

The Consumer Ombudsman's guidance on children, young people and marketing

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The Danish Consumer Ombudsman

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Section 1

Introduction

1.1 Background

In 1998, the Consumer Ombudsman issued a guidance paper on children, young people and marketing for the first time. The guidance paper has later been revised several times, mainly in connection with amendments of the Marketing Practices Act. In light of the most recent legislative amendment¹, the Consumer Ombudsman has resolved to issue a new guidance paper on applicable legislation and practice from the courts of law and the Consumer Ombudsman.

1.2 Purpose

Traders promoting their products and services to children and young people are required under section 8 of the Marketing Practices Act to frame their marketing activities in a way that takes into account the special need for protecting this target group². This type of marketing is subjected to stricter assessment than marketing directed at adults, and it will take less for the Marketing Practices Act to be considered violated. The younger the target group, the stricter the requirements.

It appears from the legislative material to section 8(1) of the Act that children and young people do not possess the necessary experience to make objective assessments in relation to advertising and that they are readily influenced and easy to impress. They are easily tempted by e.g. offers accompanied by promises of gifts and participation in competitions offering attractive prizes and odds for winning. The fact that children and young people are readily influenced makes for a particularly good opportunity for traders to increase children's and young people's interest in branded products and to influence their spending patterns³.

This guidance paper contains a review of the requirements of the Marketing Practices Act on traders' marketing activities when directed at children and young people. In addition, the guidance provides an overview of how the Consumer Ombudsman interprets the provisions of the Marketing Practices Act that are particularly relevant in relation to children and young people and what is emphasised when enforcing the provisions. The main emphasis is on the requirements that may be made in pursuance of sections 1 and 8 of the Marketing Practices Act. This guidance is not exhaustive.

¹ Act no. 378 of 17 April 2013 to amend the Marketing Practices Act, the Administration of Justice Act, the Financial Business Act and the Payment Services and Electronic Money Act.

² See explanatory notes on section 8(1) of the Marketing Practices Act (Bill L 13 tabled on 6 October 2005).

³ Ibid.

Whether an advertisement is within the limits of the law relies on a specific assessment and it is ultimately up to the courts to decide whether the provisions of the Marketing Practices Act have been violated, including whether a criminal act has been committed.

The Marketing Practices Act is technology neutral, meaning that the Act – and the indicative interpretations provided in this guidance – apply irrespective of which medium is used for the marketing communications.

If other legislation (special legislation) prescribes special requirements for marketing activities directed at children and young people, such requirements must also be complied with⁴ ⁵. Special legislation is typically enforced by special authorities. Unless otherwise determined by law, the Marketing Practices Act also applies by way of supplement, and marketing activities are thus subject to the supervision of the Consumer Ombudsman, including the possibility of having questions about the lawfulness of marketing activities tried in court⁶.

⁴ For example, section 36(1)(iii) of the Gambling Act comprises a ban against gambling activities being marketed, by way of communication form or choice of media, at children and young people. It is provided in the explanatory notes on the Gambling Act that the offering of gambling activities is a sensitive area in which aggressive marketing of gambling products can be the direct cause of excessive use and increased addiction to gambling among particularly exposed population groups. As a result, the marketing of gambling activities is subject to further restrictions in addition to those following from the provisions of the Marketing Practices Act.

⁵ Another example is the Executive Order on Radio and Television Advertising, which contains rules on protection of minors in radio and television commercials (sections 16-22).

⁶ See judgment delivered by the Supreme Court on 4 July 2013 as printed in U.2013.2941H.

Section 2

Legislative framework

2.1 Unfair Commercial Practices Directive⁷

The Unfair Commercial Practices Directive is implemented in the Marketing Practices Act by Act no. 1547 of 20 December 2006 to amend the Marketing Practices Act and by Executive Order no. 1084 of 14 September 2007 (as amended by Executive Order no. 546 of 24 May 2013 concerning unfair business-to-consumer commercial practices), both of which became effective as of 1 December 2007.

The Directive prohibits unfair commercial practices. See article 5(1). The purpose is to protect consumers⁸ against traders using unfair marketing practices. According to article 2(d), "commercial practices":

"means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers".

The expression "commercial practices" in the Directive is equivalent to the concept "marketing". It means marketing in a broad sense, comprising not only marketing in a technical sense but any activity serving a commercial purpose⁹, i.e. any and all activities from initial advertising over production, distribution and sale to after-sales service and debt recovery¹⁰.

According to article 5(2) of the Directive, a commercial practice is unfair if:

- a) it is contrary to the requirements of professional diligence¹¹, which is equivalent to the good marketing practice concept of section 1 of the Marketing Practices Act¹², and
- b) at the same time it materially distorts or is likely to materially distort the economic behaviour¹³ with regard to the product of the average consumer whom it reaches or

⁷ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

⁸ See article 3(1). Business-to-business commercial practices are not comprised by the rules of the Directive.

⁹ See explanatory notes on section 1(1)(ii) (Bill L 2 tabled on 4 October 2006), cf. explanatory notes on section 1 of the Marketing Practices Act of 1974, FT 1973-74 (2nd session), Schedule A 2256. See also Supreme Court judgment printed in U.2013.2941H.

¹⁰ See explanatory notes on section 2 of the Marketing Practices Act (Bill L 13 tabled on 6 October 2005).

¹¹ Professional diligence is the standard by which acts performed by traders is assessed. In article 2(h), the standard is defined as: "the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity".

¹² See explanatory notes on section 1(1)(ii) of the Marketing Practices Act (Bill L 2 tabled on 4 October 2006).

¹³ This implies using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise. See the definition in article 2(e). The concept "transactional decision" is defined in article 2(k) of the Directive.

to whom it is addressed, or of the average member of the group when a commercial practice is directed at a particular group of consumers.

In particular, commercial practices are unfair if they are misleading or aggressive. See article 5(4)¹⁴.

Annex I to the Directive lists a number of examples of commercial practices which are in all circumstances considered unfair¹⁵. These types of commercial practice are thus prohibited, and further assessment is not necessary, including e.g. assessment of whether any misleading of consumers in specific cases has taken place¹⁶. The Annex has been implemented in the Executive Order on Unfair Business-to-Consumer Commercial Practices.

The Directive only protects the consumers' economic interests – not other interests such as the health and safety aspects of products¹⁷. For example, since the marketing of alcohol and tobacco is related to the consumers' health, this type of marketing is not within the scope of the Directive. This also applies to the consideration for public interests and questions of taste and decency¹⁸.

It appears from recital 7 of the Directive that member states can prohibit certain types of commercial practices for reasons of taste and decency¹⁹.

Against this background, the Consumer Ombudsman can use section 1(1) (and possibly section 8(1)), section 8(2) or (3) of the Marketing Practices Act as a basis for intervening against certain types of marketing for reasons of taste and decency. This applies, for example, to matters concerning discrimination and ethics as well as advertising playing on violence, fear, anxiety, etc. or inciting to dangerous behaviour.

For use in the interpretation of the Unfair Commercial Practices Directive, the Commission issued an unofficial guidance document on 3 December 2009²⁰. The guidance document is not legally binding but can in a number of ways serve as an aid to understanding and interpreting the Directive.

2.1.1 The average consumer

According to recital 18 of the Directive an "average consumer" should be taken to mean a person who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice.

¹⁴ Misleading commercial practices are dealt with in articles 6 and 7, and aggressive commercial practices are dealt with in articles 8 and 9.

¹⁵ See article 5(5) of the Directive.

¹⁶ See recital 17 of the Directive and the judgment of the European Court of Justice in the joined cases C-261/07 and C-299/07 (VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV), paragraph 56, and judgment of 9 November 2010 in C-540/08 (Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG v "Österreich"-Zeitschriftenverlag GmbH), paragraph 34.

¹⁷ See article 3(3) of the Directive.

¹⁸ See general explanatory notes on Bill L 2 tabled on 4 October 2006.

¹⁹ Recital 7 of the Directive mentions "commercial solicitation in the streets" as an example of this.

²⁰ The European Commission's guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices (Commission Staff Working Document, COM no. SEC(2009) 1666 of 3 December 2009).

However, this norm is flexible, as article 5(2) expressly mentions that a specific delimitation of the average consumer should always consider the person whom the advertisement reaches.

If the commercial practice in question is directed at a particular group of consumers, the assessment should be based on an average member of the group. See article 5(2)(b). This implies that the effect of a commercial practice specifically directed at children must be assessed on the basis of an average child²¹.

The "average consumer" concept not a statistical concept. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case. See recital 18 of the Directive.

According to the legislative material, this does not constitute a change relative to the interpretation of the consumer concept which was made before the Directive was implemented in Danish law²².

2.1.2 Special protection of children and young people

The Directive is based on the notion that all consumers should be protected against "unfair commercial practices". This also applies to children, who are considered to be a particularly vulnerable group of consumers and who according to article 5(3) and item 28 of the Annex enjoy special protection.

It is stated in article 5(3)²³ that if the trader could reasonably be expected to foresee that the use of a given practice is likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable, for example due to age, the assessment must be made from the perspective of the average member of that group.

