

Perspectives to Mobile Cramming: Methods, Liability, and Potential Anti-Cramming Measures

Antti Suomalainen*

Abstract

During the last few decades, the illegal practice of inserting unauthorized charges in mobile bills, “mobile cramming”, has emerged worldwide in the field of direct carrier billing. In the United States, civil and criminal aspects regarding mobile cramming have been addressed and prominently displayed in governmental investigations and notable legal cases. In Finland, the discussion on mobile cramming has focused solely on questions about the contractual liability of the parties involved. This article aims to bring clarity to the phenomenon by describing the potential cramming and anti-cramming methods, the chain of liability and the parties involved. The article also describes what courses of action have been taken by governmental officials when pursuing mobile cramming cases in Finland and the U.S. Due to the lack of case law in Finland, the issue is addressed from the perspective of the Competition and Consumer Authority. In conclusion, it is summarized that regardless of the preventive regulatory measures, the practice of mobile cramming still exists, and the crammers are finding new avenues for their operations through regulatory loopholes. Contractual liability for unauthorized charges has been acknowledged to be divided among the parties involved, but this alone is not sufficient to prevent mobile cramming in Finland. More attention needs to be paid to effective preventive measures.

Keywords: *Direct Carrier Billing, Mobile Cramming, Mobile Payment*

*The author is a master’s student of law at the Tallinn University of Technology, Department of Law. The author's master’s thesis is based on the article (an article-based thesis).

1 Introduction

The appearance of direct carrier billing (DCB) has transformed the way mobile phone bills can be utilized. Instead of only covering expenses arising from the use of the mobile phone, DCB enabled the mobile phone bill to be used as a payment method for third party products and services. Instead of using a bank card, these products and services would be billed directly from the mobile phone users incoming phone bill.

After mobile payments and DCB started gaining popularity, the negative aspects related to mobile payment systems also started to emerge. The mobile payment sector was seen as unorganized and risky due to the lack of standardization and due to unclear rules on liability in fraud situations. Also, the uncertainty about the net benefits to consumers of mobile payments relative to traditional payment methods was affecting the consumers perception¹. The mobile payment methods of premium rate services (PRS) and DCB were seen as particularly open to fraud. PRS refers to delivery of services that allow content providers to deliver specific services, such as information or entertainment, to users at an elevated cost – “premium rate” using prefixed premium rate numbers or short code messaging. In contrast, DCB enables the billing of the end-user by directly linking their account to the charges for the good or service being purchased². Mobile cramming through DCB is *the facto* modern and developing mobile cramming method³. This is due to the decreased use of WAP and SMS technologies⁴ and due to the decreasing popularity of commercial premium rate numbers⁵. Increased use of DCB has also resulted in pushbacks from the public in EU countries in the form of consumer complaints⁶. In the United States numerous consumer complaints have led to landmark legal cases. The U.S. Federal Trade Commission (FTC) has sued content

¹ Hayashi, Fumiko, Mobile payments: What's in it for consumers?, Economic Review 35, Federal Reserve Bank of Kansas City 2012, p. 41–42.

² This article mainly focuses on direct carrier billing, which has become the typical method of inserting unauthorized charges to phone bills during the era of smartphones.

³ US Office of Oversight and Investigations, Staff Report for Chairman Rockefeller, Cramming on Mobile Phone Bills: A Report on Wireless Billing Practices 2014, p. 2.

⁴ Parlakkiliç, Alaattin, Responsive mobile learning (m-learning) application design and architecture in fog computing, International Journal of Modern Education Studies 3.2 2019, p. 83.

⁵ US Office of Oversight 2023, p. 37.

⁶ BEREC, Report on the handling of third party payment charges on mobile phone bills, BoR (21) 118/2021, p. 4.

providers and major mobile phone companies for purportedly running or participating in mobile cramming schemes. Almost all the cases have been settled with sizeable monetary judgments, with the cases against AT&T and T-Mobile ending up with the mobile operators paying massive settlements⁷.

At the end of 2015, also the Consumer Ombudsman of the Finnish Competition and Consumer Authority (FCCA)⁸ received complaints on unauthorized mobile phone bill charges and subsequently gave a line decision on the matter. According to the Ombudsman, the consumers did not know the source of the charges and had no recollection of making a purchase⁹. This description by the Finnish customers is universally associated with the practice of mobile cramming. Mobile cramming is essentially a fraud - an illegal and deceptive billing practice. In mobile cramming third-party companies or individuals, using DCB, insert fraudulent unauthorized or misleading charges directly to a consumer's mobile phone bill. These charges can appear in the form of any type of payment, or subscription-based service that consumers never authorized or intended to sign up for¹⁰.

Against this backdrop, in the second section, this article seeks to map and present the background and general issues of mobile cramming. The third section investigates the Finnish and U.S. case law context with the help of several examples, as well as FCCA's line decision and information requested by the author from the agency. The fourth section offers a view of the issues related to the regulation surrounding mobile cramming. The fifth section concludes that mobile cramming is not fully understood as a phenomenon and mobile operators, authorities and regulatory bodies need to boldly address issues related to it to protect consumers in Finland from the fraudulent practice. This could be accomplished e.g. by expanding the regulatory obligations on direct carrier billing.

⁷ Caroline E. Sweet, *The Hidden Scam: Why Consumers Should No Longer Be Forced to Shoulder the Burden of Liability for Mobile Cramming*, 11 *J. Bus. & Tech. L.* 69 (2016), p. 77–78.

