

Proposal for a new Marketing Control Act

On 9 May 2008 the Norwegian Government presented the proposal for a new Marketing Control Act. The proposal will be of great importance for all businesses marketing goods and services to consumers in Norway. The provisions in the current Marketing Act that protect the interests of businesses (regulations on unfair competition etc.) are not affected by the proposal, and will not be amended.

BACKGROUND FOR THE PROPOSAL – IMPLEMENTATION OF THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE

The background for the proposal is that Norway as a member of the EEA-agreement is obliged to implement the Unfair Commercial Practices Directive (Directive 2005/29/EC) concerning unfair business-to-consumer practices. The Directive is based on the concept of total harmonisation, i.e. Member States are not allowed to go above or below the level of consumer protection established by the Directive. Practice from the ECJ and the EFTA-court will subsequently be normative for the interpretation of the new Act.

When the Directive is incorporated in all the EU and EEA-countries, cross-border marketing of goods and services will be easier, for instance by using the same advertising campaign in all EU-countries. The proposed provisions are much more detailed than the current Act, and will probably establish a more predictable legal situation.

KEY ISSUES IN THE PROPOSAL

New general clause concerning “unfair commercial practice” and new specific rules on misleading/aggressive commercial practice

Section 6 of the proposal sets forth a general prohibition against “unfair commercial practices” towards consumers. The clause is similar to the general clause found in Section 1 of the current Act. However, practice from the ECJ and the EFTA-court will be decisive for what is to be considered “unfair”. A commercial practice will be considered unfair if it is in conflict with good business practice towards consumers, and it is likely to materially distort the economic behaviour of the consumer.

The concept of “commercial practices” covers more than just advertising and marketing, and includes activities linked to the promotion, sale, and supply of a product sold to consumers. Thus, after sale services and handling of complaints may be considered to constitute unfair commercial practices.

In addition to the general clause, special provisions concerning misleading and aggressive practices are set forth in sections 7-9. Misleading actions will be covered by Section 7, while misleading omissions will fall under Section 8. Aggressive practices are prohibited in Section 9 of the proposal. Evidently, the Government proposal is very much in line with the Directive on these points.

The said provisions are supplemented by the so-called Black List (annex 1 of the Directive) of prac-

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tices which shall, in all circumstances, be regarded as unfair and thus prohibited. The Black List will be incorporated in a subsequent administrative regulation. Amongst others the Black List prohibits use of bait offers, creating a false impression that the consumer's rights pursuant to mandatory law is a special feature to the product (misleading warranties), and describing the product as "free" when this not the case.

Whether a commercial practice is "unfair" is to be considered both in relation to the Black List and in relation to the more detailed provisions in Section 7-9. The general clause will intercept unfair practices that are not covered by any of the other provisions.

Obligation to verify factual information

Section 3 sets forth an obligation to verify factual information presented in advertising and marketing. The provision is a codification of general principles that apply to all marketing in Norway. According to the Government, the provision is in accordance with the Directive. The documentation must be adequate and correct compared to the factual information presented, and it may be demanded that documentary proof shall consist of statements or surveys by neutral bodies. The documentation shall be available at the time when the advertising/marketing takes place. It is also proposed that the Consumer Ombudsman may request disclosure of the necessary documentation within a period of 48 hours after the request is set forward.

Specific provisions concerning the protection of children

The Government proposes a separate chapter in the new Act concerning the protection of children in marketing. The purpose of the provisions is to emphasise that children are a particularly vulnerable group, and that marketing and commercial practices must be adjusted accordingly. To a great extent the proposals must be considered as codifications of current authority practice. The Government is of the opinion that the proposed provisions, to the extent that they are stricter than the Directive, are aimed to protect the non-economic interests of children, and thus fall outside the scope of the Directive.

Section 19 sets forth a special duty of care as regards children's reliability, lack of experience and natural naivety when the marketing is aimed at

children, or may be seen or heard by children. This implies that it must be considered that children may be exposed for marketing, even if the marketing is not particularly directed towards children. It is also proposed that it shall be particularly considered when practising the new general clause in Section 6 that the marketing is directed towards children, and a special provision addressing certain ethical aspects in marketing towards children.