The Commission guidance states that children, for example, might be particularly vulnerable to advertisements about videogames. Despite the fact that a substantial part of the target audience is constituted by adults, a trader could reasonably foresee that such advertisements may have an impact on children. For example, the compatibility of a videogame with a specific device may be sufficiently clear to an adult consumer but, due to the way the information is provided, it may still confuse children²⁴.

Another example is the promotion of products which are particularly appealing to teenagers in a way which exploits the fact that they are not mature enough to see through the promotion. For example, an advertisement for mobile phone services conveying the message that by taking out a certain subscription you can easily make and maintain friends is likely to be taken more literally by teenagers than by adults.

²¹ See recital 18 of the Directive and item 2.2.2. of the Commission guidance.

²² See explanatory notes on section 1(1)(ii) of the Marketing Practices Act (Bill L 2 tabled on 4 October 2006).

²³ Article 5(3) reads: Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This does not affect the general and lawful advertising practice consisting of making exaggerated statements or statements which are not meant to be taken literally.

²⁴ See item 2.3.2. of the guidance.

The Consumer Ombudsman interprets this to the effect that in situations in which the marketing communication is directed at both adults and children, but in which the trader could foresee that the economic behaviour of children would be likely to be distorted, the norm according to article 5(3) will be an average child.

2.2 The Marketing Practices Act²⁵

2.2.1 Section 1 of the Marketing Practices Act – Good marketing practice

*1.-(1) Traders subject to this Act shall exercise good marketing practice with reference to consumers, other traders and public interests.
(2) Marketing in respect of consumers' economic interests may not be designed to significantly distort their economic behaviour.*

Section 1(1) of the Marketing Practices Act is the general clause of the Marketing Practices Act and the overall behavioural standard imposing a duty on traders to exercise good marketing practice. This is a legal standard making it possible for the standard to evolve over time and to develop the provision in line with trends in society²⁶.

Section 1(2) of the Marketing Practices Act implements article 5(2) of the Unfair Commercial Practices Directive. It only applies to marketing practices that distort the economic behaviour of consumers. Marketing practices which are comprised by subsection (2) and which are deemed to be lawful according to this provision cannot be prohibited pursuant to section 1(1) as the Directive provides for total harmonisation.

Marketing practices related to consumer health and safety, questions of taste and decency and public interests on the other hand are outside the scope of the Directive. Rules related to this type of marketing are thus not harmonised at community level but only regulated at the national level – in section 1(1) (and possibly section 8(1)), section 8(2) and (3) of the Marketing Practices Act.

2.2.2 Section 8(1) of the Marketing Practices Act – Special considerations regarding children and young people

Marketing directed at children and young people shall be designed with specific reference to their natural credulity and lack of experience and critical sense, as a result of which they are readily influenced and easy to impress.

This provision functions as a frame of reference or standard of care within which businesses must design marketing activities directed at children and young people. This implies a general tightening of the other provisions of the Marketing Practices Act when the target group is children and young people²⁷. Marketing activities will thus be assessed more strictly, and it

²⁵ Consolidating Act no. 1216 of 25 September 2013 on Marketing Practices as amended by Act no. 1460 of 17 December 2013.

²⁶ See explanatory notes on section 1 of the Marketing Practices Act (Bill L 13 tabled on 6 October 2005).

²⁷ See explanatory notes on section 8(1) of the Marketing Practices Act (Bill L 13 tabled on 6 October 2005).

will take less for the Marketing Practices Act to be considered violated than for marketing activities directed at adults.

This implies that an assessment as to whether an advertisement directed at children and young people is misleading and contrary to section 3 of the Marketing Practices Act should take into account that children and young people are more likely to accept advertising statements on trust. The description of the size, value, type, durability or performance of a product must be more precise and realistic than in advertisements directed at adults²⁸.

A comparison of the requirements of section 4 of the Marketing Practices Act on covert marketing activities with section 8(1) indicates a tightening of the requirements for advertising identification. This means e.g. that in advertisements in interactive media directed at children and young people, special care must be taken not to disguise the marketing communication²⁹.

Section 8(1) of the Marketing Practices Act is supplemented by two punishable prohibitions. One appears from subsection (2) and concerns a prohibition against the use of certain aggressive and brutalising effects in advertisements directed at children and young people. The other appears from subsection (3) and concerns a prohibition against the use of intoxicants, including alcohol, in advertisements directed at children and young people.

2.2.3 Section 8(2) of the Marketing Practices Act – Incitement to violence or inconsiderate behaviour or use of violence, fear or superstition for effective purposes

Marketing directed at children and young people under the age of 18 must not directly or indirectly incite them to violence or other dangerous or inconsiderate behaviour, nor make unwarrantable use of violence, fear or superstition in order to influence them.

According to this provision, marketing activities encouraging acts of violence, bullying or similar conduct are not permitted. This also applies if an advertisement makes unwarrantable use of homicide, violence or abuse for effective purposes. For example, advertisements for toy guns must not use illustrations showing realistic gun fights between soldiers³⁰.

Moreover, the marketing communication must not, without justification on educational, social or other objective grounds, contain depictions or descriptions of dangerous situations or situations disregarding general precautions. This could be e.g. an advertisement showing models with plastic bags over their heads which would be associated with great danger if the advertisement were to inspire children to do the same. Another example could be advertisements showing careless handling of fire³¹.

²⁸ Ibid.

²⁹ Ibid.

³⁰ See explanatory notes on section 8(2) of the Marketing Practices Act (Bill L 13 tabled on 6 October 2005).

³¹ See explanatory notes on section 8(1) of the Marketing Practices Act (Bill L 13 tabled on 6 October 2005).

2.2.4 Section 8(3) – Alcohol in marketing

Marketing directed at children and young people under the age of 18 must not mention or include images of or references to intoxicants, including alcohol.

With a view to increasing the protection of children and young people, section 8(3) was inserted in the Marketing Practices Act effective 1 May 2013 to the effect that *any* kind of reference etc. to intoxicants, including alcohol, in advertisements directed at children and young people is now contrary to the provision.

It appears from the legislative material that the provision is intended to ensure that intoxicants, including alcohol, are in no way whatsoever used directly or for effective purposes in marketing directed at children and young people³². This implies that it will be contrary to the provision if a trader directs its marketing of alcohol as a product at children and young people or if alcohol is used for effective purposes, thus forming part of the marketing of other products directed at children and young people.

Section 8(3) was inserted on grounds of a judgment delivered by the High Court of Western Denmark on 11 April 2012³³, which determined that the previous wording of the provision³⁴ did not provide grounds for considering all references to alcohol in advertisements directed at children and young people aged 16-18 to constitute a violation of the provision.

Among other things, the High Court of Western Denmark found that it was outside the scope of the provision that it was stated in the marketing communication which services were included in various events, including that alcoholic beverages might be served in connection with meals, that certain events included free beer or soft drinks, that night-time visits to a number of bars and discotheques at the holiday destination were involved, that in this connection beer or sangria would be served, that free beverages or cheap drinks were offered, that discount agreements had been made with bars, that "happy hour" arrangements had been made, etc.

In addition to section 8(3), traders are required pursuant to section 1 of the Marketing Practices Act on good marketing practice to exercise special care in connection with advertisements mentioning or showing or containing references to intoxicants, including alcohol, irrespective of whether they are not specifically directed at children and young people, if the advertisements are shown publicly in places frequented by children and young people in particular, e.g. in close proximity to day-care centres or educational institutions frequented by children and young people under the age of 18 or near playgrounds. This also applies to websites, including online social media³⁵.

³² See item 1.2 of the general explanatory notes on Bill L 101 tabled on 12 December 2012.

³³ U.2012.2435V.

³⁴ Formerly section 8(2) of the Marketing Practices Act.

³⁵ See item 2.2.2. of the general explanatory notes on Bill L 101 tabled on 12 December 2012.

2.2.5 Section 8(3) – Item 28 in the Black List to the Executive Order on Unfair Business-to-Consumer Commercial Practices –³⁶ Invitations to purchase

Section 2 of the Executive Order provides that the commercial practices on the Black List to the Executive Order are, in all circumstances, considered as unfair business-to-consumer commercial practices and thus prohibited.

Item 28 in the Black List is an example of aggressive marketing and is worded as follows:

"Including in an advertisement a direct exhortation to children³⁷ to buy the advertised products or persuade their parents or other adults to buy the advertised products for them. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television and radio broadcasting."

The assessment of whether a matter is unfair has thus been made by the legislature.

In this type of case, it will thus only be relevant to determine whether the marketing communication contains a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them. If this is the case, the marketing communication is unlawful.

Item 4.4. of the Position of the Nordic Ombudsmen on Social Media Marketing provides that it must be assessed in each case whether the marketing communication exhorts or invites children to make a purchase. This assessment must be made from the perspective of the individual child by taking into consideration its age, development and other factors rendering children particularly vulnerable. In the specific assessment, importance will be attached to the following elements, among others:

- How clearly the exhortation to buy has been phrased, including the impression created. Marketing containing text such as: "go buy the book" or "ask your mum to pick up the product in the nearest shop"³⁸ will be a direct exhortation to buy.
- How the marketing communication is directed at children. Has the marketing communication been sent through a medium targeting children directly and individually, for example.
- How easy it is to buy the product marketed. For example, is it possible to click a link, thereby making a purchase. Marketing with a text stating "buy here" and linking to a page on which a purchase can be made will be a direct exhortation to buy.