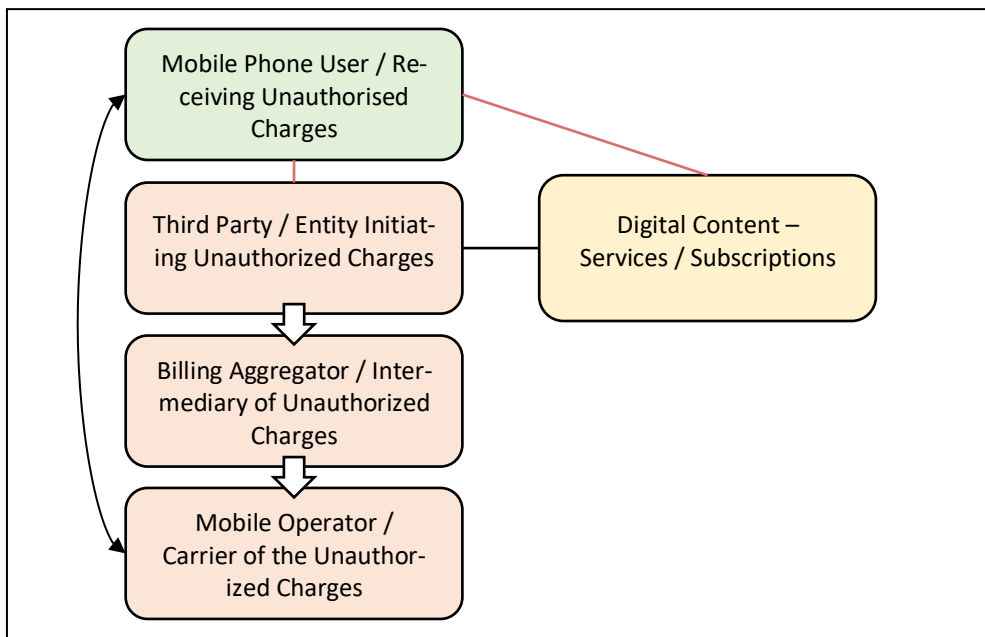
⁸ English translation of *Kilpailu- ja kuluttajavirasto / Konkurrens- och konsumentverket* (KKV).

⁹ KKV/1491/14.08.01.05/2015, KKV/1490/14.08.01.05/2015, KKV/1489/14.08.01.05/2015, decision of 13.5.2016. <https://www.kkv.fi/paatokset/kuluttaja-asiat/teleyrityksen-vastuu-liittymalaskulla-veloitettavista-ostoksista-ja-tilauksista-seka-mobiilimaksua-koskeva-tiedonantovelvollisuus/>, Accessed 10.12.2023.

¹⁰ Sweet 2016, p. 71–72.

2 Background

2.1 Describing and mapping mobile cramming



Author's figure on Mobile Cramming¹¹

Sweet described mobile cramming as a “*fraudulent practice in which a company other than a mobile phone carrier (e.g., Sprint or Verizon) places charges on a consumer's mobile telephone bill that the consumer did not authorize*”¹². The U.S. Federal Trade Commission defines mobile cramming as “a modern version of a long-time scam in which consumers' phone bills are used as a vehicle for unauthorized charges placed by third parties”¹³. The Law Insider's online dictionary defines “cramming” as: “the practice of charging customers

¹¹ Author's picture. Mobile phone user – owner of a registered phone number who owns a mobile phone subscription with the mobile operator. Third party – an individual or company initiating unauthorized charges. For these charges, digital content can be used as a fraudulent vessel. Unauthorized charges can also be placed directly to the phone bill without any interaction with digital content services or subscriptions. Billing aggregator – payment facilitator between the third party and the mobile operator. Billing aggregator is in direct contract with the mobile operator for organizing the billing on behalf of the third party. Mobile operator/carrier – e.g. Telia, DNA etc. billing the mobile phone user with unauthorized charges

¹² Sweet 2016, p. 70.

¹³ The US Federal Trade Commission's official website. <https://www.ftc.gov/news-events/top-ics/mobile-cramming>, Accessed 7.12.2023.

for services that they have not ordered or have been sold in a deceptive manner such that the customer is not reasonably aware of the nature or price of the service for which he or she is being charged”¹⁴.

In comparison to the standard billing process, mobile cramming situations are preceded by several repeating elements: lack of contractual order and purchase confirmation, lack of customer contact and lack of customer consent. Mobile cramming through DCB is typically exercised by deliberately shortcutting through the confirmation stages of the purchase process¹⁵.

In the initial stages, the third party creates a contractual connection to carrier billing platforms typically using websites and apps. Using these channels as phishing links to “trap” the mobile phone user, the third party obtains the users’ data and subscribes the user to digital content or other services¹⁶ (the mobile phone user never agrees to any contract and never authorizes any subscriptions or payments). Methods used to initiate cramming can also include deceiving the customers with fraudulent promotional material, as well as a social engineering technique known as negative option marketing¹⁷. Mobile cramming can be initiated with computers or smartphones, in essence any device with mobile service contract and number attached to it¹⁸. This is because for the DCB method the mobile subscription needs to be identified in order to accept payments¹⁹. In most cases, the third party then delivers the fraudulent billing data to a billing aggregator, who in turn installs the fraudulent payments to the mobile phone user’s phone bill²⁰. The payment confirmation can be forged²¹. Third party content providers are trusted to offer billing aggregators with supposedly truthful evidence of purchase data²². Mobile phone operator receives the fraudulent billing data from the third party or

¹⁴ Law Insider’s online dictionary. <https://www.lawinsider.com/dictionary/cramming>, Accessed 7.12.2023.

¹⁵ BEREC 2021, p. 8.

¹⁶ In mobile cramming cases digital content and services are typically useless “spam material” used as a “front” for the unauthorized billing. In some cases, the content only exists in writing.

¹⁷ Merve Sahin et al., Sok: Fraud in telephony networks, European Symposium on Security and Privacy IEEE 2017, p. 244.

¹⁸ US Office of Oversight 2014, p. 38–39.

¹⁹ Nadin Vazquez Torralba, Security Analysis of Mobile Payments: Direct Carrier Billing, 2017, p. 76.

²⁰ Billing aggregators are not always necessary for mobile cramming and unauthorized charges might be sent without the involvement of a billing aggregator.

²¹ Vazquez Torralba 2017, p. 77.

²² David J. Balan et al., Economics at the FTC: Fraud, mergers and exclusion, Review of Industrial Organization 47 2015, p. 375.

billing aggregator and is then responsible for the processing of the phone bill. Ultimately the phone bill is delivered by the mobile operator to the mobile phone user²³. The mobile phone user ultimately pays the phone bill with the unauthorized charges included. The parties involved share the profit derived from the payment, each getting a share. E.g. in the U.S., it has been estimated that third-party wireless billing constitutes a multi-billion-dollar industry, and that wireless cramming has likely cost consumers hundreds of millions of dollars²⁴.

