

MARKETING AND TERMS OF CONTRACT OF BROADBAND CONNECTIONS

Connection Speed and Coverage Area of the Network

This guideline addresses problems and legislative requirements pertaining to connection speeds. While the main focus is on broadband services offered by mobile communication networks, the same principles apply to other types of connection as well.

The fixed line broadband connection is still the most common type of broadband connection on the market. Wireless networks include mobile broadband services offered on mobile networks and on Digita's @450 network. The vast majority of the reports on connection speed and functionality received by the Consumer Agency are made regarding mobile broadband connections offered on mobile networks.

Due to technical reasons, various networks differ in regard to what factors influence the actual transfer speeds available to customers. With mobile networks the transfer speeds available to customers are influenced, for instance, by the geographic area the customer is in at any given time, as network technologies may vary from one geographic area to another. However, this factor does not apply to customers using fixed line networks. For any kind of broadband service, **the company must ensure the functionality of the service and, within their marketing, provide consumers with a sufficient amount of truthful information regarding the service features, such as connection speed. If the service does not live up to the promises made to the consumers, the telecommunications operator is liable for any service defects as stipulated in the Communications Market Act.**

For consumers, connection speed and the coverage area of the network are essential considerations in the process of choosing which service to subscribe to. Consumer reports suggest that marketing by service providers sends out false or misleading messages regarding connection speed and functionality. The most common source of complaints is slow connection speed. For example, connection speed during the evening hours has been reported to be less than one fifth of the advertised theoretical maximum speed, or generally only one tenth of the theoretical maximum speed.

Several reports also mention problems of services repeatedly not functioning at all. Several complaints also highlight the fact that consumers have been sold a connection with theoretical maximum speeds that are impossible to reach at the subscriber's address. One example of such instances is the service providers selling a 3G-based mobile broadband subscription to customers whose address is not within the coverage area of the said 3G network. In regard to the management of service defects, the reports suggest that operators have not been able to pinpoint the cause of problems or rectify the problems within a reasonable time period, and that requests by the consumer to terminate the contract have either not been granted or have not received any response within a reasonable time period.

The Consumer Agency has requested several telecommunications operators to submit their accounts of what is stated in the service description, contract forms and terms of contract regarding the maximum speed, actual speed and minimum speed of broadband connections. The Consumer Agency has also requested certain telecommunications operators to clarify accounts of their marketing and terms of contract based on individual reports from consumers.

1 Connection speed and marketing of broadband connections

The marketing of broadband connections is governed by **the general regulations of marketing in Chapter 2 of the Consumer Protection Act**. According to Section 1 of Chapter 2 of the Consumer Protection Act, no conduct that is considered inappropriate or otherwise unfair from the point of view of consumers shall be allowed in marketing. Marketing that does not convey necessary information in respect to the economic security of consumers shall always be deemed unfair. According to Section 2 of the same Chapter, false or misleading information shall not be conveyed in marketing.

The regulations of marketing stated in the Consumer Protection Act are, on one hand, meant to prevent inappropriate marketing activities directed at consumers, and, on the other hand, to force businesses to provide information that is relevant to consumers' decision making process through their marketing.

The clause pertaining to false and misleading information aims to emphasise the fact that providing untruthful or misleading information in marketing is particularly unacceptable. Marketing that is in breach of this regulation tends to give consumers a false impression of the contents of the service or product offered, or any aspect of purchasing the service or product. Misleading information is a more general concept than false information. Even marketing that contains truthful information may be construed as misleading if it doesn't include information that is significant in the consumer's opinion or if the information is presented in an unclear manner. The advertiser must ensure that the overall impression of an advertisement - text and graphic content combined - gives an accurate impression of the offer's content.