There is currently no Danish case law determining the scope of the provision. However, case law from other Nordic countries is available which may be important in assessing this type of case. A brief description of such case law is provided below.

In a judgment of the Swedish Marknadsdomstol³⁹ delivered on 6 December 2012, the court prohibited a gaming community the purpose of which was for children and young people (7-

³⁶ As mentioned above, Executive Order no. 1084 of 14 September 2007 as amended by Executive Order no. 546 of 24 May 2013, implements parts of the Unfair Commercial Practices Directive.

³⁷ It does not appear from the Directive what is precisely meant by the concept "children". However, it follows from article 1 of the UN Child Convention, which was ratified by Denmark on 20 November 1989, that for the purposes of the Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier. This aligns with how the concept "children" should be understood in the Marketing Practices Act.

³⁸ See the Commission booklet on the Unfair Commercial Practices Directive. ISBN 92-79-02666-6.

³⁹ Marknadsdomstolen is a special court in Sweden which hears cases pertaining to marketing law.

17 years) to put make-up on and dress virtual dolls from using expressions such as "köp" (buy), "köp fler" (buy more), "köp her" (buy here), "uppgradera" (upgrade), "uppgradera til Superstar" (upgrade to Superstar), "uppgradera nu" (upgrade now) and "uppgradera her" (upgrade here) by reference to item 28 of the Black List to the Unfair Commercial Practices Act. Citing section 7 of the Swedish marketing practices act on aggressive marketing, the court also prohibited the expressions "den stannar inte länge" (available for a limited period only) and "innan det är för sent!" (before it's too late).

On 3 December 2013, Markedsrådet⁴⁰ in Norway found that a concert organiser's incitement to buy tickets to a Justin Bieber concert on Facebook constituted a direct exhortation to buy directed at persons under the age of 18 in contravention of section 20(2) of the Norwegian marketing practices act, which corresponds to item 28 of the Black List to the Unfair Commercial Practices Directive. The incitement was worded as follows: *"Beliebers – det finnes fortsatt RIMI-kodekort igjen i mange butikker! Løp, kast deg på sykkelen eller få noen til å kjøre deg"* (Beliebers – RIMI code cards are again available at many stores! Run, get on your bike or get someone to take you).

In January 2014, the British Office of Fair Trading (OFT)⁴¹ issued "Principles for online and app-based games". Principle 7 contains two examples of what the OFT considers to be an unlawful exhortation to make a purchase:

1. "You have run out of cherries. BUY MORE NOW from the shop!" A link takes the consumer directly to the shop.
2. "Join now to become a member!" or "Upgrade your account!" where doing so would require the consumer to make a payment.

The Consumer Ombudsman agrees that these expressions could be contrary to item 28.

2.3 Self-regulation

Before section 8 was inserted in the Marketing Practices Act, the special considerations regarding children and young people were dealt with under the general provisions on good marketing practice and the prohibition against misleading statements of the Act.

It appears from the legislative material that the previous legislative material related to the general clause of the Act, and the case law related to the current general clause will continue to apply.⁴² It also appears that the standards phrased by the business sector on good marketing practice in the code on Advertising and Marketing Communication Practice of the International Chamber of Commerce (the ICC Code on Advertising and Marketing Communication Practice) will apply in the assessment of whether section 1 of the Marketing Practices Act has been violated⁴³.

⁴⁰ Markedsrådet is a quasi-judicial administrative body the task of which is to settle complaints related to the Norwegian marketing practices act. A case can only be heard by Markedsrådet if it has been heard by Forbrukerombudet (the Norwegian consumer ombudsman) beforehand.

⁴¹ The OFT was the UK consumer and competition authority until 31 March 2014. The Competition and Markets Authority has taken over the OFT's work related to children and online games.

⁴² See explanatory notes on section 1 of the Marketing Practices Act (Bill L 13 tabled on 6 October 2005).

⁴³ See explanatory notes on the Bill in the Consumer Commission's second report (Report no. 681/1973, page 18).

Against this background, self-imposed rules adopted by the industry, including the ICC Code on Advertising and Marketing Communication Practice, may be used in the interpretation of section 1 and possibly section 8(1) of the Marketing Practices Act if the marketing communication is directed at children and young people.

The ICC Code on Advertising and Marketing Communication Practice contains rules pertaining to children and young people. Article 18 provides that marketing communications should not exploit the natural credulity and lack of experience of children and young people. Article 18 goes on to list a number of directions on how to ensure that an advertisement does not mislead children and young people and how to avoid harming children and young people mentally, morally or physically. Finally, article 18 emphasises that marketing communications should not undermine social values, including the authority of parents⁴⁴.

Another example of self-induced rules is the guidelines of the Alcohol Advertising Council on marketing of alcoholic beverages, which do not permit the direct marketing of alcoholic beverages towards children and young people. These rules are enforced and managed by the Alcohol Advertising Council⁴⁵, which will issue critique against a business if it finds that the business' marketing communications do not comply with the guidelines.

Lastly, there is the Soft Drinks Advertising Board, which is responsible for ensuring compliance with the guidelines for marketing soft drinks in Denmark, and the Danish Forum of Responsible Food Marketing Communication, a collaboration between providers of food advertisements and media in Denmark, which is responsible for ensuring compliance with the self-imposed code of responsible food marketing communication to children.

2.4 Scope

2.4.1 The target group children and young people

Section 8 of the Marketing Practices Act only applies if the marketing communication is directed at the target group children and young people.

The prohibitions in section 8(2) and (3) define "children and young people" as persons under the age of 18.

The legislative material to section 8(1) states that the concept "children and young people" also in relation to this provision generally covers persons up to the age of 18, but that the marketing communication should be assessed relative to the specific age group at which it is directed. This implies that an advertisement directed at small children must be assessed differently from an advertisement directed at young people at the age of 15-16⁴⁶.

This means that the standard of care is flexible and that assessments should be based on the marketing communication as well as the specific age group.

⁴⁴ Moreover, article 19 of the Code contains a section on personal data from children, and article D5 contains a provision on digital marketing communications and children.

⁴⁵ In 2008, the Consumer Ombudsman and the Alcohol Advertising Council concluded a case processing agreement which, among other things, determines interfaces in the processing of cases concerning the marketing of alcoholic beverages. The agreement is available on the websites of the Consumer Ombudsman and the Alcohol Advertising Council.

⁴⁶ See explanatory notes on section 8(1) of the Marketing Practices Act (Bill L 13 tabled on 6 October 2005).

2.4.2 The marketing activity must be directed at children and young people

It is furthermore a requirement that marketing communications must be directed at children and young people in order for section 8 to apply.

In this connection it is stated in the legislative material to the provision that e.g. marketing communications posted on a website will be deemed to be directed at children and young people if the website itself or the marketing of the website or key products from the website are directed particularly at children and young people⁴⁷.

It is further stated that advertisements on e.g. music and file sharing services and other online social media not primarily directed at children and young people are not comprised by the provision. The same applies to advertisements shown e.g. at metro stations, bus stops and stadiums. The key issue is thus whether the advertisements are shown in a place designed especially for children and young people e.g. schools and after-school care centres etc. This distinction also applies to sponsorships⁴⁸.

This means that each case should be assessed from an overall point of view on its own merits, and several different matters may influence whether a marketing activity can be deemed to be directed at children and young people. In its assessment, the Consumer Ombudsman will, among other things, attach weight to the wording and contents of the marketing communication, where the marketing communication is shown, which product is marketed and whether children are used in the marketing communication.

For example, it may be given weight if the marketing communication appears in a magazine whose primary readers are children and young people or on a website which is normally only frequented by children. In the same way it may be given weight if the advertisement is for toys, sweets or other items particularly attracting children's interest.

In general, it is crucial whether the marketing communication appeals to children and young people.

In that connection the Consumer Ombudsman is of the opinion that e.g. the fact that a person should be 18 years old to participate in a competition does not prevent the marketing of the competition from being directed at children and young people if other aspects of the marketing communication appeal to children and young people.

If the marketing communication is not directed at children and young people, the provision does not apply. In the opinion of the Consumer Ombudsman, it could, depending on the circumstances, make for a stricter assessment of whether section 1 of the Marketing Practices Act on good marketing practice has been violated if the advertisement e.g. is shown publicly in places frequented particularly by children, e.g. in close proximity to schools, day-care centres or playgrounds. It would thus be contrary to good marketing practice if advertisements shown in such a place e.g. contain images or statements that might harm children mentally or morally⁴⁹.

⁴⁷ See explanatory notes on section 1(1)(v) of the Marketing Practices Act (Bill L 101 tabled on 12 December 2012).

⁴⁸ Ibid.

⁴⁹ See item 4 of the Consumer Ombudsman's Guidance on Gender-related Advertising of 2012 (issued following negotiations with a number of industry organisations and interest groups, including the Danish Consumer Council, the Danish Chamber of Commerce and the Confederation of Danish Industry).

