

Guidance on vendor rewarding

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The Danish Consumer Ombudsman

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Background

In most cases, vendor rewarding as a means promoting the sale of products is contrary to the principles of good marketing practice, even if the reward is in the form of a prize draw among a vendor's employees. This is set out in the Danish Consumer Ombudsman's guidance on vendor rewarding issued in March 2000. The guidance was updated in November 2013.

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Section 1

Introduction

With this guidance paper, the Consumer Ombudsman intends to provide information on using vendor rewarding as a marketing tool.

Guidance papers issued by the Consumer Ombudsman may be seen as "general advance indication" from the Consumer Ombudsman, providing information on his evaluation of issues relating to marketing practices in specific areas. Guidance papers may also signal that customary practices are no longer in keeping with the times.

Guidance papers usually take the form of a description of special issues in a particular area of marketing and the Consumer Ombudsman's assessments of and opinions on the issues. They do not usually provide detailed descriptions or accounts of administrative practice or case law.

However, this guidance paper deviates from this in as much as the issues relating to vendor rewarding are of a nature best illustrated by examples from cases assessed by the consumer ombudsman institution since 1975.

Section 2

Vendor rewarding

This guidance paper relates to the practice of rewarding vendors as a marketing tool and mainly targets importers, manufacturers, wholesalers, advertising agencies and other traders. When traders plan a campaign of offering additional benefits (rewards) to the next link in the chain of distribution (typically retailers), they may consult this guidance paper to find out whether such a campaign would be lawful or whether it might be contrary to the Danish Marketing Practices Act.

On the basis of case law and the practice of the consumer ombudsman institution, the guidance addresses when vendor rewarding is unlawful pursuant to section 1 of the Marketing Practices Act. It should also be noted that vendor rewarding may be unlawful under the Danish Competition Act. This guidance paper does not, however, cover any issues in relation to competition law.



Section 3

What is vendor rewarding?

When a trader rewards the next link in the chain of distribution for purchasing goods for resale or use in production, this constitutes vendor rewarding. The purpose of vendor rewarding is to promote sales. Vendor rewarding is also seen in connection with the performance of work or rendering of services. Vendor rewarding resembles gifts with purchase in that a trader provides an additional, 'free' benefit in connection with the sale of a main product. In either case, the purpose is to promote sales to the end buyer.

Additional benefits are benefits in kind, typically for personal use, granted at no separate charge. An offer to participate in a draw for attractive prizes also constitutes vendor rewarding. In the following, the terms 'additional benefits', 'rewards', 'prizes' and 'gifts' are used synonymously.

The Marketing Practices Act contains no provision explicitly regulating vendor rewarding. Vendor rewarding should be considered in relation to the general clause set out in section 1 of the Marketing Practices Act. However, according to settled Danish case law, vendor rewarding is commonly contrary to the principle of good marketing practice.

Section 1 of the Marketing Practices Act:

“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.”

Moreover, it is not impossible that a campaign which involves vendor rewarding may be arranged in such a

way that it is in violation of section 3(2) of the Marketing Practices Act.

On the basis of case law and the practice of the consumer ombudsman institution, it is relatively clear when rewarding of traders is unlawful.

Factors that may make vendor rewarding unlawful:

Where the reward is concealed from the customer (the consumer) and thus may have a negative effect on the correct customer care and guidance as the main product is competing with other, similar products.

Section 4

Who is the next link in the chain of distribution?

Rewards are usually offered to the retailer, although vendor rewarding is found in all links of the distribution chain. It is of no consequence whether the reward is given to the owner or the employees. In the case referred to below, a cake manufacturers rewarding of wholesalers and their employees was thus found to be unlawful (case no. 1975-417-6). Nor is it of any consequence whether the products are resold in shops with sales assistants or in self-service shops.

In the judgment by the Maritime and Commercial High Court, printed in the Danish weekly law reports (UfR) 1981, p. 516, referred to below, the court found the vendor rewarding applied to be unlawful, regardless of whether the products were sold to shops with sales assistants or to self-service shops or supermarkets. In either case, the reward is designed to affect the shops' marketing of products of a similar nature to the effect that the consumers' choice of an otherwise equivalent, competing product may be affected by non-objective considerations.

In the following, this guidance paper will describe case law examples of vendor rewarding. The examples are not exhaustive, and as the market competition evolves, other types of marketing may occur that are not included in this guidance paper.



Section 5

Examples from case

5.1 Rewarding purchases

Offering rewards in connection with purchases of certain products to be resold in competition with other, equivalent goods is unlawful. Typically, a condition for receiving the reward is that the vendor purchases a specified number of the company's products.