The practice of mobile cramming violates several laws and regulations and is often seen as fraudulent. Regulations and laws that mobile cramming may breach can differ depending on the jurisdiction, yet typical legal concerns related to it include areas of consumer protection, telecommunication, trade practice and commercial regulation. On top of contractual violations, mobile cramming can include aspects of individual criminal liability. It is not exactly clear to what extent different parties are deliberately involved in the cramming schemes. E.g., in the U.S. it has been alleged that mobile aggregators and third-party vendors have colluded to facilitate unauthorized charges to customers phone bills²⁵.

2.2 Defining direct carrier billing and mobile payment

As stated, DCB refers to a payment method which allows mobile device users to make purchases by charging payments directly to their mobile phone bill. In contrast, “mobile payment” can be also seen as any payment where “a mobile device is used to initiate, authorize and confirm an exchange of financial value in return for goods and services”²⁶. According to the FCCA, a mobile payment happens “when the consumer uses a mobile data connection from their mobile phone, tablet or laptop and selects a mobile payment as the payment method on the service provider's website. The operator identifies the mobile device based on the IP address (and indirectly the SIM card of the subscription) and the payment is charged on the subscription invoice”²⁷.

In Finland, the popularization of DCB was originally a joint operation of the Finnish mobile operators through Teleforum (advocacy and cooperation

²³ US Office of Oversight 2014, p. 38.

²⁴ *Ibid.*, p. 18–19.

²⁵ *Ibid.*, p. 2.

²⁶ Yoris A. Au – Robert J. Kauffman, The economics of mobile payments: Understanding stakeholder issues for an emerging financial technology application. *Electronic commerce research and applications* 7.2 2008, p. 141.

²⁷ FCCA decision of 13.5.2016.

organization for producers of services offered via telephone). Work on the project started in 2014 and the operators agreed on the DCB framework, which was supposed to standardize the payment process among the mainstream mobile operators. It was also decided that DCB is supposed to be governed by the ethical rules created by the ethical board of commercial telephone services (MAPEL) upheld by Teleforum²⁸. The payment option of direct carrier billing is supposed to be recognizable from a special insignia (mobile payment button/logo that needs to present during the payment transaction). The payment process is meant to include a two-stage payment confirmation. Also, a summary of purchase information must be present and clearly marked. It must be disclosed what the customer is buying and what is the purchase price. The customer must also be notified that the purchase will be charged on the phone bill²⁹. The Finnish Mobiilimaksu/Mobilbetalning scheme is not used in international platforms.

For the purposes of this article, the term “mobile operator” is used to refer to entity (usually a company) that maintains a telecommunications network and/or performs invoicing for its use.

2.3 General issues

Due to the deceptive nature of mobile cramming, it can be difficult for the mobile phone user (consumer) receiving the mobile phone bill to notice the unauthorized charges, as well as to understand the source of them. Crammed charges usually appear as small service fees on the back pages of the mobile phone bill underneath the mobile operator’s listed charges³⁰. Also, without knowledge of the liability of the parties involved it can also be unclear where to direct complaints related to the unauthorized charges and where to seek remedies from³¹. It seems to be universal that in mobile cramming situations, the loose regulation and the customer service conduct of the mobile operator places the burden on the consumer and forces the consumers to directly con-

²⁸ Juhani Pirinen, *Mobiilimaksujen maksuvälitysjärjestelmän kehitys Drupal 8-sisällönhallintajärjestelmällä*. Karelia University of Applied Sciences 2017, p. 32–33.

²⁹ Digital Forum Finland ry, *Mobiilimaksu - Graafinen ohjeisto*, p. 11. <http://www.mobiilimak-suinfo.fi/mobiilimaksu-visual-assets.zip>, Accessed 30 December 2023

³⁰ Sweet 2016, p. 73–74.

³¹ Amy J. Schmitz, *Organic Online Dispute Resolution: Resolving “Cramming” Claims as an Example*, Banking & Financial Services Policy Report 32.9 2013, p. 2.

tact the third party. The consumer must immediately address any unauthorized charges, and proactively prevent further unauthorized charges from appearing³².

Mobile carriers are capable of intervening and possess the ability to stop cramming schemes. The carriers receive constant complaints and requests for refunds from the consumers. This should early on steer any responsible operators away from the cramming entities. However, several market factors encourage the carriers not to act. The lack of public understanding of the mobile payment market ensures that unauthorized billing can be exploited without adverse market reaction. Cramming can continue in the background apart from other mobile operations. Even after encountering crammed charges in a phone bill received from their mobile operator, many consumers can not exit the customer relationship due to the underlying contractual circumstances, or due to the increased fees following the changing of mobile operators. Also, some consumers can be satisfied with refunds, which can help to ease the negative market pressure on the mobile operators. As only the most persistent consumers end up being refunded for at least part of the crammed charges, this refund scheme can end up whitewashing a large part of the illegal billing practice³³. As telephone subscription can be viewed as an everyday necessity service offered by a regulated industry, many consumers can place excessive trust on the billing process of the mobile operator.

3 Anti-cramming approaches

3.1 Mobile cramming in the United States

The Federal Trade Commission of the United States noted already in 2012 that mobile cramming had become a significant consumer problem³⁴. In the following year, the FTC's Mobile Cramming Roundtable concluded that the mat-

³² Schmitz 2013, p. 10.

³³ Balan 2015, p. 376.

³⁴ Amy J. Schmitz, Ensuring Remedies to Cure Cramming, *Cardozo Journal of Conflict Resolution* 14 2012, p. 877.

ter is starting to become a major issue around the world, including in Canada³⁵. In 2017, around 2 million people in the United States reported experiencing fraud related to consumer products and services³⁶.

In the U.S., mobile cramming has been addressed from both, civil and criminal perspective. Mobile operators, third party service providers and mobile aggregators have been challenged by the FTC which has filed enforcement actions for the unauthorized billing of consumers. FTC has the mandate to start investigations and proceed with filing of lawsuits³⁷. Federal Communications Commission (FCC) has also been instrumental in investigating mobile cramming schemes in the U.S.³⁸. In the most prominent cases, FTC was pursuing enforcement actions against two of the leading mobile operators (AT&T and T-Mobile)³⁹. During the same year, the Consumer Financial Protection Bureau (CFPB) pursued enforcement actions against the Sprint Corporation⁴⁰ (Sprint Corporation was acquired by T-Mobile in 2020). The billing was regarded as unfair and deceptive. In these cases, consumers had been charged with third-party subscription services. The billing process was continued despite being surrounded by constant consumer complaints, high refund rates, as well as law enforcement actions. It was found that the carriers had earned substantial profits from the unauthorized billing practice⁴¹. The mobile operators ended up settling the cases, with AT&T settling for 105 million and T-Mobile for 90 million dollars⁴². There have also been other ethical concerns related to the conduct of the U.S. based mobile operators⁴³.