2.4.2.1. Age filters

The legislative material to section 8(3) of the Marketing Practices Act provides as follows:

*"In practice, there are various examples of traders using age filters to cut off children and young people from accessing a specific website. It follows from case law that such filters may form part of the overall assessment of whether a website is directed at children and young people. Filters that do not include some form of verification of the information provided can only be given limited weight."*⁵⁰

It further appears from the legislative material that:

*"An age filter which only requires you to enter your date of birth or answer "yes" or "no" when asked whether you are over 18 but does not include any additional verification of information will thus normally not be sufficient basis for assuming that the relevant website is not directed at children and young people."*⁵¹

In a judgment from 2005⁵², the Maritime and Commercial High Court determined that an information box only requiring the consumer to click "OK" to access the service offered (sexual services) and stating that the user must be 18 years or older was of no value because persons under the age of 18 could simply click OK and get access anyway.

In another judgment from 2012⁵³, the High Court of Western Denmark found that an age filter consisting of persons stating to be 18 years or older and registering as such through a log-on system was sufficient to ensure that the marketing of youth travels was not directed at children and young people.

The High Court of Western Denmark reached this conclusion although young people aged 16 and 17 could also travel with the travel agency and although the information provided was not verified, thus making it possible to state an incorrect age.

It must be assumed that the legislature through the above-mentioned legislative material to section 8(3) has intended to create a state of law which was more aligned with the judgment of the Maritime and Commercial High Court of 2005.

If marketing measures on a website are directed at both adults and children, an efficient age filter which includes verification of the information provided would thus restrict the intended target group of the marketing communications. If e.g. it is possible for 16-25 year-olds to travel with a travel agency marketing the travels through a website, an efficient age filter could have the effect that the website may be deemed to be directed only at 18-25 year-olds and not 16-17 year-olds.

The legislative material to section 8(3) of the Marketing Practices Act further provides that it is not the intention that online social media not primarily directed at children and young people should be comprised by the provision⁵⁴. In addition, it is stated that pursuant to section 1

⁵⁰ See explanatory notes on section 1(1)(v) of the Marketing Practices Act (Bill L 101 tabled on 12 December 2012).

⁵¹ Ibid.

⁵² Judgment delivered by the Maritime and Commercial High Court on 20 October 2004 printed as U.2005.2250S.

⁵³ Judgment by the High Court of Western Denmark of 11 April 2012 printed as U.2012.2435V.

⁵⁴ See explanatory notes on section 1(1)(v) of the Marketing Practices Act (Bill L 101 tabled on 12 December 2012).

of the Marketing Practices Act traders must exercise special care in connection with advertisements mentioning, showing or containing references to alcohol if e.g. the marketing communication is shown on websites frequented particularly by children and young people, e.g. online social media⁵⁵.

This raises the question of the extent to which traders are required to ensure that marketing of alcohol on social media is directed only at users over the age of 18 and whether in that connection they have a duty to use an efficient age filter. This should be seen in light of the fact that social media are restricted platforms used by many young people to share information and content with each other, including content from traders.

This issue has not been resolved in case law. Businesses that want to be on the safe side should always use the best technical facilities available to verify the age of users of social media to whom the marketing communication is shown.

If social media users are required to state their age in the process of setting up a profile, and if a social media site on that basis offers traders setting up a website the option of choosing an age limit, the traders should generally be able to rely on the users having stated their correct age.

In a case from 2010⁵⁶, the Consumer Ombudsman requested a trader to use age differentiation on a social media site. The trader chose to use the social media site's own age filter. This offered the trader access to choosing an age limit implying that all users who had stated that they were below the age of 18 would be prevented from accessing the specific website. As a result, no alcohol advertisements were shown in the marketing communications shown to people logging on with an under-18 profile.

In the above case, the Consumer Ombudsman found that the trader would be entitled to assume that the users of the relevant social media site had provided correct information about their age, based in part on the fact that only persons aged 13 years or older could set up a profile on the social media site, which functioned as a social network service, as it was found that the profile was presumably not set up for the purpose of watching advertisements from traders but for the purpose of communicating with other private individuals, including to share information and content.

2.5 Legal effects of minority and parental liability

2.5.1 Ability of minors to become bound in legal transactions

Children and young people under the age of 18 are minors and thus legally incompetent. See section 1 of the Guardianship Act. Section 1(2) of the Guardianship Act provides that minors cannot be bound in legal transactions or dispose of their assets, unless otherwise provided.

However, minors can dispose of assets e.g. acquired through own work after they have attained the age of 15, or assets given to them as a gift for their sole use and benefit, or assets

⁵⁵ See item 2.2.2. of the general explanatory notes on Bill L 101 tabled on 12 December 2012.

⁵⁶ See case no. 10/01998.

left to them by their parents⁵⁷. Minors can pay cash⁵⁸ with the money they have for their sole use and benefit, but they cannot assume debt obligations, enter into subscription agreements or otherwise undertake to pay an amount in the future⁵⁹.

The effect of a minor acting in contravention of section 1(2) of the Guardianship Act will be that the agreement is rendered void. If the minor fails to provide correct information about his age or his capacity to enter into the agreement, the agreement will be void anyway. However, the minor may, depending on the circumstances, be ordered to cover any loss incurred by the trader, if reasonable⁶⁰.

The guardians, most often the parents, act on behalf of the minor in financial affairs. See section 1(3) of the Guardianship Act. However, there are limits to the types of agreement a minor can enter into, even with the consent of the guardian. For example, the guardian cannot consent to raising debt in excess of what is generally required to provide for the minor's necessities⁶¹. In the opinion of the Consumer Ombudsman, it is therefore doubtful whether the minor, with the consent of the guardian, can e.g. undertake to pay for participation in online games. That would depend on the amount of expenses involved.

2.5.2 Parental liability

A minor cannot create an obligation on the part of his parents to pay for a product or a service, unless the parents have issued a power of attorney to the minor⁶² – or have otherwise authorised the child to act on their behalf (implied authority).

The implied authority is characterised by the principal in effect tolerating that another person acts so as to give a third party the impression that the acts will bind the principal. The pivotal point in the assessment of whether implied authority exists is who is closest to bearing the risk of the intermediary's conduct. This question should be assessed e.g. on the basis of a consideration of whether a protectable expectation has been created in the third party.

In situations involving in-app purchases by children and young people, such an authority could lead to a parent (the principal), although not intending to be bound by the conduct of the child (the intermediary), being held liable for the agreement which the child has entered into with the gaming operator (the third party), because the parent due to its behaviour has given the gaming operator reason to believe that a power of authority had been granted⁶³.

⁵⁷ See section 42(1) of the Guardianship Act, which is an exception to section 1(2). In that connection, the minor can dispose of both monies and assets comprised by section 42(1)(iii). Finally, the right of disposal also covers income from acquisitions and anything substituting such assets. See section 42(2), first sentence.

⁵⁸ Any payment made by a card with no overdraft facility, the funds of which originate from own income or funds left for the minor's sole use and benefit, may in the opinion of the Consumer Ombudsman be deemed to be a "cash" payment. Conversely, any payment made by use of a mobile phone will generally not be deemed to be a "cash" payment.

⁵⁹ See section 42(2), second sentence, of the Guardianship Act.

⁶⁰ See section 45(2) of the Guardianship Act.

⁶¹ See section 7 of Executive Order no. 1444 of 13 December 2013 on Guardianship.

⁶² Section 10(1) of the Contracts Act provides that a person issuing a power of attorney to another person to enter into a contract will be directly entitled and obliged towards a third party in a contract entered into by the agent in the name of the principal and within the scope of the power of attorney. A power of attorney is thus characterised by the principal generally being liable for transactions made by the agent, whereas the agent is not bound by transactions made by himself.

⁶³ It is ultimately up to the courts to determine whether a specific situation involves an implied authority and which consequences this, if established, would have.

In other words, an implied authority authorises the child to act on behalf of the parents so that the parents will be liable for any claims for payment.

On the other hand, an implied authority cannot be enforced by a trader acting in bad faith – i.e. if the trader knew or ought to have known that the parents did not intend to be bound. It is the opinion of the Consumer Ombudsman that the question of good or bad faith may be important e.g. in a situation in which a child has been entrusted with the parents' mobile phone or tablet.

If a child e.g. buys services in a game (in-app purchases) for a greater amount than it is authorised to spend, and if the provider of the game ought to have realised this, it is the opinion of the Consumer Ombudsman that the parents can generally not be held liable for such claims for payment. It is the opinion of the Consumer Ombudsman that a trader e.g. could be deemed to be acting in bad faith in situations in which an online game appealing to children and young people contains an invitation to buy a virtual bone for a virtual dog at a very high price per unit.

Section 3

Special forms of marketing

3.1 Violence, dangerous and inconsiderate behaviour, fear and superstition in marketing communications

As mentioned above, section 8(2) of the Marketing Practices Act contains a punishable prohibition against the use of certain aggressive and brutalising effects in advertisements directed at children and young people⁶⁴.

