



WELL-FUNCTIONING MARKETS

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THE DANISH MARKETING PRACTICES ACT HAS BEEN GIVEN A COMPLETE OVERHAUL AND IS NOW MORE USER-FRIENDLY

The Danish Marketing Practices Act has been given a complete overhaul, which makes it consistent with EU regulations. The new Act has been made more comprehensible for both businesses and consumers, and helps to reduce administrative burdens for businesses. The Danish Marketing Practices Act supports good, uniform consumer conditions and is technology neutral and therefore agile with regard to technological developments. The Act comes into force on 1 July 2017.

The article describes the main changes brought about by the new act. This applies both to the purely material changes in the act, and the more technical legal changes and clarifications.

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The Danish Marketing Practices Act lays down the rules for companies' consumer-facing marketing. The rules are enforced by the consumer ombudsman.

Among other things, the purpose of The Marketing Practices Act is to ensure good consumer conditions and establish the framework for effective competition based on proper parameters. For example, consumer protection consists of protection against misleading or aggressive marketing.

The Marketing Practices Act thus constitutes an essential framework of conditions for all businesses and consumers in Denmark.

The rules concerning the marketing of companies is largely determined at the EU level. The aim of a common framework is to strengthen the internal market in Europe. This supports trade between countries and reduces companies' costs when marketing themselves in other countries.

The last major revision of The Marketing Practices Act took place in 2005. Since then, the implementation of EU Directives (especially the Unfair Commercial Practices Directive) has entailed "budding", which has led to the Act becoming fragmented and opaque. This has also resulted in a letter of formal notice from the European Commission assessing that, on a number of points, Denmark has not properly implemented the Unfair Commercial Practices

Directive. In addition, the technological development has provided new ways for companies to market themselves. This has created challenges for companies as regards assessing whether their communications remain in compliance with the law. Consumers may also come to doubt what their rights are.

Based on these matters, the previous government established the Committee on the Marketing Practices Act at the end of 2014. The committee was asked to conduct a thorough review of the Danish Marketing Practices Act and then submit a draft of a simplified, clearer Act. In accordance with the mandate, the aim was for the new Act to support well-functioning, uniform consumer conditions in the light of technological developments in commercial communications. At the same time, it should not impose on business life unnecessary burdens. Furthermore, it should support well-functioning markets and effective competition, and it should be consistent with EU rules in the marketing area¹.

The new Danish Marketing Practices Act was adopted on 25 April 2017 and entered into force on 1 July 2017. The Act primarily contains a number of legal-technical amendments and clarifications which, among other things, ensure compliance with relevant EU legislation. But other, more substantive amendments have also been made, while the administrative burdens deriving from the Act have been slightly reduced, cf. Box 1.

Box 1

General information about the contents of the Act

The Act contains a number of legal-technical amendments and clarifications. Among other things, these changes must ensure that the explanatory notes to the Act are updated, modernised and comprehensible within the framework of existing EU rules.

The systematic of the Act is changed from the current Act, so that the Act is more closely aligned with EU regulations, but is also given a more logical structure. Therefore, the Act is divided into thematic parts.

One focus of the Act has been to find the balance between ensuring that the new Marketing Practices Act adheres to directive, both in content and wording, but is also possible to understand in a Danish context. The new Marketing Practices Act thus involves a more textual implementation of the relevant EU regulation than the previous Marketing Practices Act did.

To some extent, the new Marketing Practices Act is based on EU legal concepts and definitions, which may seem foreign compared to Danish, marketing-legal language, but which, in the opinion of the commission, ensure that the Act is EU compliant.

The new Marketing Practices Act contains a number of substantive changes in the law, including i.a.:

Organised discount: The requirement for signage of organised discounts, i.e. discounts for particular associations, organisations or specific groups of people, is repealed.

Duty to instruct: The rule regarding the duty to instruct in connection with the sale of a product or service is repealed. It is estimated that a similar duty already follows from the rules of misrepresentation and the Sale of Goods Act.

Warranties: If a company provides a guarantee, the guarantee only needs to be in Danish if the company has marketed itself in Danish.

Hidden advertising: The ban on hidden advertising is upheld. However, it is clarified that it is not a prerequisite that an agreement is in place between the company whose products are advertised and the person responsible for the exposure of a product for it to be categorised as advertising.

Substantive changes in the law

The new Danish Marketing Practices Act entails a number of amendments.

With the Act, the obligation for merchants to announce via signage organised discounts is repealed, i.e. discounts for special associations, organisations or specific groups of people. The removal is due to the obligation to announce via signage not being deemed consistent with the directive on unfair commercial practices.