³⁵ Steve Trites, Charles Gibney, Bruno Lévesque, Mobile payments and consumer protection in Canada, Financial Consumer Agency of Canada 2013, p. 32.

³⁶ Rachel Morgan Elizabeth, Financial fraud in the United States 2017, US Department of Justice Office of Justice Programs Bureau of Justice Statistics 2021, p. 1.

³⁷ Kirsten Martin, Privacy law for business decision-makers in the United States, Ethics of Data and Analytics 2022, p. 131.

³⁸ Jaewan Lim, Sungjune Park, Chandra Subramaniam, Reporting Spam Calls and Texts: A Comparative Study of the US and South Korea 2020, p. 1.

³⁹ *FTC v. T-Mobile USA, Inc.*, No. 2:14-cv-00967 (W.D. Wash. July 1, 2014), *FTC v. AT&T Mobility, LLC*, Case 1:14-mi-99999-UNA (N.D. Ga. October 8, 2014).

⁴⁰ *CFPB v. Sprint Corporation*, Case 14-cv-9931 (S.D.N.Y December 17 2014).

⁴¹ Lucy E. Morris, CFPB and FTC Take Different Approaches in Mobile Cramming Cases, *Bus. L. Today* 2015, p. 1.

⁴² Nicolas A. Florio, Some Added Security: Applying Lessons from Bankruptcy Law to Strengthen the Collection of Consumer Fraud Penalties, *Federal Communications Law Journal* 75.2 2023, p. 264–265.

⁴³ Alan N. Hoffman and Natalia Gold, T-Mobile “The Un-Carrier”: Good Strategy Despite Ethical Concerns, *Rotterdam School of Management Erasmus University* 2016, p. 1–3.

In the U.S., individuals engaged in a mobile cramming schemes have been also charged with criminal charges and convicted of fraud. In a case from 2015, an individual was sentenced to a federal prison term for orchestrating a cramming scheme that operated across the country⁴⁴. In another notable case, the Frauds and Cybercrime Unit of the U.S. Attorney's Office prosecuted individuals, including the Chief Executive Officer and the Vice President of Compliance & Consumer Protection of a billing aggregator company, as well as representatives of third-party content providers for their involvement in a mobile cramming scheme. The illegal profits gained through the scheme were estimated to comprise over 150 million dollars in illegal profits. The CEO of the billing aggregator involved ultimately received a 10-year prison sentence⁴⁵. Besides the criminal charges filed by the Attorneys Office against the individuals involved, enforcement actions were also filed by the FTC against the companies and individuals connected to the scheme. FTC successfully enforced halting orders against the companies in 2023. The companies and individuals involved were ultimately prohibited from engaging in telephone billing and from making misrepresentations about products or services. Additionally, the responding parties were prohibited from using or benefiting from the customer data collected through the mobile cramming scheme and required to destroy any remaining customer data in their possession⁴⁶.

3.2 Mobile cramming as a fraud/crime

In general, fraud can be characterized as any illegal activity including the use of deception to acquire an advantage⁴⁷. The possibility of prosecuting mobile cramming as a fraud depends on the evidential circumstances. E.g., in Finland, fraud can be further divided into serious or minor fraud, depending on the circumstances⁴⁸. The type of fraud committed is usually evaluated against the monetary profits pursued or gained with the criminal action. In Finland, the

⁴⁴ FBI newsletter September 15, 2015. <https://www.fbi.gov/news/stories/-cramming-scheme-operator-sentenced>, Accessed 30 December 2023.

⁴⁵ U.S. Attorney's Office, Southern District of New York, press release 18-103, April 3, 2018. <https://www.justice.gov/usao-sdny/pr/former-mobile-phone-industry-ceo-sentenced-manhattan-federal-court-10-years-prison-role>, Accessed 23 December 2023.

⁴⁶ Federal Trade Commission, press release, November 15, 2023. <https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-obtains-orders-halting-mobile-cramming-scheme>, Accessed 28 December 2023.

⁴⁷ Tim Prenzler, What works in fraud prevention: A review of real-world intervention projects, *Journal of Criminological Research Policy and Practice* 6(1) 2020, p. 83.

⁴⁸ Annika Härkki, Vakuutuskorvauksiin kohdistuvat petokset, University of Eastern Finland 2023, p. 56–63.

threshold for serious fraud has been around 10 000–17 000 EUR in criminal profits⁴⁹. Fraud in the criminal law sense is committed by individuals instead of companies and billing related frauds have been traditionally defined as so called “white collar crimes”⁵⁰. Fraudulent practice exercised via the internet can be masked with operations that seem legitimate and involve aspects of cybercrime⁵¹. This is what can differentiate mobile cramming fraud from traditional white-collar crimes.

3.3 Context of Finland

In Finland, the Communications Regulatory Authority (TRAFICOM) operates in the role of overseeing the legal obligations and rights of electronic service providers besides overseeing the secure operation of network and communication services⁵². In Finland, direct carrier billing first emerged in 1997 when products could be purchased from vending machines and paid with phone bills. The number of mobile subscriptions in Finland has increased significantly ever since. Combined with the increasing digitalization of society, there are more business openings for DCB to be utilized⁵³. Nordic countries have been gradually moving towards a change to cashless societies⁵⁴. With the increased use of DCB during the last few decades, also the discussion surrounding the emergence of mobile cramming has been raised in the public media on multiple occasions. In July 2010, it was reported that unauthorized charges have started to appear, and they have caused confusion among mobile phone users⁵⁵. Initially the FCCA and the National Consumer Advisory Service received multiple contacts from consumers between 2015–2016 related to mobile payment charges billed with mobile operator’s subscription invoices⁵⁶. Also, nu-

⁴⁹ Topi Pohjola – Janne Piirainen, *Petos vai törkeä petos: Huomattavan hyödyn määrän arviointi oikeuskäytännön mukaan*. Police University College 2023, p. 17–18.

⁵⁰ Hazell Croall, *Understanding white collar crime*, Open University Press 2001, p. 1–3.