According to the provision, marketing communications directed at this group must not directly or indirectly incite them to violence or other dangerous or inconsiderate behaviour. It is also prohibited to make unwarrantable use of violence, fear or superstition for effective purposes.

Marketing communications inciting to acts of violence, bullying or the like are therefore not permitted⁶⁵. This also applies if the advertisement makes unwarrantable use of homicide, violence or abuse for effective purposes. For example, advertisements for toy guns must not use illustrations showing realistic gun fights between soldiers⁶⁶.

Finally, depending on the circumstances, it would be contrary to section 8(2) of the Marketing Practices Act if marketing communications directed at children and young people, without justification on educational, social or other objective grounds, contain depictions or descriptions of dangerous situations or situations disregarding general precautions⁶⁷. This could be for example an advertisement showing models with plastic bags over their heads which would be associated with great danger if the advertisement were to inspire children to do the same. Another example could be advertisements showing careless handling of fire⁶⁸.

In the assessment of whether section 8(2) has been violated, it may be important whether the ICC Code on Advertising and Marketing Communication Practice has been complied with. Article 18 among other things contains the following wording:

"Marketing communications should not contain any statement or visual treatment that could have the effect of harming children or young people mentally, morally or physically. Children and young people should not be portrayed in unsafe situations or engaging in actions harmful to themselves or others, or be encouraged to engage in potentially hazardous activities or behaviour."

⁶⁴ As mentioned in 2.2.3. above, this is a purely national provision as the scope of the provision falls outside the scope of the Unfair Commercial Practices Directive.

⁶⁵ See explanatory notes on section 8(2) of the Marketing Practices Act (Bill L 13 tabled on 6 October 2005).

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

In a case from 2008⁶⁹, the Consumer Ombudsman found that parts of a clothing catalogue directed at young people both under and over the age of 18 in which a number of young people were depicted with firearms could offend and cause discomfort to the reader and could be perceived as a quasi-acceptance of abuse and violence or an incitement to crime. Against this background, the Consumer Ombudsman requested that the trader refrain from using similar marketing communications in future.

3.2 Alcohol and intoxicants

Section 8(3) of the Marketing Practices Act also contains a punishable prohibition in that marketing communications directed at children and young people under the age of 18 must not mention or include images of or references to intoxicants, including alcohol⁷⁰.

The provision was inserted in May 2013⁷¹ on grounds of a judgment delivered by the High Court of Western Denmark on 11 April 2012⁷² and with a view to increasing the protection of children and young people.

In the judgment, the High Court of Western Denmark determined that the previous wording of the provision⁷³ did not provide grounds for considering all references to alcohol in advertisements directed at young people aged 16-18 to constitute a violation of the provision.

As a result of the insertion of section 8(3) of the Marketing Practices Act, any marketing of intoxicants, including alcohol, in advertisements directed at children and young people is now contrary to the provision.

It will thus not only be contrary to the provision if a trader directs its marketing of alcohol as a product at children and young people but also if alcohol is used for effective purposes, thus forming part of the marketing of other products directed at children and young people.

In the opinion of the Consumer Ombudsman, it could e.g. be considered a "reference" to alcohol in violation of the provision if a discotheque were to arrange "soft drink discotheques" for children at which the organisers simulate drinking games, regardless of whether the beverages consumed by the children are non-alcoholic.

Finally, traders are required pursuant to section 1 of the Marketing Practices Act on good marketing practice to exercise special care in connection with advertisements mentioning or showing or containing references to intoxicants, including alcohol, irrespective of whether they are not specifically directed at children and young people, if the advertisements are shown publicly in places frequented by children and young people in particular, e.g. in close proximity to day-care centres or educational institutions frequented by children and young

⁶⁹ See case no. 11130/5-151.

⁷⁰ As mentioned in 2.2.4. above, this is a purely national provision as the scope of the provision falls outside the scope of the Unfair Commercial Practices Directive.

⁷¹ The provision was inserted by Act no. 378 of 17 April 2013 to amend the Marketing Practices Act etc. based on the fact that the High Court of Western Denmark in its judgment printed as U.2012.2435V determined that the previous provision (formerly subsection (2)) did not provide grounds for considering all mentioning of alcohol in advertisements directed at young people aged 16-18 to constitute a violation of the provision.

⁷² U.2012.2435V.

⁷³ Formerly section 8(2) of the Marketing Practices Act.

people under the age of 18 or near playgrounds. This also applies to websites frequented in particular by children and young people, e.g. online social media⁷⁴.

3.3 Sexual references

Section 1 of the Marketing Practices Act on good marketing practice is a legal standard evolving over time in line with trends in society. One of the consequences of this is that advertising previously in violation of good marketing practice is not necessarily in violation today – and vice versa.

It follows from the Consumer Ombudsman's Guidance on Gender-related Advertising⁷⁵ that the current state of fashion and media contributes to providing considerable leeway for using nudity and eroticism in gender-related advertising. In that connection, an advertisement in which naked or scantily dressed persons and/or erotic effects are included is generally not unlawful, even if nudity or eroticism is not naturally related to the products or services being advertised. An example of that could be if the content of the advertisement is not particularly sensational in the light of the general state of fashion and media.

However, if a gender-related advertisement targets children and young people, more stringent requirements apply to the design of the advertisement. See section 8 of the Marketing Practices Act.

It appears from the legislative material to the Marketing Practices Act that today it has become more acceptable to use sexual references in marketing communications as a means of attracting the attention of the target audience. It further appears that it is not lawful to use sexual undertones in advertisements directly addressed at children as it would offend against their natural modesty and because they would be introduced to a universe which they are not yet equipped to deal with⁷⁶.

The fact that nudity is a part of the current state of fashion and media does not give traders free rein to use nudity and eroticism in advertisements directed at children and young people.

Whether an advertisement is in contravention of good marketing practice will always depend on an overall assessment of the elements of the advertisement, including the content and design of the advertisement.

In that connection, advertisements for films, plays, art exhibitions and the like are typically given more leeway when showing pictures from the specific artwork or exhibition.

According to the guidelines, gender-related advertising not targeting children and young people, but shown publicly in places naturally frequented by children in particular, e.g. in close proximity to schools, day-care centres or playgrounds, should take this into account. See section 1 of the Marketing Practices Act. Consequently, it should not contain any images or statements that could cause psychological or moral harm to children, and it should not be likely to affront children's natural modesty.

⁷⁴ See item 2.2.2. of the general explanatory notes on Bill L 101 tabled on 12 December 2012.

⁷⁵ See item 4 of the Consumer Ombudsman's Guidance on Gender-related Advertising of 2012 (issued following negotiations with a number of industry organisations and interest groups, including the Danish Consumer Council, the Danish Chamber of Commerce and the Confederation of Danish Industry).

⁷⁶ See explanatory notes on section 8(1) of the Marketing Practices Act (Bill L 13 tabled on 6 October 2005).

In shops where children go with their parents and perhaps sometimes alone, the guidelines stipulate that no magazines, newspapers, films, etc. may be displayed the front pages of which are pornographic in a way which will be immediately seen by children. It is up to each shop to find an appropriate way of displaying porn magazines and porn films so that they are less visible to children.

3.4 Health and safety

It is the opinion of the Consumer Ombudsman that it could be deemed to be a violation of section 1, cf. section 8(1), of the Marketing Practices Act if traders advertise products unsuitable for children in media addressing this group. Such products could include products which are potentially harmful or products which, when used, pose a safety risk for children or young people. For example, an advertisement for dietary supplements must not appear in an online doll or fashion universe targeting children and young people⁷⁷.

In the opinion of the Consumer Ombudsman, it could be deemed to be a violation of section 1, cf. section 8(1) of the Marketing Practices Act, if marketing communications directed at children and young people contain initiatives involving potentially harmful conduct for children and young people or conduct which could put children or young people in danger.

In the assessment of whether a marketing activity is in violation of section 1 and possibly section 8(1) of the Marketing Practices Act on good marketing practice, it may be important whether the ICC Code on Advertising and Marketing Communication Practice has been complied with. Article 17 among other things contains the following wording:

"Marketing communications should not, without justification on educational or social grounds, contain any visual portrayal or any description of potentially dangerous practices, or situations which show a disregard for safety or health, as defined by local national standards."

In a case from 2013⁷⁸, the Consumer Ombudsman found that the organisation of a competition the purpose of which was to stay awake more than 48 hours in order to continue to the finals was contrary to section 1 as it was generally considered to be potentially harmful for the participants. In its assessment, the Consumer Ombudsman attached importance to the fact that no upper limit had been set for how long the finalists should stay awake and that no medical supervision was involved in the process. The Consumer Ombudsman also attached importance to a statement obtained from the Danish Health and Medicines Authority stating that extensive sleep deprivation may be harmful and that the harmful effects could develop and exacerbate in different ways, e.g. by physical activity or by consumption of caffeine, energy drinks and alcohol.

In this case, it was consequently deemed to be an aggravating circumstance that the competition formed part of the advertising campaign for an energy drink, because the combination of sleep deprivation and caffeine could serve to amplify the risk of harmful effects. In spite of the fact that it was a condition for participation in the competition that the participants had attained the age of 18, it was further deemed to be an aggravating circumstance that, in the

⁷⁷ See case no. 10/02385.

