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Complaint regarding Apple iCloud's terms and conditions

The Norwegian Consumer Council ("the Consumer Council" hereafter) is hereby filing a complaint on iTunes Sarl, 31-33, rue Sainte Zithe, L-2763 Luxembourg ("Apple" hereafter) for breaches in the Norwegian Marketing Law and the Council Directive 93/13/EEC on unfair terms in consumer contracts. The complaint is based on the discrepancies between Norwegian Law and the standard terms and conditions applicable to the Apple iCloud service ("the Agreement" hereafter), as they are presented at: <http://www.apple.com/legal/internet-services/icloud/no/terms.html>.

The Consumer Council finds that the Agreement in several aspects is in breach of the law regarding control of marketing and standard agreements.

The background for filling the complaint is the study prepared by the Norwegian Consumer Council published 31st January 2014. The study was conducted as part of the Consumer Council's work to ensure good consumer rights in digital services. A survey conducted on behalf of the Consumer Council in November 2013 showed that more than 40% of the Norwegian population uses cloud storage services. The study also showed that consumers rarely read the terms and conditions, mainly because of their length and convoluted language and forms which hamper understanding. Of all the tested services compared in the Consumer Council's research, Apple iCloud's Agreement was the least comprehensible.

The Consumer Council conducted the study by analysing 11 key areas that were considered especially important for consumers. The study shows that several services can terminate user access to the service with no reason, and that some of the services reserve the right to review the users' file contents.

However, the most **serious issue found in the study was Apple's unilateral right to change the Agreement at any time, at their own discretion, and without giving users notice.**

1. About iCloud

iCloud is a cloud storage service created and hosted by Apple. The service allows users to store music, images, apps, books, documents, contacts, calendar and email on Apple's servers with automatic synchronisation to other iOS devices including iPhone, iPod Touch and iPad, in addition to Mac and Windows. iCloud offers 5 GB free storage; with the possibility of purchasing additional storage.

2. Norwegian law is applicable to the Agreement

The Agreement's section regarding «Governing Law» shows that Norwegian law is applicable to the Agreement:



«[...] If (a) you are not a U.S. citizen; (b) you do not reside in the U.S.; (c) you are not accessing the Service from the U.S.; and (d) you are a citizen of one of the countries identified below, you hereby agree that any dispute or claim arising from this Agreement shall be governed by the applicable law set forth below, without regard to any conflict of law provisions, and you hereby irrevocably submit to the non-exclusive jurisdiction of the courts located in the state, province or country identified below whose law governs:
If you are a citizen of: _____ Governing law and forum:
Any European Union country or Switzerland, Norway or Iceland The laws and courts of your usual place of residence
Specifically excluded from application to this Agreement is that law known as the United Nations Convention on the International Sale of Goods.» (Our emphasis)

For Norwegian citizens the Agreement is consequently governed by Norwegian law, and the Norwegian Marketing Practices Act is thus applicable.

3. Unfair contract terms

3.1. About the Apple iCloud standard terms and conditions

The Agreement between Apple and the user is creating mutual obligations, as it imposes both Apple and the User both duties and rights. It is the Consumer Council's opinion that the Agreement disfavours one-sidedly for the User. Users are given limited rights, while Apple reserves quite a few, partly, unfair rights.

Furthermore, the Agreement is difficult to navigate and hard to read. It contains more than 8600 words, with little or no formatting, which makes it difficult to understand for an average user. Users of cloud storage services often store all their important documents, photos, music and other digital content in the cloud, and do not always keep a second copy of their content. It is therefore of particular importance that the terms of the service are clear and understandable to the user. A key aspect of this is under what circumstances and on what grounds the terms of the service might change, and if sufficient time is given to the user to complain or to the change service. It is the view of the Consumer Council that this is not the case today with iCloud's terms and conditions.

3.2. The right to unilaterally alter the terms of the contract

In the Consumer Council's view, the Agreement's clause regarding changes is in breach of the Norwegian Marketing Practices Act section 22 cf. the European Council Directive 93/13/EEC on unfair terms in consumer contracts:

“Apple reserves the right at any time to modify this Agreement and to impose new or additional terms or conditions on your use of the Service. If you do not agree with them, you must stop using the Service and contact iCloud Support to retrieve your Content. Your continued use of the Service will be deemed acceptance of such modifications and additional terms and conditions.”