⁵¹ Iina Savela, *Kyberrikollisuuden esiintyminen Suomessa*. Haaga-Helia University of Applied Sciences 2020, p. 9–10.

⁵² Saku Hirsikangas, *Riverbed AirPcap Nx: Wi-fi-verkon liikenteen seuranta AirPcap-ohjelmistolla*. Centria University of Applied Sciences 2023, p. 18.

⁵³ Vazquez Torralba 2017, p. 9.

⁵⁴ Carolyn Lowry, *What's in your mobile wallet: an analysis of trends in mobile payments and regulation*, *Federal Communications Law Journal* 68 2016, p. 358.

⁵⁵ YLE 4.7.2010, *Puhelinlaskussa maksettavista sisältöpalveluista suuri riesa*. <https://yle.fi/a/3-5591126>, Accessed 9.12.2023.

⁵⁶ *Contacts were related to the billing of all three leading Finnish mobile operators – DNA, Elisa, Telia*.

merous complaints were made to the European Consumer Center (ECC Finland)⁵⁷. As a result, during the years 2015–2016, the FCCA reviewed the actions of the mobile operators and some third-party companies in perceived mobile cramming situations.

Around 2019, another notable set of contacts was made again to the FCCA related to perceived mobile cramming. In June 2023, mobile cramming has still been observed to continue in Finland, with new unauthorized charges emerging in consumers phone bills⁵⁸. During the same month, DNA announced they had terminated ongoing business with a company perceived to be engaged in mobile cramming⁵⁹.

Coming into the year 2023, in Finland and in the EU, there has been several legislative changes affecting mobile payments and DCB. The issues related to mobile payments led to the creation of a specific provision that was included in Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code (ECC)⁶⁰. In Annex VI Part A (h) it is required that all mobile operators must, through their own services, offer the mobile phone user the option to deactivate third party billing.

At least on paper, some enhanced oversight measures related to DCB and third-party service providers have also been established. The Communications Market Act was amended in 2013 (later amended by Act on Electronic Communications Services in 2014). The Consumer Ombudsman of the FCCA received the right to directly intervene, under threat of a fine, with the PRS and digital services offered through mobile operators. In accordance with Act on Electronic Communications Services (2014/917) Article 337 (1) of the Chapter 42, the ombudsman can order mobile operators to shut down premium rate service numbers or order the operators to prevent the use of services that are

⁵⁷ FCCA correspondence, request for clarification, KKV/1491 4.1.2017 (sent to DNA).

⁵⁸ Talouselämä 28.6.2023, Telia ja DNA aloittivat bisneksen Kyproksella toimivan yhtiön kanssa – Kymmenet asiakkaat ovat reklamoineet yllättävistä laskuista. <https://www.talouselama.fi/uutiset/telia-ja-dna-aloittivat-bisneksen-kyproksella-toimivan-yhtion-kanssa-kymmenet-asiakkaat-ovat-reklamointeet-yllattavista-laskuista/d39a6925-c3e8-4cb3-b359-91a056e076aa>, Accessed 9.12.2023.

⁵⁹ Talouselämä 30.6.2023, DNA lopetti bisneksen Kyproksella toimivan yhtiön kanssa: ”Uusia veloituksia ei pääse syntymään”. <https://www.talouselama.fi/uutiset/dna-lopetti-bisneksen-kyproksella-toimivan-yhtion-kanssa-uusia-veloituksia-ei-paase-syntymaan/24509c00-e67a-4cb8-9dc5-011900c9b83c>, Accessed 9.12.2023.

⁶⁰ BEREC 2021, p. 2.

deemed to be engaged in mobile cramming. Paragraph 2 states that immediately after the operator has been informed of the ombudsman's initial decision, the ombudsman must order the mobile operator to cease the unauthorized billing and terminate the payment of funds which have accumulated or are yet to accumulate from the services to the service provider or another telecommunications operator. Paragraphs 3–5 state that the ombudsman must reserve the mobile operator and service provider the right to be heard on the matter and the decision can be contested in the Market Court by the mobile operator or by the service provider affected. Apart from the ability to directly intervene in unauthorized billing practices, the Consumer Ombudsman of the FCCA exercises oversight over mobile operators and other service providers under the mandate of Consumer Protection Act 38/1978 Article 20 of Chapter 2.

4 FCCA inquiries and decisions

4.1 FCCA inquiry and line decision of 2016

The FCCA decision of 13.5.2016⁶¹ was essentially a line decision to the question about the mobile operator's responsibility in mobile cramming situations, especially related to the handling of refunds and customer complaints⁶². At the end of 2015, the Consumer Ombudsman of the FCCA received numerous complaints related to unauthorized mobile phone bill charges. Serving as a precedent line decision, the FCCA stated that the settlement of alleged contractual violations was a joint responsibility of the teleoperators, and the third parties involved. Even further, it was stated that the operator also has the obligation to inform the customer about the new subscription-based agreements during the purchase as well as during the operator-customer relationship. The FCCA based their decision on the Finnish Act on Electronic Communication Services 2014/917 and the Finnish Consumer Protection Act 1978/38. In the view of the Ombudsman, the actions of the mobile operators must be viewed through the Act on Electronic Communication Services in combination with the Finnish Consumer Protection Act.

⁶¹ Also referred to as KKV/1491/14.08.01.05/2015, KKV/1490/14.08.01.05/2015, KKV/1489/14.08.01.05/2015.

⁶² The term "unauthorized mobile phone bill purchases" is used in the line decision.

The mobile operators at the center of the complaints (DNA, Elisa and TeliaSonera⁶³) received inquiries from the Consumer Ombudsman stating that the operators must clarify the contractual violations related to the billing of goods and services via mobile phone bill charges. The Ombudsman posed similar questions to all three mobile operators:⁶⁴

- Related to instructing consumers to contact the third-party service provider directly. How does DNA/Elisa/TeliaSonera view their actions considering the joint responsibility provision of Section 128 of the Information Society Code?
- What kind of process is used to guide the consumers to proceed with their complaint? Where does the operator direct the consumer in cases of disputes over charges for additional paid services on their subscription bill?
- Which party does the operator consider to be obliged to explain to the consumer when and how the purchase/order subject to the complaint was made and how does the operator explain what kind of services were used (which pages the consumer visited)?
- If the consumer appeals to misleading presentation of information on a third-party service provider's website, which party must prove that the service ordered/purchased corresponds to the information provided in the marketing?
- How is the operator's customer service instructed to inform consumers about DCB and consumers ability to prevent its use? How are the consumers informed when the operator is selling mobile phones or mobile internet subscriptions to consumers?
- How does the operator practically ensure that the third-party service providers implement the mobile payment standards set out by the ethical board of commercial telephone services?⁶⁵

E.g., according to the response by TeliaSonera, all service providers/payment aggregators working in cooperation with the company have their own customer service, where complaints are primarily handled. Consumers have been advised to contact the customer service of payment aggregators directly, because payment aggregators have the best information and details about the

⁶³ Later "Telia".