⁷⁸ See case no. 12/02645.

opinion of the Consumer Ombudsman, the competition also appealed to children and young people, among other things because children and young people widely use this product.

3.5 Covert advertising – Use of children and young people in marketing activities

3.5.1 Consent

In the opinion of the Consumer Ombudsman, it could generally be contrary to good marketing practice for a trader to enter into an agreement with a minor under which the minor is to market the business and/or its products if the trader has not obtained consent from the parents in advance.

This is because children and young people do not have the same experience as adults enabling them to understand the commercial objective of the agreement. In its assessment, the Consumer Ombudsman will take into account factors such as the child's age, the marketing communication contents and design, the procedure used and whether the child receives any form of payment.

3.5.2 Advertisements must be identifiable

If a trader enters into an agreement with a person under which the person is to market the trader's products or services, it must be absolutely clear to the marketing communication audience that it is an advertisement. If this is not absolutely clear, it would be a case of covert marketing activities in violation of section 4 of the Marketing Practices Act⁷⁹, which has the following wording:

"An advertisement⁸⁰ shall be designed in such a way that it will be clearly understood to be an advertisement irrespective of its form and irrespective of the medium in which it is presented."

Section 4 of the Marketing Practices Act should be interpreted in accordance with article 7(2)⁸¹ of the Unfair Commercial Practices Directive.

It is generally left to the sender of the advertising message to decide how to identify the advertisement, provided the identification is clear and unambiguous⁸².

As section 8(1) imposes a stricter identification requirement, it takes more to comply with section 4 in the case of marketing communications directed at children and young people. If a trader enters into an agreement, e.g. an agreement with a child under which the child is to wear clothes, use a smartphone or some other product in front of its classmates, it is key for

⁷⁹ And/or section 9(1) of the E-commerce Act in the case of an "information society service" within the meaning of the law.

⁸⁰ According to the explanatory notes on the provision, the definition of the word "advertisement" in section 4 of the Marketing Practices Act should be interpreted in accordance with the definition of the concept in article 2 of the Misleading and Comparative Advertising Directive. However, the definition of the concept was amended by article 2(d) of the Unfair Commercial Practices Directive. Although it is not stated in the explanatory notes on the Bill (Bill L 2 of 4 October 2006) implementing the Unfair Commercial Practices Directive that the advertisement concept has been changed, the Consumer Ombudsman interprets it accordingly pursuant to the duty to adopt an interpretation consistent with EU directives.

⁸¹ It follows from article 7(2) that it could be regarded as a misleading omission if a trader fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where this causes or is expected to cause the average consumer to take a transactional decision that he would not have taken otherwise.

⁸² See explanatory notes on section 4 of the Marketing Practices Act (Bill L 13 tabled on 6 October 2005).

the assessment of whether section 4 has been complied with whether all children and young people exposed to the clothes or smartphone are aware that they are being exposed to advertising.

In a case from 2007⁸³, businesses could get so-called "buzzadores", who were stated to be over the age of 18, to test their products and spread awareness of them to their friends and acquaintances. In an advance indication to the business, the Consumer Ombudsman stated that, based on the information available, the concept would be contrary to good marketing practice, among other things because the business would not, in practice, be able to ensure the buzzadores' compliance with section 4 of the Marketing Practices Act on covert marketing activities.

Traders must pay particular attention to the necessity of making it clear to users of social media, blogs and similar forums that they are being exposed to advertising, as social media, blogs, etc. are primarily perceived as platforms for the exchange of information between private individuals. See item 2 in the Position of the Nordic Ombudsmen on Social Media Marketing.

It appears from item 2.3. of the Position that when a private individual receives payment or other benefits for mentioning or otherwise marketing a trader's products or services, the private individual must clearly identify the marketing communication as such or make it clear that he has received payment or other benefits for mentioning the product. In that connection, the trader must inform the private individual about this requirement.

If a trader enters into an agreement with a blogger for the blogger to write about the trader's product on his blog, the reader of the blog must be made aware that he is being exposed to advertising, and the trader must inform the blogger about the identification requirement.

If the target group of this type of marketing is children and young people, a wording comprehensible to that target group must be used. In that connection, it is the opinion of the Consumer Ombudsman e.g. that wordings such as "sponsored text", "sponsored by X" or similar statements are generally not sufficient if the marketing communication is directed at children and young people.

In a specific case from 2014⁸⁴, a trader requested advance notification of whether it would be lawful to enter into an agreement with a 12-year-old blogger represented by the blogger's father under which the blogger in return for receiving a language study trip free of charge would blog about the trip using different video clips on a social media site on which the minor was blogging through the use of video clips.

In the specific case, the Consumer Ombudsman stated that the key factor determining whether the marketing communication was compliant with the advertising identification requirement of section 4, cf. section 8(1), would be whether the children reading the blog would be aware that they were being exposed to advertising. In that connection, the Consumer Ombudsman assessed that the information that the blogger's trip had been paid by the trader was not sufficient for the children to know that they were being exposed to advertising. Instead, the key issue would be the information stating that the video clips posted by the blogger on the social media site had been paid by the trader.

⁸³ See case no. 1100/5-1108.

⁸⁴ See case no. 14/05699.

Against this background, the Consumer Ombudsman considered the marketing activity to be legal, provided that the information would clearly and unambiguously appear on the blogger's profile on the social media site and that the blogger would provide the information at the beginning of each video clip.

3.5.3 Submission of gifts, product samples etc. to children and young people with a view to getting exposure to a wider group of children and young people

It follows from the legislative material to section 4 of the Marketing Practices Act that it is a prerequisite for application of the provision that an agreement exists between the trader whose product is being advertised and the person exposing the product. If a trader submits a gift or makes a product available to a person without that person undertaking to use the product in a certain way, no agreement exists⁸⁵.

However, it is the opinion of the Consumer Ombudsman that a trader may generally not send gifts in the form of product samples etc. or make products available to children and young people if this is done by the trader to get the children or young people to spread knowledge of the products received to a broader group of children and young people on behalf of the business. Doing so could be contrary to section 1, cf. section 8(1), of the Marketing Practices Act.

This should be seen in light of the fact that it must be applied that such an approach from a trader generally has a commercial aim, i.e. the trader wanting to use the recipient of e.g. the product sample in a marketing and sales launch, and that children and young people are less critical and more prone to mentioning products they have received than adults. Considering that the commercial message is communicated to children and young people who are less conscious that they are being exposed to advertising, such an approach would generally be considered, based on an overall assessment, to exploit the natural credulity and susceptibility of children and young people in contravention of good marketing practice. See section 1, cf. section 8(1), of the Marketing Practices Act.

Read more in the Consumer Ombudsman's Guidance on Covert Marketing Activities.

3.6 Use of children and young people as a marketing channel on blogs and other social media

New marketing activities involving children and young people are constantly being developed, including in particular concepts which encourage social media users to share content in some way from traders.

Some traders e.g. offer social media users remuneration in the form of free products or a discount in return for the users e.g. agreeing to "like" or share content or the like from the trader on Facebook or another social media site such as Twitter.

Other traders focus on spreading commercial messages through people who have their own channel on YouTube or bloggers who have their own blogs. This is done e.g. by the trader forwarding free product samples to a blogger who then writes about the products or gives

⁸⁵ See explanatory notes on section 4 of the Marketing Practices Act (Bill L 13 tabled on 6 October 2005).

them away to their blog readers as competition prizes. Some blogs also have links to online stores where the blog readers can buy the products mentioned. In such a case, a blogger may have entered into an agreement with the online store to be rewarded for each "click" on the link or each purchase completed by a reader.

The traders and the bloggers should be aware that the Marketing Practices Act – and the indicative interpretations provided in this guidance – apply irrespective of which medium is used for the marketing activity, as the Act is technology neutral. This implies that the considerations applying e.g. to the section on covert marketing activities and the section on "friend-to-friend solicitation" also apply to these concepts. Moreover, marketing communications directed at children and young people will be assessed more strictly when determining whether a provision of the Marketing Practices Act has been violated.

Item 3 of the Position of the Nordic Ombudsmen on Social Media deals with the question of when social media communications or messages are considered electronic mail and whether, as a result, they are comprised by the prohibition against distribution of unsolicited electronic communications of section 6 of the Marketing Practices Act. The item also states what applies if a trader uses means other than "electronic mail" for unsolicited communications.

3.7 Covert marketing in online games

A comparison of the requirements of section 4 of the Marketing Practices Act on covert marketing activities with section 8(1) implies a tightening of the requirements for advertising identification. This means e.g. that in advertisements in interactive media directed at children and young people, special care must be taken not to disguise the marketing communication⁸⁶.

Media developments, including media amalgamation, opens up possibilities of new and different marketing activities. The use of live images and sound and interactivity influences consumers in a more intense and direct way, and the boundaries between advertising and information, entertainment and games become more elusive. As a result, advertising directed at children and young people on interactive media is subject to special requirements that the advertisements must be within the realm of the advertising universe accessed by the child⁸⁷.