This assessment is based on the fact that, in a number of cases² the European Court of Justice has ruled that the Directive precludes general prohibitions, except for those listed in the Directive's Annex 1. In all other cases, a specific assessment must be made of whether a matter is misleading. On this basis, it is judged that the Unfair Commercial Practices Directive requires a specific assessment of whether the lack of indication of the availability of organised discounts is misleading.

Furthermore, the obligation for companies to provide guidance to a customer in connection with the sale of a product is repealed. This means that consumers will no longer have a mandatory requirement in the Marketing Practices Act to be provided with instructions in connection with the purchase of a product. However, this should be viewed in the context that in most cases, a similar duty will follow from the misrepresentation provisions of the Marketing Practices Act. Furthermore, there is a duty to provide instruction under the Sale of Goods Act, which can be enforced by the Marketing Practices Act's rules for proper conduct.

It also follows from the new Marketing Practices Act that the Consumer Ombudsman, in connection with inspections, will be allowed to copy all the relevant data, so that the information can be reviewed after the inspection visit itself. Among other things, this means that the period when the company is troubled by the inspection and possibly prevented from exercising its profession, is expected to be shortened. The material is kept isolated and locked, and the material is deleted when the matter has been finally closed.

As a new feature, the Consumer Ombudsman is also allowed to inspect the contents of employees' pockets, bags and the like. The reason for this is that small electronic media, such as mobile phones, USB keys and the like which can be easily placed in a pocket, may often contain information relevant to the case.

The Marketing Practices Act also entails that companies who provide a warranty for a product are only obliged to provide the warranty in Danish if the marketing has exclusively been done in Danish.

A warranty means that the consumer receives some advantages beyond the rights granted by the Sale of Goods Act. For example, the warranty must be longer than the two-

year warranty which follows from the Sale of Goods Act, or it must cover more, i.e. wear and tear.

Among other things, the reason for this change is the fact that if the marketing of a product is only available in English or a language other than Danish, the consumer should be prepared for the information about the warranty also being formulated/written in said language.

With the Act, the rules governing the assessment of what constitutes so-called hidden advertising are changed. Under the new Act, it is advertising if a company has a commercial purpose for i.e. sending their product to a blogger, who then mentions it in his/her blog. Previously, there would have to be an actual agreement in place between the blogger and the business owner.

Lastly, under the new Marketing Practices Act, it follows that *special circumstances* are no longer required for the consumer to be able to request additional information to verify the price in connection with an invoice for services on a time and materials basis. Under the new Act, the consumer will thus be able to request further information in all cases. The reason for this change is that, in practice, there has been uncertainty about which specific situations are covered by the provision.

Burdens on business community eased

The new Danish Marketing Practices Act helps ensure that Danish companies are not subject to stricter conditions than their foreign competitors. It is believed that a more textual implementation of EU rules may better ensure a practice and an understanding of the rules which corresponds to what applies in other countries.

Focus has also been on reducing unnecessary administrative burdens on business life, to the extent this is possible and appropriate.

It is estimated that the new Danish Marketing Practices Act and the repeal of certain underlying consolidation acts will reduce the administrative burdens on companies by DKK 10.5 million.

The estimate is based on a report drawn up in connection with the committee work on the Act. Among other things, the report contains a measurement of administrative burdens in the previous Marketing Practices Act. The report shows that a vast majority of the Act is rooted in EU obligations which Denmark was partly behind the adoption of.

Technology neutrality in the context of EU legislation

The new Danish Marketing Practices Act is essentially technology neutral in the sense that it can be applied to marketing practices across all media. However, certain provisions in the Act, such as the bill's section 10 on unsolicited communications, only regulate marketing done through certain media, such as electronic mail.

In connection with the preparation of the Act, it has been discussed how the Act can be modernised and how the provisions can apply to new digital marketing methods.

An acknowledgement in the work is that it is not suitable to link regulation closely to certain media or forms of communication which can quickly become obsolete. For example, the problem is illustrated by the rules of the ePrivacy Directive on unsolicited communications entailing that the new Marketing Practices Act must continue to refer to "telex" and "automated dialling systems", although these forms of communication are used only to a very limited extent in Denmark today.

A further modernisation of the rules in the Marketing Practices Act regarding, for example, unsolicited communications, awaits the modernisation of the underlying EU directives and their being made independent of specific technologies, to the extent this is possible.