⁶⁴ Out of nine questions sent to the operators, six have been chosen as examples for this article.

⁶⁵ FCCA correspondence, requests for clarification 25.11.2015, KKV/1489 (sent to TeliaSonera), KKV/1490 (sent to Elisa), KKV/1491 (sent to DNA).

disputed charges. According to TeliaSonera, if the customer has been unwilling to contact the payment aggregator's customer service, TeliaSonera has received the complaint and initiated contact with the payment aggregator on behalf of the customer to handle the complaint together with the payment aggregator. In their view, TeliaSonera has upheld their legal obligations related to joint responsibility in accordance with Section 128 of the Information Society Code. TeliaSonera, in their view, had processed the complaints in accordance with the normal complaint process.

In relation to the obligation to explain the source of the charges to the consumer, according to TeliaSonera, customer service staff does not have the right to process accurate data related to the disputed charges. According to TeliaSonera's view, the final service provider is responsible for ensuring that the service billed through the operator's invoice corresponds to the information provided in the marketing. TeliaSonera claimed in their response that consumers had been informed of the DCB option and informed about the ability to deactivate it⁶⁶.

Considering TeliaSonera's response, several contrary claims were made to the Consumer Ombudsman. E.g., according to some consumers, after being in contact with TeliaSonera's customer service, they had been informed that the only available option was to pay the phone bill with the disputed charges. In contacts related to all three mobile operators, consumers described unwillingness on behalf of the operators to resolve the allegedly crammed charges and/or refund claims, questionable customer service responses as well as recommendations to pay for the disputed charges⁶⁷. As shown, many similar experiences described by other consumers have been visible in the Finnish media.

4.2 Legal background

The Information Society Code regulating the joint responsibility of mobile operators and third parties came into force in 2015. The law was later amended with the Act on Electronic Communications Services 917/2014. Section 128 states that a consumer who has the right to refrain from paying or receiving a refund, compensation, or other payment from a business operator due to the operator's breach of contract has the same right in relation to the mobile operator that has charged the consumer for a commodity. However, the mobile operator is not required to pay the consumer more than what it has received

⁶⁶ FCCA consumer contacts related to TeliaSonera in relation to KKV/1489 25.11.2015.

⁶⁷ FCCA consumer contacts related to KKV/1489, KKV/1490, KKV/1491.

in payments from the consumer. As referred in the FCCA decision, the Consumer Protection Act 38/1978 Section 39 of Chapter 7 states that where a consumer has the right to withhold payment or to receive a refund, compensation or another money payment from the seller or the service provider based on a breach of contract of the latter, this right also applies in respect of the creditor who has financed the purchase or service. According to the FCCA, this section is equal in its content to Section 128 of the Information Society Code. Due to this the position of a mobile operator and the position of a creditor are evaluated according to the same criteria. This has the effect that legal liability is not a question of main and secondary responsibility but rather a genuine joint responsibility. The FCCA decision also confirmed that consumers can choose to which entity a complaint will be addressed, using the same reasoning.

Related to this point, a representative of FiCom (Finnish Federation for Communications and Teleinformatics) stated that mobile operator's disagreed with the premise of joint liability already in 2015. The representative stated that DCB should not be equated with the actions of creditors as a credit card company offers credit and the mobile operator offers extended payment time. In the view of the representative, the credit card company has an agreement with a company that sells services, while a telecommunications company is not always a party to an agreement in question. Representative of FiCom also compared the situation to a scene where consumer ordering a pizza with mobile method receives a faulty product and then directs the complaint to the mobile operator. According to the representative, the commissions received from direct carrier billing are not critical in terms of the operators' total turnover⁶⁸.

Section 1 & 3 of Chapter 2 of the Consumer Protection Act prohibits inappropriate behavior in customer relationships. This includes a mandatory notification to the customer when a product has a defect. It also means that the forwarding process of the bills involving unauthorized/crammed fees can be seen to be included in the "inappropriate behavior" of the mobile operator. Further, Section 6 of Chapter 2 prohibits providing untruthful or misleading information, as it relates to the purchase decision.

The FCCA line decision also set new obligations, requirements, and standards for the mobile operators. Customer service of the mobile operator became

⁶⁸ Ilta-Sanomat 30.01.2019, Kuluttaja-asiamies: Suomen puhelinoperaattorit venkoilevat eroon lakisääteisestä velvoitteestaan – näin operaattorit vastaavat. <https://www.is.fi/taloussanomat/art-2000005982901.html>, Accessed 30.12.2023.

central in the complaint process. In a complaint situation, the customer service of the teleoperator must be able to advise the customer according to the laws. The Consumer Ombudsman of the FCCA identified several wrongdoings by the customer services of the operators. E.g., contact situations where the mobile operator's customer service had stated that it was "impossible" for the operator to proceed with investigating the complaint, or situations when the customer service directly withdrew their responsibility. In the view of the Ombudsman, the described were situations where the operator had given untruthful information about the legal obligations of the mobile operator. Even when the operator's customer service announced they would be complying with the customer complaints, some still directed the customers to be in contact directly with the third-party service providers or digital stores without informing the customer of his/her rights or without disclosing the operators' own obligations.

The new line decision also meant that immediately after a problem is recognized, the operator must update their protocols. With the decision it was also established that a mobile operator has a specific obligation to investigate cases where a contractual breach is suspected. When needed the operator can also request information from the partnering service provider if there is contractual connection. Furthermore, the decision guided the mobile operators to their rights. The operators on their behalf, have the legal right to get back the amount paid by them from the contracting service providers.