For example, it could be in contravention of section 1, cf. section 8(1), and, depending on the circumstances, also section 4, if branded products are used as props during a game⁸⁸.

It appears from the legislative material to section 8(1) of the Marketing Practices Act that a marketing game on a business website which unambiguously advertises the business' products is permitted, as it is clear to the child that it has entered an advertising universe and what products are being advertised. Accordingly, there is nothing to prevent a toy manufacturer from having a game on its website that allows users to play with the business' products virtually. It is also permitted to have an advertising game which uses the business' advertising mascot or logo⁸⁹.

⁸⁶ See explanatory notes on section 8(1) of the Marketing Practices Act (Bill L 13 tabled on 6 October 2005).

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

However, it also appears from the legislative material that it would be contrary to section 4, cf. section 8(1), if an advertising game were to be shown in advertisements for other products that do not belong to the game's advertising universe. An example could be a game on a toy manufacturer's website in which a doll suddenly drinks a certain brand of soft drinks or buys branded clothing⁹⁰.

In a case from 2004⁹¹ concerning a freely accessible chat room and play site for young people which also turned out to be a sophisticated advertising universe where businesses could pay to get access and join the chat, branded products were frequently used as props in the play activity. It was the opinion of the Consumer Ombudsman that the intermixture of chat, play, games and marketing of the products of different businesses on this website constituted a covert marketing activity in contravention of good marketing practice⁹².

In another case from 2010⁹³, the Consumer Ombudsman's attention was drawn to an advertisement for a bank's website on financial education of children which was brought in a magazine whose primary readers were children. The texts in the advertisement and on the website were written in the typeface and colour and with the background also used by the bank in its own marketing communications without showing the bank's logo or name. After the matter had been addressed by the Consumer Ombudsman, the bank changed the website so that it would not be associated with the bank in terms of text, imaging, colour or otherwise.

3.8 Club memberships and continuing subscription agreements

Young people who have attained the age of 15 may enter into cash transactions involving cash earned through own work or cash given to them as a gift for their sole use and benefit or as pocket money by their parents⁹⁴.

However, children and young people under the age of 18 cannot enter into agreements committing them to make payments at a later date. This means e.g. that traders are not permitted to offer young people under the age of 18 to purchase products on credit or to take out a subscription without the consent of their parents⁹⁵.⁹⁶

In a case from 2009⁹⁷, a 12-year-old continued to receive magazines and reminders to pay for a subscription for a magazine after having won three issues of the magazine in a competition. The Consumer Ombudsman stated that it follows from the provisions of the Guardianship Act that a minor cannot enter into valid agreements for continuing subscriptions.

⁹⁰ Ibid.

⁹¹ Case 09/03671.

⁹² The matter was decided pursuant to section 1 of the Marketing Practices Act on good marketing practice, as section 4 was not inserted in the Act until in 2005 by Act no. 1389 of 21 December 2005.

⁹³ Case no. 11109/5-48.

⁹⁴ See section 42 of the Guardianship Act, which is an exception to the general rule in section 1(2) stipulating that minors cannot be bound in legal transactions or dispose of their assets, unless otherwise provided.

⁹⁵ See section 1 of the Marketing Practices Act on good marketing practice.

⁹⁶ For additional information about the legal position of minors, see 2.5.1. above.

⁹⁷ See case no. 08/08925.

If the child has entered into an agreement with the consent of its parents, all distributions and offers to the child must be in accordance with the club agreement or the subscription agreement. If offers are made for orders in addition to what has been agreed, it must be stated in the written offer that the order is subject to parental consent.

A trader which has received or has lawfully obtained consent to a child e.g. becoming a member of a club must observe this guidance and otherwise take into account item 28 in the Black List to the Executive Order on Unfair Business-to-Consumer Commercial Practices, from which it appears that an advertisement may not directly exhort children to buy the advertised products or persuade their parents or other adults to buy the advertised products for them.

3.9 Unsolicited communications – Electronic, personal and telephone communications and addressed direct mail

3.9.1 Prohibition against unsolicited communications

According to section 4(1) of the Consumer Contracts Act, traders are not permitted for the purpose of generating sales without having been requested in advance to contact a consumer by telephone or to contact a consumer, including children, at his home address, place of work or another place not accessible to the general public. However, section 4(2) of the Act lists a few exceptions applicable to telephone communications⁹⁸.

Pursuant to section 6(1) of the Marketing Practices Act, traders may not send advertisements to consumers, including children, businesses or public institutions by means of electronic mail (e-mail, SMS or MMS messages, etc.), telefax or automated calling systems if the consumers have not requested receipt of the advertisement⁹⁹.

Finally, it follows from section 6(3) of the Marketing Practices Act that traders may only send addressed direct mail if the consumer has not declined such receipt to the trader or has not registered his name on the so-called "Robinson list"¹⁰⁰.

3.9.2 Consent

In the opinion of the Consumer Ombudsman it would be contrary to section 1, cf. section 8(1), of the Marketing Practices Act on good marketing practice if traders fail to obtain parental consent in the cases in which the traders want to approach a child under the age of 15¹⁰¹ for commercial purposes, regardless of the channel through which the marketing communication is sent. The reason is that it would be difficult for the child to understand what he is consenting to.

⁹⁸ Consumers can avoid such calls by refusing receipt vis-à-vis the trader or by having their names registered on the so-called "Robinson List".

⁹⁹ Communications or messages on social media may also be "electronic mail". For additional information, see item 3 of the Position of the Nordic Ombudsmen on Social Media Marketing.

¹⁰⁰ Pursuant to section 29 of the Civil Registration System Act, all persons, including children, may contact their municipality of residence for the purpose of registering an entry in the civil registration system that they decline receipt of marketing communications. The list (the Robinson List) can be downloaded free of charge at www.cpr.dk.

¹⁰¹ The limit has been set at 15 years, as minors are permitted according to the Guardianship Act to dispose of funds obtained through own work when they have attained the age of 15. For additional information, see 2.5.1. above.

In a case from 1994¹⁰², a 13-year-old received a letter containing an offer and gift ideas from a business on the occasion of Mother's Day. The Consumer Ombudsman found that the procedure was in violation of section 1 on good marketing practice as marketing communications should not exploit the natural credulity and lack of experience of children.

There may be exceptions to the general rule that parental consent is not required when the child has attained the age of 15. Traders should therefore always make a specific assessment of whether the minor can be expected to understand the consequences of his consent. If not, parental consent is required. When making this assessment, traders should take into account the type of marketing communication involved, the extent to which consent is required from the child, the medium used, the child's age, etc.

In the opinion of the Consumer Ombudsman, it would be contrary to section 1 on good marketing practice, cf. section 8, if a trader conditions access to a website directed at children and young people on a minor subsequently consenting to receive marketing communications¹⁰³. Examples could be a website offering free games or a website offering the opportunity to participate in a competition. The reason is that children or young people may feel pressured to accept marketing communications from traders, although they in fact do not want to receive such advertising messages.

In the opinion of the Consumer Ombudsman, telephone communications are a more direct, personal and invasive form of marketing, among other things because the trader has significantly greater opportunity to persuade the child and consequently exploit a child's natural credulity and lack of experience and critical sense. For that reason, traders may not make telephone calls for commercial purposes to children and young people under the age of 18 without having obtained consent from the child's parents. Doing so would in the opinion of the Consumer Ombudsman be contrary to section 1 on good marketing practice, cf. section 8(1).

Consent must always be given in advance and expressly and must constitute a voluntary, proactive, specific and informed indication of intention¹⁰⁴. If the trader assesses that the minor (15-17 years) can give consent himself, the minor must be able to understand what he is consenting to. Instructions to this effect must therefore be adapted to the minor and must be stated clearly immediately before the information is provided. It is for the trader to prove that consent has been given and that it was given on a sufficiently informed and specific basis.

A trader which has received or has lawfully obtained consent to sending marketing communications or to making telephone calls for marketing purposes to children and young people must observe this guidance and otherwise take into account item 28 in the Black List to the Executive Order on Unfair Business-to-Consumer Commercial Practices, from which it appears that an advertisement may not directly exhort children to buy the advertised products or persuade their parents or other adults to buy the advertised products for them.

¹⁰² See case no. 1994-629/5-25.

¹⁰³ It also follows from the Consumer Ombudsman's Guidance on Spam that, in the opinion of the Consumer Ombudsman, conclusion of an agreement to purchase a product or service should be subject to the consumer consenting to the trader subsequently contacting the consumer for marketing communication purposes, among other things because it raises questions about whether the consent was given voluntarily and expressly.

¹⁰⁴ See article 13 of Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector as amended by Directive 2009/136/EC. The provision contains a prohibition against the use of electronic mail for direct marketing communications. Article 2(f) of Directive 2002/58/EC provides that consent corresponds to the data subject's consent in Directive 95/46/EC (article 2(h)).

In the opinion of the Consumer Ombudsman, sending an advertisement directly to a child e.g. by letter, e-mail, SMS message or the like will always be an aggravating circumstance in the assessment of whether unlawful exhortation to make a purchase can be claimed. For additional information, see 2.2.5. above.

Read more about the requirements for the contents of a consent and how consent can be obtained lawfully in the Consumer Ombudsman's Guidance on Spam.