In some areas, such modernisation is underway. In January 2017, the EU Commission presented a proposal for a new regulation to strengthen the right to privacy in electronic communication³. It is the intention that the new rules extend the scope to cover all providers of electronic communications.

With the current proposal from the Commission, unsolicited electronic communications are prohibited, regardless of media, including via e-mail, SMS and, in principle, also by phone, if users have not given their consent. Member States may choose a solution which gives consumers the right to refuse to receive phone calls for marketing purposes, i.e. by registering their number on a no call list.

Telephone salespeople are required to display their phone number, or use a special prefix which indicates a call for marketing purposes.

In connection with the regulation's entry into force, the proposed rule in the Marketing Practices Act's section 10 on unsolicited communications must be repealed or revised.

Legal-technical amendments and clarifications

As previously stated, in addition to the substantive changes, a number of legal-technical amendments and clarifications have been made in the Act.

These amendments and clarifications have been made in order to ensure a closer adherence to directives in the implementation of the underlying EU regulations, but also to get a more logically structured Act. Thus, the Act is divided into thematic parts, and a definition clause has been inserted which should make it easier to use and understand the terms used in the Act.

The technical legal amendments and clarifications will not impact the existing state of the law.

Firstly, the new Marketing Practices Act entails that the current general clause in section 1 concerning good conduct are divided into two separate good conduct regulations – one which governs good conduct in matters not designed to protect the economic interests of consumers, e.g. relationships between companies, and another for matters designed to protect consumers' economic interests.

Among other things, the purpose of this division is to clarify what, under marketing law, constitutes good practice within and outside the scope of the directive on unfair commercial practices.

The Unfair Commercial Practices Directive only covers matters concerning the protection of consumers' economic interests and excludes, by its wording, matters relating to contract law, in particular rules on the validity, formation or effect of contracts and matters relating to health and safety, taste and decency etc. This means that matters where the primary protection consideration is not the economic interests of consumers fall outside the Directive's scope.

The division of the good conduct provision is a natural part of the proposal to isolate the provisions of the Act which must be interpreted in accordance with the Directive on unfair commercial practices in a single chapter in the law.

The division results in greater legal clarity and closer adherence to the directive and ensures greater clarity about which parts of the Act fall outside the competence of the EU Court of Justice.

Another technical legal amendment is that the Act's prohibition against acts of misrepresentation and omission as well as aggressive commercial practices is now divided into three elements, namely sections 5-7 of the Act, compared to the previous single provision.

In the previous Danish Marketing Practices Act, the provision on comparative advertising implemented two Directives. Firstly, the provision implemented the minimum Directive on Misleading and Comparative Advertising, which only regulates business-to-business situations. Secondly, the provision also implemented the Unfair Commercial Practices Directive, which solely covers the relationship between consumers and businesses to the extent that the commercial practice concerns the economic interests of consumers. This has created uncertainty about what applies to individual situations.

The division also ensures a more textual implementation of the directive on unfair commercial practices.

In addition, the Marketing Practices Act's provisions on hidden advertising and purchase exhortation are incorporated into the new provision in section 6 on misrepresentative omissions. This is new compared to the previously applicable Danish Marketing Practices Act,

according to which the provisions on covert advertising and invitation to purchase were divided into two separate provisions.

This also helps ensure a more accurate and textual implementation of the directive on unfair commercial practices, as the regulation of hidden advertisement and exhortation is also an integral part of the provision on misrepresentative omissions in the directive.

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- 1 The Committee has included the practical experiences and challenges which both business life and consumer organisations have experienced, as well as the enforcement challenges encountered by the Consumer Ombudsman. These experiences come partly from the committee members' own experience, and from their discussions with the organisations they represented. Furthermore, knowledge and experience has been gathered from a number of stakeholders and experts. The committee's report can be read [here](http://www.kfst.dk/media/2729/2016juli-rapport-fra-udvalg-om-markedsfoeringsloven.pdf): <http://www.kfst.dk/media/2729/2016juli-rapport-fra-udvalg-om-markedsfoeringsloven.pdf>
 - 2 European Court of Justice in Joined Cases C-299/07 and C-540/08 (VTB-VAB and Others v Total Belgium NV), C-206/11 (Mediaprint Zeitung und Zeitschriftenverlag GmbH & Co. KG v Österreich-Zeitung Verlag GmbH) and C-206/11 (Georg Köck against Schutzverband gegen unlauteren Wettbewerb).
 - 3 Proposal for a European Parliament and Council Regulation concerning respect for private life and protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on privacy and electronic communications) COM 10 (10).
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