The fact that the service or product being marketed is complex in nature and involves an abundance of information does not mean that information relevant to consumers can be left out or presented in an unclear manner. Broadband connections are complex consumer services and the actual data transfer speed of a broadband connection is influenced by a number of factors. Close attention must therefore be paid in the marketing of such services to ensure that information essential to consumers is not left out or presented unclearly. The marketing must give consumers an accurate overall impression of the features of the service marketed, including connection speed. **Marketing may be construed as inappropriate if the consumer's attention is drawn to factors irrelevant to consumer decision making process, or if information relevant to forming an accurate overall impression of the service is left out.**

The connection speeds of mobile broadband services may presently vary a great deal more than fixed line connection speeds, as the connection speed over mobile networks is primarily dependent on the network technology available (e.g. GPRS, EDGE, 3G, HSDPA). The theoretical maximum speeds presented in the marketing are based on a 3G network capacity. Connection speeds are also affected by the amount of traffic on the network. The higher the number of users in the area of a given base station, the smaller the share of bandwidth allocated to each user. Furthermore, voice and message traffic are given priority over data traffic. Network coverage may also be weaker indoors. Data transfer speeds may also be influenced by the type of mobile device used by the consumer.

At present, marketing materials generally indicate theoretical maximum data transfer speeds over mobile networks using 3G technology. The naming conventions of service packages and speed categories are also often based on these theoretical maximum speeds.

Marketing shall be construed as misleading if an advertisement for a broadband connection is dominated by expressions of theoretical maximum speeds different from actual transfer speeds and information pertaining to actual connection speeds and limitations on the network technology used are not stated at all or are expressed in an unclear manner. Marketing in general may not give the impression that the connection works the same way everywhere without providing clear information regarding the limitations on network coverage.

Expressions related to connection speed in marketing must **give an accurate and truthful impression of the actual data transfer speed available to the consumer. Marketing must include information on the range of actual, realisable speed**, but it may additionally be necessary to provide more details on typical actual speeds within the range given at various times of the day. In advertising, numerical information pertaining to connection speed could indicate the **actual average connection speed during normal hours of use**, such as between 7 a.m. and 1 a.m., instead of theoretical maximum speeds. Marketing must also provide information on any geographic and regional differences in connection speeds or the network coverage area of certain types of networks.

In the sales situation it must be clarified to each consumer entering into a service agreement whether the speed category being subscribed to is available for the intended use of the consumer in question, for example, based on the consumer's geographical location. Details about connection speeds must also be readily available, for example, on the service provider's website. Section 66 of the Communications Market Act stipulates that the contract terms and price lists must be published in such a way that they are readily available to subscribers free of charge.

Finally, we shall focus on taking other factors affecting connection speeds into consideration in the marketing. This includes factors such as the technical features, limitations and software updates of the device that the consumer intends to use the service with. The operator's marketing communication must provide sufficient and truthful information on what technical requirements exist for using the service in terms of, for example, the hardware or mobile device used by the consumer.

2 Fairness of contract terms and service defects

According to Section 1, Chapter 3 of the Consumer Protection Act, businesses offering consumer goods or services shall not make use of contract terms which, considering the price of the good or service and the relevant circumstances, is to be deemed unfair from the point of view of consumers. Further **special provisions are given in Chapter 7 of the Communications Market Act**, which states in Section 58a that provisions pertaining to user rights shall not be derogated from by agreements to the detriment of the consumer. Telecommunications operators have an obligation to draw up standard agreement terms for consumer agreements, which shall not include any terms of limitations unfair to the consumer (Section 66). The legal relationship between the consumer and the telecommunications operator is always also covered by the Consumer Protection Act (Section 83).

Unfair terms include any terms in breach of the provisions of the Communications Market Act and, in most cases, terms that breach discretionary rights. The unfairness of contract terms is assessed based on whether they favour the business to the extent that a fair balance no longer exists between the contractual parties. Contract terms may also be construed as unfair if they are worded unclearly.

According to Section 67 of the Communications Market Act, communication service agreements shall specify the nature and features of the services provided and the types of maintenance service offered. The provision was amended based on a government proposal to add a clause regarding the features of the service in addition to the clause on the quality of the service. According to the government proposal, current agreements are problematic in the sense that the features of the service in question are not described in sufficient detail. As a result, the contractual parties may not be aware of, or may have different views on the nature of the service which was originally agreed upon. The amendment aims to have **agreements define in greater detail how the service should function and what its essential features are. Agreements must address features in as much detail as possible to help define defects in service delivery as referred to in Section 67d.**