3.10 Soliciting information from children and young people about other children and young people for commercial purposes

It is the opinion of the Consumer Ombudsman that it could be contrary to section 1 on good marketing practice, cf. section 8, of the Marketing Practices Act if a trader solicits information from a minor about another minor if the trader intends to use the information to market its products or services to the minors about whom information has been provided. Moreover, in the opinion of the Consumer Ombudsman it would be an aggravating circumstance if the trader were to reward the minor for providing such information.

In a case from 2003¹⁰⁵, a clothing store exhorted children and young people to provide names and addresses of friends preparing for confirmation in return for a t-shirt. The information was used to send addressed direct mail to the young people named. The Consumer Ombudsman found that the conduct of the store was in violation of section 1 on good marketing practice.

3.11 Traders' use of children and young people in sales and marketing activities

After the insertion of section 8(1) in the Marketing Practices Act, it will not take much for concepts exploiting the natural credulity and susceptibility of children and young people to be considered contrary to good marketing practice. This applies e.g. in relation to "friend-to-friend solicitation"¹⁰⁶.

In a judgment from 2002¹⁰⁷ concerning a concept involving a telecommunications provider which had entered into agreements with athletic associations for the purpose of selling mobile telephones and subscriptions to the members and supporters of the associations in return for a sponsorship, the Maritime and Commercial High Court stated as follows:

"The court endorses that children and young people under the age of 18 must be protected so as to ensure that their loyalty towards e.g. athletic associations is not exploited, and likewise children and young people under the age of 18 should not be used for sales and marketing purposes or as sales channels for private traders."

¹⁰⁵ See case no. 2003-11130/5-8.

¹⁰⁶ See annex 11 (brief on friend-to-friend solicitation) to the Bill on Marketing Practices (Bill L 13) tabled on 4 October 2005 and the response from the Minister for Family and Consumer Affairs to question no. 21 of 6 December 2005 from the Business and Commerce Committee of the Folketing (the Danish parliament) concerning the proposed amendment.

¹⁰⁷ Judgment delivered by the Maritime and Commercial High Court on 13 June 2002 printed as U.2002.2277/2S.

However, the court also determined that parents and other educators and adults in athletic associations have a responsibility to guide children and young people on how to respond to commercial requests of this kind so that they learn to be critical towards them and are trained in how to make the assessments required from a consumer.

In this specific case, the court did not find that the concept was contrary to good marketing practice, emphasising that the case involved the sale of mobile phone subscriptions, which children and young people under the age of 18 cannot decide to take out on their own.

It is the opinion of the Consumer Ombudsman that traders must generally not use children and young people in their sales and marketing activities, including for purposes of friend-to-friend solicitation. However, this should always be assessed on a case-by-case basis, as special circumstances may warrant derogation from the general rule.

If a trader attempts to circumvent the prohibition in section 6(1) of the Marketing Practices Act against unsolicited electronic communications or the prohibition in section 4(1) of the Consumer Contracts Act against unsolicited personal or telephone communications by letting non-traders, including children, contact other non-traders in a manner which is comprised by the provisions, the trader may, depending on the circumstances, be punished for violation thereof whether or not the marketing activity was directed at children and young people.

In addition, it appears from the judgment by the Maritime and Commercial High Court¹⁰⁸ that, as a trader, the telecoms operator must comply with the rules of the Marketing Practices Act in connection with marketing communications, regardless of whether the telecoms operator uses assistance from non-traders, whether athletic associations or children, in connection with the distribution of marketing material.

3.12 Friend-to-friend solicitation

Friend-to-friend solicitation means that a trader exhorts customers to solicit new customers among their friends and acquaintances in return for receiving products, which are often characterised as "gifts", or other remuneration. This is done to get the persons solicited to purchase products or services.

Traders must generally not use children or young people for friend-to-friend solicitation, as this may be considered an unfair practice exploiting the natural credulity and susceptibility of children and young people. In particular, this practice is considered to exploit the loyalty of the one being solicited towards his friend and the fact that it is difficult to say no to someone you know¹⁰⁹.

However, friend-to-friend solicitation may also be problematic for the person soliciting a friend. In that connection, it may be an element in the assessment of whether a friend-to-friend solicitation concept is in violation of section 1, cf. section 8(1), whether the person soliciting has been subjected to pressure. For example, it would be relevant to consider whether the trader requires that a large number of friends must become customers of the trader within

¹⁰⁸ Ibid.

¹⁰⁹ See annex 11 (brief on friend-to-friend solicitation) to the Bill on Marketing Practices (Bill L 13) tabled on 4 October 2005 and the response of 6 December 2005 from the Minister for Family and Consumer Affairs to question no. 21 re. L 13 submitted by the Business and Commerce Committee of the Folketing.

a short period of time, whether the trader has given the person soliciting a very burdensome or responsible role, and/or whether the trader has promised the person soliciting many benefits or a great reward. Other matters could also be of importance to the assessment.

Finally, the friends must have the opportunity to take a critical position on the messages conveyed. They must know that they are being exposed to advertising on behalf of a trader and that the messages conveyed do not necessarily represent their friend's own point of view. If friends and others are not informed about the fact that children or young people present a product on behalf of a trader, "covert friend-to-friend solicitation" may be involved, which contravenes section 4 of the Marketing Practices Act on covert marketing activities.

For example, covert friend-to-friend solicitation will be involved if a travel agency enters into an agreement with a high-school student that he should convince his friends to go on the agency's skiing holiday without the friends knowing that the reason why the student is recommending this exact trip is that he will get the trip free of charge¹¹⁰.

For additional information on covert marketing activities and the use of children and young people in marketing activities, see 3.5. above.

3.13 Sponsorships and other marketing activities in schools and day-care centres

School and day-care centre sponsorships constitute a special type of marketing in which businesses, industry organisations and others e.g. offer free teaching materials, products, services or financial support for various purposes.

By sponsoring a playground for a day-care centre, for example, a business gets the opportunity to show its name, product and/or logo in the context it wants, while getting a lot of sympathy among those benefiting from the financial support.

It follows from section 2 of the Act on the Use by Local and Regional Authorities of Real Property and Chattels for Advertising on Behalf of Others that local and regional councils may use real property and chattels for advertising on behalf of others if the advertising activity is in accordance with the Marketing Practices Act and other legislation. Any kind of advertising using the property and chattels of local and regional authorities to promote a product or service is thus comprised by the Act¹¹¹.

It follows from the legislative material to the Act that it is up to the local and regional councils to make the necessary assessments of, on the one hand, regard for neutrality and objectivity and, on the other hand, regard for procurement of supplementary finance. It further appears that local and regional councils may lawfully set up conditions for the use of real property and chattels for advertising on behalf of others¹¹².

¹¹⁰ Ibid.

¹¹¹ However, electronic media, e.g. the website of a local authority, are not comprised. See explanatory notes on section 1 (Bill L 136 tabled on 25 January 2006).

¹¹² See report prepared by the Municipal Affairs Committee on 18 May 2006 in connection with proposal for the use by local and regional authorities of real property and chattels for advertising on behalf of others submitted by the Minister for the Interior and Health.

The legislation on schools does not contain any specific rules on advertising and sponsorships in schools.

In accordance with the Act on Primary and Lower Secondary Education, the local councils determine the overall aims and framework for municipal schools. The school boards implement the aims and framework by defining concrete operating principles for each individual school and the school principal is subsequently responsible for the school's compliance with these principles in its day-to-day activities.

Accordingly, it is up to the local councils and the municipal school boards to decide whether rules on marketing activities and sponsorships should be defined and how to draft such rules¹¹³.

Considering that schools or day-care centres are private areas, it is only possible for traders to use such places for marketing purposes if the school or day-centre in question has permitted such use. It is thus up to the school board or the parents' committee of the individual school or day-care centre to determine whether advertisements or other marketing activities are allowed in the school or day-care centre¹¹⁴. The individual schools and day-care centres, whether independent or municipal, are responsible in consultation with the parents for determining the degree to which the children and young people attending their institution should be exposed to advertising.

This type of marketing is thus not unlawful per se. However, it is the opinion of the Consumer Ombudsman that traders should exercise great caution in designing this type of marketing communication, as children and young people do not possess the necessary experience to understand the underlying commercial motives of the trader.

Traders contemplating the use of this type of marketing should note that they are required to comply with the rules of the Marketing Practices Act, including section 4 on covert marketing activities, and this guidance.

The advertising identification requirement of section 4 implies e.g. that if a trader sponsors books for a school for educational use, it must be clear to children using a textbook that the books have been made available/sponsored by the trader in question.

¹¹³ See Part 5, item 5.5.1.1. of the report "Marketing and Price Information" prepared by the Committee on Revision of the Marketing Practices Act and the Price Marking and Display Act.

¹¹⁴ See the response from the Minister for Family and Consumer Affairs to question no. 2 of 8 November 2005 from the Business and Commerce Committee of the Folketing regarding the Bill on Marketing Practices (Bill L 13) tabled on 4 October 2005.

Section 4

Commencement

This Guidance enters into force on 1 July 2014.