The Ombudsman also commented on the problematic functioning of DCB, stating that it's distinctly different from other forms of payments such as credit card or text message payments. A customer can easily perform a purchase by mistake⁶⁹. The Ombudsman stated that the characteristics of DCB, and the risks associated with it must be evaluated further. Considering this, regardless of the sales channels, the Ombudsman stated, that the sale of mobile operator services with an included mobile payment feature must be accompanied with a notification of the possibility to block the use of mobile payments. Providing the necessary information about the features of the payment methods is also mandatory. Informing the customer about the mobile payment feature is a requirement set forward in Section 7 of Chapter 2, which states that the operator/service provider should disclose all information that can influence the economic security of the customer.

⁶⁹ This is especially problematic since cramming can include the deliberate creation of misleading subscription "traps".

4.3 FCCA inquiry and decision of 2019

In the 2019 contacts, it was repeated several times that consumers had again received crammed charges on their mobile phone bills and that the mobile operators (Telia & Elisa) had inappropriately handled consumer complaints. Several themes were repeated in the contacts. Instead of handling the complaints, consumers were directed to contact the service providers directly. In many instances the operators asserted that they were not responsible for third party services and that the operator only served as the billing processor⁷⁰. In relation to these cases, some representatives of mobile operators issued public statements on the matter. Yle, the public broadcasting company in Finland, reported that in 2019, a representative of Telia (mobile operator) publicly shifted responsibility for alleged unauthorized charges away from the operator to consumers. In this instance, consumers received additional mobile phone bill charges from a Dutch company claiming to offer digital content⁷¹. During the same year, the FCCA received complaints regarding charges billed by Telia and Elisa initiated by the same Dutch company. After reviewing the complaints and inquiries about the company, the Consumer Ombudsman released his findings. Considering Finnish consumer protection laws, the service order process had multiple flaws, according to the Ombudsman. Soon after the inquiry, the Dutch company providing services through Telia disappeared from the Finnish market as a digital service provider. It was deemed that there was therefore no need for more detailed investigations. However, the Ombudsman pointed out the violations he observed in the billing process of the company in case the company planned to operate in the Finnish market again in the future. The billing processes of Telia and Elisa were also investigated. The companies were notified that the service providers offering services through the operator's DCB should uphold the ethical rules created by the ethical board of commercial telephone services⁷².

⁷⁰ FCCA correspondence, appendix to request for clarification, KKV/402/14 (sent to Elisa) 18.4.2019.

⁷¹ YLE 14.8.2019, Lapsen vahinkoklikkaus YouTubessa on johtanut yllätyslaskuihin – ilmiö työllistää sekä operaattoreita että kuluttajaviranomaisia. <https://yle.fi/a/3-10916146>, Accessed 9.12.2023.

⁷² FCCA newsletter article 18.12.2019. <https://www.kkv.fi/en/current/the-consumer-ombudsmans-newsletter/unexpected-charges-in-telephone-subscription-invoices-operators-also-responsible/>, Accessed 30.12.2023.

5 Anti-cramming issues with direct carrier billing regulation

Directive 2007/64/EC of the European Parliament and of the Council on payment services in the internal market (PSD) was created to harmonize the payments market within the EU by focusing on consumer protection, consumer rights and obligations for payment providers and users. PSD did help to create some EU-wide payment rules to remove entry barriers to the payments market⁷³. The directive was also used to define payment institutions and payment services. In accordance with Article 3 (l), certain payment transactions made using telecom or IT devices were excluded from the directive's scope. In addition to serving as an intermediary for these payments, as stated in the preamble Section 6, the prerequisite for the exclusion was that the network operator added value to the goods or services delivered digitally through the device in question.

Directive (EU) 2015/2366 of the European Parliament and of the Council on payment services in the internal market (PSD2) amended the 2007 PSD directive. This directive also aimed to increase competition and aimed to facilitate innovation in financial services. For this reason, the telecommunication exemption was also included in the new directive. However, as stated in the preamble Section 15, the original ambiguous wording of the exemption led into a situation where EU Member States started implementing the exclusion differently across EU. This caused a lack of legal certainty for operators and consumers and occasionally allowed payment intermediation services to claim eligibility for an unlimited exclusion from the scope of Directive 2007/64/EC. Preamble Section 19 states that the ambiguous wording also caused some exclusions to be used by businesses to redesign their business models for the purpose of qualifying their payment services for the exclusions. This was done without consultation with the relevant authorities. It was noted that this resulted in increased risks for payment service users and diverging conditions for payment service providers. For this reason, the telecommunication exemption was defined more precisely. It was emphasized that the exclusion allows for so-called operator billing or DCB purchases which contribute to the development of new business models based on the low-value sale of digital content and voice-based services. Those services include ringtones and premium SMS services, as well as entertainment, such as chat and downloads

⁷³Marijana Petrović, PSD2 influence on digital banking transformation, *Journal of process management and new technologies* 8(4) 2020, p. 1.

such as video, music, and games. Services also included information such as weather, news, sports updates, stocks, and directory enquiries, as well as TV and radio participation such as voting, competition entry, and provision of live feedback. Section 16 of the preamble further clarified that “the exclusion relating to certain payment transactions by means of telecom or information technology devices should focus specifically on micro-payments for digital content and voice-based services”.

In the new wording of Article 3 (l), it was stated that the telecommunication exemption specifically covered “*payment transactions by a provider of electronic communications networks or services provided in addition to electronic communications services for a subscriber to the network or service*”. According to the European Banking Authority (EBA), this should be understood to mean that there exists a direct contractual arrangement between the electronic communications operator (mobile operator) and the subscriber for the provision of the electronic communication services and that the payment service is an additional service to these services.⁷⁴ The payments and services were further clarified in subsection 1 as “*for purchase of digital content and voice-based services, regardless of the device used for the purchase or consumption of the digital content and charged to the related bill*” or as in subsection 2 “*performed from or via an electronic device and charged to the related bill within the framework of a charitable activity or for the purchase of tickets*”. In connection with subsections 1 and 2, it was defined that the value of any single payment transaction referred to in the subsections does not exceed 50 EUR or that the cumulative value of payment transactions for an individual subscriber does not exceed 300 EUR per month, or when a subscriber pre-funds an account connected to the provider of the electronic communications network or service, the cumulative value of these payment transactions cannot not exceed 300 EUR per month.

