, at no charge, from premium rate services, and to have an amount

block implemented for their invoices. There are, however, numerous examples of cases where subscribers have contested their payment obligation regarding the purchase of apps, ringtones or premium rate calls, on the grounds that it was someone else, usually a child in the family, who, without permission, entered into a contract concerning the purchase of digital services by means of the subscriber's telephone. The question then arises of who bears the burden of proof regarding whether it was the subscriber or some unauthorised person who used the telephone, and what responsibility a holder of a subscription or prepaid card with an operator, or an account with e.g. the App Store, has for other people's orders and payments.

For example, under a provision of the EC Payment Services Directive (2007/64/EC), the burden of proof should rest upon the person who claims the subscriber has carried out a transaction, at least if the subscriber has a reasonable explanation why he or she has not carried out the transaction, and has not consented to it. It would seem that this is also the way the burden of proof is placed in practice. In this context, it can be stated that the mere fact that a parent lends their mobile telephone to their child should not mean that it can be considered that the child has been given authorisation to purchase ringtones or apps on behalf of their parent.

The Inquiry considers that the mobile telephone's PIN code to the SIM card does not constitute a payment instrument under the Act on Unauthorised Transactions with Payment Instruments (2010:738), since the telephone PIN code was not provided specifically for payment transactions. This means that the above-mentioned Act does not provide the consumer with any immediate protection against unauthorised transactions. However, this Act, as is the case with other general rules on authorisation, etc., may be considered to provide consumers with a minimum degree of protection through Section 36 of the Contracts Act. Thus contract terms and conditions that are more stringent towards consumers should be considered invalid.

This opinion affects most of the currently existing market terms and conditions. The Swedish Consumer Agency should examine operators' contracts and, if these are not revised so that the terms and conditions at the very least fulfil the requirements under the Act on Unauthorised Transactions with Payment Instruments, bring action for a prohibitory order to the Swedish Market Court.

In this section, the Inquiry also presents views on how the requirement concerning gross carelessness in the Act on Unauthorised Transactions with Payment Instruments has been formulated and how the requirement has been applied in practice. In this context, it is asserted that the requirements concerning care should be less stringent regarding the use of a code, the primary purpose of which is to enable telephone calls and surfing in general, than they are regarding the use of a code that is to be used exclusively for payment transactions.

During the course of the Inquiry, the four major telecommunications operators jointly launched a service, WyWallet, that can be described as a mobile wallet, to and from which consumers can transfer money and pay for premium SMS services, etc., via their mobile telephones. Banks, too, have announced that they intend to launch a similar service in autumn 2012. When using a mobile wallet, the consumer must use a special code. In this way, the Act on Unauthorised Transactions with Payment Instruments will be applicable to transactions that have not been authorised by the account holder.

Since consumer protection can be considered satisfactory by means of Section 36 of the Contracts Act and Sections 3 and 4 of the Consumer Contracts Act (1994:1512), and since it is uncertain how extensively premium SMS services and premium rate calls will be offered in the future, the Inquiry considers that at present, the responsibility for unauthorised use of mobile telephones should not be regulated in law.

## Orders of premium services and apps by minors

The use of premium services and apps by minors has led to new problems when applying the regulations on the legal competence of minors, since this type of contract is associated with an anonymity that does not exist with in-store purchases. A similar phenomenon for young users is the development of various gaming sites and network services, called communities, run by business operators on the internet and where young people are encouraged, by means of premium rate calls or premium SMS services, etc., to upgrade their membership and purchase various virtual products. The Inquiry has examined the regulations on the legal competence of minors and concludes that minors have good protection under the currently applicable regulations. The fact is that under the general rule, a minor lacks legal competence and can only enter into a contract if their parent or guardian has given their consent. To be sure, it can be considered that a parent or guardian who has transferred money or a prepaid card to his or her child has given the child authorisation to enter into a contract customary for a child of that age (cf. implied authority). However, in practice this rule has been applied with caution. Even if the provision in Chapter 9, Section 6 of the Children and Parents Code could be made somewhat more explicit to clarify the applicable law (the Inquiry is working on a draft of such a legal text), the Inquiry does not consider that children's handling of mobile telephones requires legislation.

Furthermore, the Inquiry's view is that the existing regulations on marketing that target young people provide adequate protection. Under the Marketing Act (2008:486) in particular, marketing may not directly encourage children to purchase products. Nor may advertising be integrated into games on the internet, etc., so that children do not understand what comprises advertising. The Inquiry considers that offers of In-App purchases, which appear in apps targeting children, are contrary to generally accepted business practices and constitute unauthorised marketing.