According to Section 67d of the Communications Market Act, the delivery of a communications service is defective if the quality or mode of delivery of the communications service does not correspond to what is

considered to have been agreed upon. Unless otherwise agreed, the delivery of a communications service is defective if the communications service does not meet the marketing information or differs from what the user can normally expect from a similar service. The mandatory provisions of Section 67d of the Communications Market Act mean that the determination of a service defect is based not only on the written service agreement, but also the service provider's verbal promises to the user regarding the detailed quality, as well as the content of the service and the service features communicated in the marketing of the service. This view is supported by the government proposal regarding the amendment. Section 67e of the Communications Market Act stipulates that the user has the right to demand and the operator has the right to carry out the rectification of the defect. If the defect cannot be rectified or if such a rectification is not made within reasonable time after the user's notification of the defect, the user shall have the right, based on Sections 67f-67h, to a reduction of price, standard compensation, compensation for damages and termination of the agreement.

3 Defining connection speed in the service description and terms of contract

Speed categories are currently described in service descriptions based on a numerical value corresponding to theoretical maximum speed. For example, service descriptions and terms of contract may indicate that the speeds listed are theoretical maximum speeds and that actual data transfer speeds may be lower. Some terms of contract also indicate factors which may influence connection speeds. Terms of contract for mobile broadband connections may additionally reserve the operator's right to give priority to other types of network traffic and indicate that the operator makes no guarantees that a given data transfer speed will be achieved. The order confirmations or service descriptions of fixed line broadband connections offered by certain operators also indicate a minimum speed or a speed that subscribers may "generally" expect to achieve. According to reports and information received by the Consumer Agency, such minimum speeds are not indicated for mobile broadband services.

As indicated above, the quality and features of the service must be defined in the service description and terms of contract clearly enough to facilitate the determination of service defects. Contract terms may not stipulate service quality requirements, for example regarding connection speed, so low or so open to interpretation that they practically prevent service defects from happening. Provisions which are unclear or designed to prevent fair determination of service defects, and therefore breach the mandatory legal provisions, may be deemed **unfair provisions to the consumer as stipulated in the Communications Market Act and Consumer Protection Act**.

As such, the presently used terms of contract are not fully in compliance with legislative requirements. The features of broadband connections in terms of their data transfer speeds may not be defined in a manner that is too open to interpretation. **It shall be deemed unfair to the consumer if the operator can prevent the determination of service defects by stating service quality requirements in an insufficient or unclear manner.**

The operator may also not use contract terms to reject responsibility of the factors related to service functionality and connection speed which are under the operator's control. The operators may therefore not transfer responsibility to the consumer for any aspect which it can control through their own actions, such as the sufficiency of network capacity in relation to growth in the customer base.

Service quality and features may not be determined sufficiently clearly without an indication of the range of connection speeds. The fair assessment of situations where the service fails to provide the promised connection speeds to the detriment of the consumer can be facilitated only through such contractual terms. **Based on this, it is deemed necessary that the terms of contract and service descriptions of broadband connections specify a range of connection speeds for the service.**

Any provisions which specify a range so broadly as to effectively prevent the occurrence of service defects shall be deemed unfair. This calls for an assessment of what types of deviations from actual maximum speeds can be reasonably expected. Once such a level of deviation is established, terms of contract that specify a range larger than that may be deemed unfair. **For example, a range of connection speeds specified in the contract terms of a fixed line broadband connection where the actual realisable minimum speed is “generally” only one quarter of the maximum speed must be deemed clearly unfair for this type of connection.**

Depending on the service, the contract terms and service description could additionally describe actual average connection speeds and typical circumstances or times of day when the actual speed is below the average level specified.

4 A summary of the legislative requirements

Marketing must provide a truthful and accurate impression of the connection speed available to the consumer. Marketing must specify a range of actual connection speeds. Depending on the type of service, information on regional differences in the connection speeds or the coverage area of certain networks must also be provided.

In the sales situation, consideration must be given to whether the speed category in question can be delivered for the intended use and location of the consumer in question.

Contract terms and service descriptions must specify a range of connection speeds. The range may not be expressed in such a broad manner as to unfairly prevent the occurrence of service defects.