Additionally, PSD2 also lines that mobile operators and billing aggregators that collect payments on behalf of other parties are required to be an agent⁷⁵ or payment institution⁷⁶. Regarding agents and payment institutions, Article 20 emphasized that when payment institutions rely on third parties for “the per-

⁷⁴ BEREC 2021, p. 52.

⁷⁵ Natural or legal person who acts on behalf of a payment institution in providing payment services.

⁷⁶ Legal person that has been granted authorization to provide and execute payment services throughout the EU.

formance of operational functions”, the payment institutions must take reasonable steps to ensure that the requirements of the PSD2 are complied with. The payment institutions also remain fully liable for any acts of their employees, or any agent, branch or entity to which activities are outsourced. Other regulatory amendments having major effects on electronic payments related customer protection included Regulatory Technical Standards (RTS) and Strong Customer Authentication (SCA)⁷⁷. Article 4 (30) defined strong customer authentication as “authentication based on the use of two or more elements categorized as knowledge (something only the user knows), possession (something only the user possesses) and inherence (something the user is) that are independent, in that the breach of one does not compromise the reliability of the others, and is designed in such a way as to protect the confidentiality of the authentication data”. Essentially strong customer authentication refers to two-factor authentication in line with the EBA requirements. The purpose of the process is that once a customer completes the SCA, it can link the transaction to a specific amount and a specific payee⁷⁸. As stated in Article 97 (1), strong customer authentication needs to be initiated when the payer: (b) initiates an electronic payment transaction, or (c) carries out any action through a remote channel which may imply a risk of payment fraud or other abuses.

Despite all the revised measures, the new directive did very little in terms of effectively curbing the *modus operandi* of mobile cramming. More operational freedom for third-party payment providers can increase the fraud related risks⁷⁹. The exclusion of the so-called micro-payments outside of the scope also means that these payments can operate outside of the most critical legal obligations set forward in the PSD2. As previously stated, since crammed fees fall under the threshold of 50 EUR per fee and 300 EUR per month, they can be utilized under the telecommunication exemption of the PSD2 directive. Incoming PSD3 might affect the exemption thresholds⁸⁰. In the view of the European Consumer Organization (BEUC) the current telecom exemption

⁷⁷ Michał Polasik et al., The impact of Payment Services Directive 2 on the PayTech sector development in Europe, *Journal of Economic Behavior & Organization* 178 2020, p. 386.

⁷⁸ Pongku Kumar Paul, Strong customer authentication: security issues and solution evaluation. University of Turku 2020, p. 22.

⁷⁹ Inna Romānova et al., The payment services Directive II and competitiveness: The perspective of European fintech companies, *European Research Studies* 21(2) 2018, p. 8–10.

⁸⁰ Gabriella Gimigliano, Marta Božina Beroš (eds.), *The Payment Services Directive II: A Commentary*, Edward Elgar Publishing 2021, p. 405.

thresholds are excessively high⁸¹. The mobile operators facilitating the payments typically also operate as licensed payment institutions. The payment method of DCB utilized for smaller purchases and orders still carries a risk of consumer fraud which could be mitigated with strong customer authentication. SCA also includes a transaction monitoring obligation for payment service providers for the detection of unauthorized or fraudulent payment transactions. Under the current DCB regulation model this aspect of SCA is also not affecting the micro-payments. Additionally, EBA has proposed the creation of a general transaction monitoring obligation.

6 BEREC Report

Body of European Regulators for Electronic Communications (BEREC), an independent organization assisting the EU Commission and national regulatory authorities in the implementation of the EU telecoms rules, published their “Report on the handling of third-party payment charges on mobile phone bills” on 30 September 2021. For this report BEREC gathered information from different EU Member States on the scope of the present legal and regulatory obligations, as well as consumer protection measures and complaints related to third party charges on mobile phone bills. BEREC send inquiries to national regulatory authorities (NRA’s) of selected EU Member States. According to the inquiry, in Finland, complaints about third-party charges can be filed to mobile service operators, third party service providers and NRA’s. Finland was missing an option to file complaints related to the third-party charges to alternative dispute resolution⁸². Complaints can also be sent to the FCCA/Consumer Ombudsman, as well as to the Financial Authority⁸³. In terms of national regulatory measures, the report summarized that in almost all the responding countries, regulatory authorities have responsibilities regarding premium rate services, but only one third of the authorities have similar responsibilities related to DCB. Relation to this information, BEREC concluded that it is not surprising that in the existing consumer protection measures, there exists a lesser oversight for DCB compared to PRS⁸⁴.

⁸¹ BEUC, Proposal for a revised Payment Services Directive BEUC Position, 2023, p. 3.

⁸² BEREC 2021, p. 36.

⁸³ The two did not answer the BEREC inquiry.

⁸⁴ BEREC 2021, p. 2.

7 Conclusion

The phenomenon of mobile cramming is not fully understood in Finland and implies great difficulties to authorities also worldwide. As shown, the perception and understanding of mobile cramming between Finland and the United States greatly differ. In contrast to the concentrated measures of authorities in the United States, in Finland the practice has not been seen as a serious fraud or equally significant market law violation. The premise of the authorities has been mainly to hand out recommendations and notifications to entities engaged in the cramming process. Due to this, the attitude of the Finnish mobile operators has been dismissive regarding the issue. As shown by the FCCA decisions, Finnish mobile operators have neglected their obligations towards their customers on multiple occasions.

As has also been demonstrated, the phenomenon of mobile cramming still exists despite EU level regulatory improvements. Despite improvements in fraud prevention and increased oversight of alternative payment methods, loopholes enable mobile cramming to be utilized. As stated in Section 5, mobile cramming could be greatly mitigated with stronger authentication measures extended to DCB. The scope of the telecom exemptions offered by the PSD2 could be further limited to certain products/services, such as the purchase of mobile tickets for the purpose of transport, parking etc. Also, the technical shortcomings referred to in Section 2 allow the DCB method to be used for forged payments and orders.

As pointed out in the BEREC report, Finland has well established regulatory mechanisms to counter and report mobile cramming. Despite this, the deceptive practice has been shown to find new avenues among Finnish mobile operators. Finally, mobile cramming presents a threat to the perception that direct carrier billing can be used as a reliable payment option. The phenomenon also lowers the consumers' trust towards their mobile operator.