The Norwegian Marketing Practices Act section 22 states that:

*“Terms and conditions which are applied or are intended to be applied in the course of trade with consumers may be prohibited if they are deemed to be unfair to consumers and if general considerations call for such a prohibition. The same shall apply to terms and conditions applied to organisations that are not primarily acting in the course of trade, as long as the contract is to serve the personal purposes of the members.
In the assessment of fairness, emphasis shall be given to the balance between the rights and obligations of the parties, and to the clarity of the contractual relationship. [...]”*



The provision applies whether or not the service in question is paid for, cf. MR-2003-2 (decision by the Market Council).

In sum, two considerations must be taken into account when assessing whether the contract terms are unfair: First, the Agreement must be balanced. Second, the presentation of the parties' rights and duties must be clear.

However, the assessment is nevertheless meant to be quite open and flexible.

The Council Directive 93/13/EEC on unfair terms in consumer contracts is inter alia implemented into Norwegian law through the Norwegian Marketing Practices Act section 22 and the Norwegian Contract Act sections 36 and 37. Pursuant to the directive's article 3, first paragraph

“[a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer”.

According to the directive's article 3, third paragraph, the directive contains an annex which contains an indicative and non-exhaustive list of terms which may be regarded as unfair. It is laid down in paragraph 1 subparagraph j) of the annex that it will be regarded as unfair

“enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract”.

Further, pursuant to paragraph 2 subparagraph b)

“[s]ubparagraph (j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract”.

Paragraph 1 subparagraph j) of the annex limits the businesses' right to reserve to themselves the right to unilaterally alter the terms of the contract. For a change clause to be deemed fair, a reason for the change must be specified in the contract. This ensures a certain degree of control and predictability for the consumer. Further, the reason for the change must be “*valid*”. Subparagraph j) offers no further guidance as to what constitutes a “*valid reason*”.

If a contract term does not fulfil the annexes requirement for a valid reason, there is a presumption that the term is unfair according to the Norwegian Marketing Practices Act section 22.

The iCloud terms do not specify when Apple may change the terms of the Agreement. Nor do the terms state an obligation for Apple to notify the users of the service of changes to the terms and conditions. The users may, in other words, risk that important terms and conditions are changed without notice being provided to them in a reasonable way. In light of this, the users' ability to terminate the account if they disagree with the implemented changes is not satisfactory. In the Consumer Council's view, the Agreement appears unbalanced and unpredictable for the users of the service, and the clause must thus be in defiance of the Norwegian Marketing Practices Act section 22.

The question regarding businesses' right to alter the conditions of a contract unilaterally has not, as far as we are aware, been tried often in the Norwegian courts. The Market Council did, however, assess the question in its case 7.96. This case concerned the so-called “*verdenskortet*” (“the world card”) issued by Statoil and Diners Club. From the contract terms, it appeared that Statoil and Diners had the right to change the terms with one month prior written notice, regardless of whether



the changes were substantial or not. An express acceptance from the user was not required; it was sufficient that information regarding the changes was issued. In the Consumer Ombudsman's opinion, this was unfair to the consumers. Negotiations between the Consumer Ombudsman and Statoil/Diners did not succeed, and the case was sent to the Market Council.

In its decision, the Markets Council first states that the contract regarding "verdenskortet" is a contract with mutual obligations, which as a starting point may not be changed without the consent of both parties'. Merely giving notice is, in the Market Council's view, not enough: Many consumers will not take the time to carefully read the information from the company, and these consumers will thus be bound by the new terms without actually having accepted these. Statoil/Diners argued that it would be unreasonably expensive for the companies to call for express consent from all customers whenever changing the contract. However, the Market Council pointed out that judging from the way the case was presented to them, it did not appear that there was a frequent need to make substantial changes to the contract, and that this would thus not be a problem for the companies. The Market Council agreed with the Consumer Ombudsman's opinion, and the new terms in the Statoil/Diners Club contract were ruled invalid in conjunction with the Norwegian Marketing Practices Act section 9a (present section 22).

This precedent case illustrates that even if a businesses may have a legitimate need to make changes to consecutive contracts, the right to do so may not be used too widely towards consumers. If the changes are substantial, it is necessary to obtain an express consent from the consumer. An unrestricted unilateral right for the business to change the contract will provide the business with a considerable advantage, and will disturb the balance of the contractual relationship.

4. Concluding remarks

We, therefore, ask the Norwegian Consumer Ombudsman to consider the Apple iCloud's Agreement, in particular the above-mentioned right to unilaterally alter the terms of the contract, and consider appropriate measures towards Apple.

Please do not hesitate to contact us if anything is unclear or more information is needed.

Vennlig hilsen
FORBRUKERRÅDET

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This document has been approved electronically and does not contain any signatures