Unaddressed advertising material, free newspapers and inserts distributed with newspapers

Due to a long-lasting political debate, the Government in the consultation paper proposed a reversal of the existing regulations on delivering of unaddressed advertising in such a way that delivering of unaddressed advertising material should not be permitted unless the consumer expressly stated that he or she wanted to receive such material. This proposal has not been followed up, thus it is still prohibited to deliver unaddressed advertising material to consumers who have clearly stated that they do not want to receive it. However, the prohibition extended to cover free newspapers, irrespective of the newspaper's editorial content.

Inserts distributed with newspapers are not considered as unaddressed advertising material under this provision. Thus, inserts may still be distributed.

Restrictions in the provisions governing telephone marketing

The Government does not propose to introduce a requirement for prior consent of consumers concerning telephone marketing. However, several measures are being proposed to restrict and increase the efficiency of the existing provisions on telephone marketing. Key elements in the proposal are:

- ◆ Improvements of the Central Marketing Exclusion Register by introducing the possibility to register phone numbers in addition to birth numbers and obliging businesses to update their registration lists more frequently.
- ◆ Prohibition against telephone marketing on Saturdays, holidays and weekdays before 9 a.m. and after 9 p.m.
- ◆ Introducing an information requirement, i.e. that the consumer shall receive a written, brief account of the key features of the goods or services to be

sold before the consumer can enter into an agreement.

- ◆ The consumer's acceptance must be in writing, i.e. the consumer is not legally bound before having accepted the offer in writing.

The last two proposals will be implemented in the Distance Contracts Act. The other provisions concerning telephone marketing are to be implemented in the new Marketing Act, i.e. the Consumer Ombudsman will be responsible for the enforcement of the new provisions.

Premiums, stamps/coupons, competitions and lotteries

The Government proposes simplifications and certain liberalizations when it comes to the prohibitions against premiums, stamps/coupons, competitions and lotteries. Thus, the Norwegian legislation will be more in line with the current legislation in the other Scandinavian countries. Key elements in the proposal are:

- ◆ The prohibition against premiums (the Marketing Act Section 4, first paragraph) shall be abolished. Misleading use of premiums will still be prohibited pursuant to the provisions in Section 6 and 7 of the proposal and the Black List.
- ◆ The prohibition against stamps and coupons (the Marketing Act Section 4, second paragraph) shall be abolished. However, it is proposed to prohibit certain kinds of collective stamps, i.e. collective stamps giving rights to goods and services. "More of the same" - concepts and bonus programs, i.e. where the bonus points equal an amount of money, are as a point of departure not covered by the new prohibition.
- ◆ The current prohibition against competitions and lotteries for marketing purposes (the Marketing Act Section 5) shall be abolished. However, competitions and lotteries to promote the sales of goods or services will still be prohibited, if the consumer has to purchase certain goods or services in order to participate in the competition or lottery. This must be considered a simplification, but hardly any liberalization, compared to the current prohibition. The proposed prohibition will not apply to competitions in the media sector.

- ◆ The consumer shall be informed about the additional services being offered and of the terms and conditions for making use of the additional services. (Section 18 last paragraph).

Enforcement and sanctions

Pursuant to the proposal, the Consumer Ombudsman is still to be responsible for the supervision of the Marketing Act. The Consumer Ombudsman shall, through negotiations, seek to reach settlements with traders. However, if a settlement is not achieved, the Consumer Ombudsman may submit the case to the Market Council.

In urgent matters, i.e. where the Consumer Ombudsman considers waiting for the decision of the Market Council will result in a disadvantage or a damaging effect, the Consumer Ombudsman may make the decision himself. The Consumer Ombudsman may also make a decision when the Ombudsman considers the marketing or the contract term or condition to be substantially identical to cases in which the Market Council has previously issued a prohibition.

The Government proposes that the Consumer Ombudsman shall be given powers to intervene at an earlier stage when it comes to certain violations of the new Act, i.e. violation of the ban on negative sales, unsolicited marketing communications and unaddressed advertising. This will also apply if the duty to disclose documentation within 48 hours is failed to comply with.

In order to increase the efficiency of the new Act, the Government proposes that the Consumer Ombudsman shall be able to issue a fine in cases of substantial or repeated violations of certain provisions in the Act. This implies that the infringer has to pay a fine for violating the rules, contrary to the existing enforcement charges - which are applicable only if the infringer also infringes upon on a prohibition decision. When determining the fine, the severity, extent and effects of the violation shall be considered.

Further progress

The Government's proposition will probably be considered and decided by the Parliament before the summer holidays. The new Act will most likely enter into force from 1 January 2009. ●

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