## Mandatory consumer protection in the event of delays and defects regarding digital products and services

The Inquiry has concluded that neither the Consumer Sales Act (1990:932) nor the Consumer Services Act (1985:716) is applicable when a consumer enters into a contract on digital content. Accordingly, consumers now enter into numerous contracts that are not covered by mandatory protection under consumer law, and the Inquiry has considered whether there is a need to expand consumer law so that it also covers this type of contract. However, the Inquiry considers that it is possible to apply the Consumer Sales Act and the Consumer Services Act by analogy to contracts on digital content, and the relevant provisions can be made mandatory in accordance with Section 36 of the Contracts Act. In view of this, and since, during the course of the Inquiry, it has emerged that consumers seldom object to defective or delayed digital products or services, the Inquiry considers that there is no need to introduce legislation on this issue.

## The responsibility of operators, the marketplace and wallet companies when arranging payment

The operator arranges payment for premium services from the consumer to the content provider. However, a consumer does not enter into a contract concerning the purchase of a premium service with the operator, but rather with the content provider. This three-way relationship (operator – content provider – consumer) leads to certain difficulties for the consumer to object to and submit a claim concerning defective premium services. The situation in the app market is at times similar; the consumer enters into a contract concerning the purchase of the app with the developer, while the marketplace, which arranges the consumer's payment, may be separate from the developer.

The Inquiry notes that a party that collects a debt on behalf of another party without having acquired it cannot have greater rights than the holder of the debt (the principal), since it is the principal's right that is being asserted when collection is made. Contracts stating that the consumer does not have the right of opposition concerning a party collecting a debt can be declared unreasonable under Section 36 of the Contracts Act, as compared with Section 28 or Section 29, first paragraph of the Consumer Credit Act (2010:1846). It is therefore the Inquiry's assessment that the consumer has a mandatory right of opposition regarding the operator/marketplace in these situations, regardless of whether or not the operator or the marketplace has acquired the debt. However, the provision on the consumer's right of recovery in Section 29, second paragraph of the Consumer Credit Act is not applicable in these situations, where the operator or the marketplace is merely an intermediary. The consumer therefore cannot demand repayment from the operator or the marketplace of what has been paid to the operator or the marketplace for a defective product or service. However, the Inquiry considers that the right to recovery should be limited to apply to the original seller or the person who provides or assumes responsibility for the financing of a purchase on credit. For this reason, the Inquiry does not propose any legislative changes.

In a footnote, the Inquiry presents a proposal concerning revising and clarifying Sections 28 and 29 of the Consumer Credit Act, but considers that a proposal on these changes would traditionally require more extensive explanations than can be dealt with here.

One circumstance that is particularly problematic is that the terms and conditions of some of the operators' contracts mean that the operator can discontinue the telephone subscription if payment for a premium service is not received. Having a telephone subscription discontinued constitutes such a restrictive measure that there is a risk of consumers refraining from using the important means of exerting pressure that

withholding payment represents when the consumer feels that the content provider has committed a breach of contract. The operators' provision on discontinuing a subscription is not consistent with the consumer's mandatory right to withhold and right of opposition under the consumer protection laws, if the content provider has committed a breach of contract. In such a case, the condition should be deemed invalid under Section 36 of the Contracts Act. Under Chapter 5, Section 19 of the Electronic Communications Act (2003:389), discontinuation of a subscription in the event that a premium service is not paid for (even in situations where the consumer commits a breach of contract) is to be limited to that particular service, except where the consumer has previously made late payments and received a demand for payment. There is thus no need to introduce legislation on this issue, despite a conflicting judgment from the Swedish Market Court.

Operator threats to block all telephone services if the subscriber does not pay a debt to a content provider would appear to involve debt collection services, in view of the operator's role as intermediary.

In addition, the Inquiry considers that, under Section 36 of the Contracts Act, compared to Section 23 of the Commercial Agency Act (1991:351), consumers should have a mandatory right to submit claims to the party that arranged a purchase from a third party. It would not appear to be necessary to introduce legislation on this issue, either.

## Automatic extension of contracts

Certain apps contain functions that allow the customer to acquire content on a subscription basis. These In-App subscriptions are automatically extended for applicable periods of time. There are also a number of other markets, such as internet dating sites and the gym industry, in which time-limited contracts are automatically extended unless the consumer

terminates the contract a certain amount of time before it is to expire. Since the parties often enter into fixed-term contracts extending over a relatively long period, it can be difficult for the consumer to remember to terminate the contract. The consumer is often only reminded about the contract after he or she receives an invoice for the new period. It is then usually too late to terminate it. The Inquiry proposes that a new law be introduced on the consumer's right to prevent the extension of contracts. The law is to be applicable when no other legal provisions exist. It is to give consumers the right to terminate a fixed-term contract within three weeks of the date the consumer receives a payment request for a new period, provided that the business operator, no more than two months prior to the expiration of the contract term, has not informed the consumer in writing: 1. that unless the contract is terminated, it will be extended; 2. what the terms and conditions will be if there is an extension; and 3. that an extension can be avoided if the consumer terminates the contract by sending an email to that effect to a specified address within one month of the date that the message was sent.

## Right of withdrawal regarding contracts on digital content

The right to withdraw from a contract entered into at a distance is protected under EC law, and the Swedish regulations on the right of withdrawal are found in the Distance and Doorstep Sales Act (2005:59). However, the development of digital products has resulted in restrictions to the consumers' right of withdrawal, since after digital transfers it is naturally difficult to fulfil the currently applicable requirements concerning the return of the item. However, under the new Consumer Rights Directive (2011/83/EU), which is a full harmonising directive, the consumer has the right to withdraw from a distance contract within two weeks, unless the consumer has explicitly consented

to losing the right of withdrawal. The Directive does not contain any exemptions for goods that cannot be returned due to their nature. In other contexts, the Swedish legal regulations will need to be adapted to the Directive. The Inquiry therefore refrains from making any proposals in this section.

## Prohibition against charges in the Payment Services Act

This memorandum examines the issue of whether the Payment Services Act (2010:751) is applicable to mobile telephone operators and if so, how the prohibition against charges in Chapter 5, Section 1, fourth paragraph of the Act is to be applied when making payments via a mobile telephone. The Inquiry has concluded that arranging payments via SMS messages and premium rate calls, where the operator collects payment through the telephone bill, constitutes a premium rate service in the sense referred to in the Payment Services Act, when the product or service arranged is consumed externally of the telephone, e.g. when the arrangement concerns a bus trip, parking fees, the purchase of a product in a vending machine, etc. However, the Inquiry does not consider a mobile telephone PIN code to a SIM card to be a payment instrument. In the Inquiry's opinion, this means that the prohibition against charges is not applicable with regard to these premium rate services. This perception is contrary to that of Finansinspektionen (the Swedish Financial Supervisory Authority) and the Swedish Consumer Agency. The Inquiry also has some other views regarding the appropriateness and design of the prohibition against charges. However, since a review of mobile payments is underway in the EU, the Inquiry is not presenting any legislative proposals.

## Customer due diligence requirement with certain premium services

Finally, the Inquiry examined the requirement in the Act on Measures against Money Laundering and Terrorist Financing (2009:62) (Anti-Money Laundering Act) concerning customer due diligence. The Inquiry concludes that this requirement prevents mobile telephone operators from arranging payment for goods and services consumed externally of the telephone when the consumer has an unregistered prepaid card. The requirement of customer due diligence is justified by the ambition to prevent and impede money laundering and terrorism. However, it is difficult to perceive any major risk of such activities regarding today's mobile telephone services, and it is the Inquiry's assessment that this risk does not justify the inconvenience to customers holding prepaid cards that requiring registration of these cards entails. Prepaid cards are often given to children and young people, and it is desirable that it is easy for them to use prepaid cards when making payments, for example when taking a bus. Requiring registration of prepaid card holders has also meant that it is no longer possible to remain anonymous when purchasing goods and services via a mobile telephone, which can also raise certain concerns from a privacy perspective. However, the requirement concerning customer due diligence when arranging premium services is regulated under EU law. There is thus no reason for the Inquiry to present any proposals on this issue.

## Financial consequences of the proposal

In principle, the proposal of a new law on automatic extension of contracts entails clarification of existing legislation. The consequences for companies are, however, expected to be limited. Otherwise, the Inquiry has concerned itself with interpreting and clarifying the current legal situation in a range

of areas that are linked to trade in goods and services via mobile telephones. Even though the Inquiry's interpretation of the legal situation may mean that operators and marketplaces may need to change the terms and conditions of their contracts in some respects, it is expected that the economic consequences for the companies concerned will be small.