In a case instituted by the Consumer Ombudsman, UfR 1981, p. 516, the Maritime and Commercial High Court found that a vendor of paper articles offering retailers gifts if they purchased a specified quantity to be contrary to section 1 of the Marketing Practices Act. The gifts included coffee and dinner service, television sets, bicycles and auto upholstery.

The reasons of the Maritime and Commercial High Court state as follows:

“... Vendor rewarding is not covered by any of the special prohibitions against marketing set out in part 2 of the Marketing Practices Act. It is thus solely a question of whether the rewarding, as applied by the defendant and as described in the Consumer Ombudsman's claim, is deemed to be contrary to the principles of good marketing practice under section 1 of the Marketing Practices Act.

Regardless of whether products are sold to shops with sales assistants or to self-service shops or supermarkets, rewarding of the kind at issue in this case is found to be designed to affect the shops' marketing of products of an otherwise equivalent nature in such a way that the consumers' choice of product as a result may be affected by non-objective considerations. Under such circumstances, the offering to retailers of free rewards of a different nature than the products sold and of a not insignificant value, is considered to be contrary to section 1 of the Marketing Practices Act. ...”

Similarly, the Consumer Ombudsman found that a manufacturer's offer in connection with the purchase of a specific product range to reward vendors with a bottle of whisky was contrary to the principles of good marketing practice (case no. 76-416-104).

It is also prohibited in connection with the purchase of products for a specified amount to offer vouchers that the vendor can subsequently trade in for goods of a different nature than the products sold. In a judgment by the Supreme Court, UfR 1963, p. 489, the court found it to be in contravention of the general clause set out in section 15 of the Competition Act in force at that time (which prohibited activities with a commercial purpose that were contrary to generally accepted business ethics and good practice) that a wholesale importer of sanitary towels offered retailers or their sales assistants watches and jewellery in proportion to the number of vouchers they sent in. The reasons of the Maritime and Commercial High Court state as follows:

“... the court finds that, although it may be true that the use of rewards *per se* does not raise prices, there is a risk that such rewarding, which is concealed from the public, may add an element of non-objectivity to the sales assistant's consideration of which products to recommend, and as such may be detrimental to correct customer care. That a few other companies are stated to have used a similar system of reward is irrelevant in the court's opinion, and the

court finds that, for the reasons set out above, the contested reward system is unfortunate and contrary to fair competition...”

The Supreme Court accepted the reasons of the Maritime and Commercial High Court, stating the following reason:

“Regardless of whether it may be assumed that the offers of reward made are aimed solely at retailers or whether they are also aimed at sales assistants, the court allows, for the reasons set out in the judgment, that the reward system at issue is considered to be in contravention of section 15 of the Competition Act. ...”

5.2 Rewarding resale

It is also not permitted to offer rewards that are graded in size depending on how many of the products in question are subsequently sold. In UfR 1955, p. 713, the Maritime and Commercial High Court found that a prize contest organised by a shoe polish manufacturer among shoe sales assistants was contrary to generally accepted business ethics and good practice. Prizes in the form of nylon stockings were awarded for a specified amount of sales of the manufacturer's shoe polish, and holidays were awarded to the sales assistants with the highest sales figures.

The Consumer Ombudsman has also in several cases stated that sales campaigns designed to reward vendors according to the amount of the products in question sold are contrary to section 1 of the Marketing Practices Act.

An importer of calculators offered vendors of the devices rewards in the form of wine and spirits calculated depending on their sale of a specific type of calculator. The campaign was contrary to the principles of good marketing practice (case no. 1976-416-55). A cake manufacturer had organised a sales campaign according to which wholesalers and their employees were offered rewards in the form of 'holiday vouchers' that were graded according to the amount of sales of the products in question. The prizes were holidays, which could be obtained by the participants by sending in a specified number of holiday vouchers for each type of holiday.

The campaign was contrary to section 1 of the Marketing Practices Act (case no. 1995-417-6). The products resold are normally goods, but may also be services.

The Consumer Ombudsman approached several car rental companies to inform them that it constituted unlawful vendor rewarding when the companies offered gifts such as a bottle of red wine to travel agency employees based on how many car rental reservations the agencies secured.

5.3 Prize draws

Whether a reward system is unlawful or not is not affected by the reward being in the form of a prize draw among vendors or their employees, if purchasing certain goods or selling a certain amount is required to participate.

In UfR 1960, p. 438, a contest organised by a mattress manufacturer was found to be contrary to section 15 of the Competition Act then in force. Each time they sold a mattress, retailers and



their sales assistants were to send in a postcard. Everyone who had sent in a postcard participated in a prize draw for holidays, tape recorders and transistor radios.

The Consumer Ombudsman also set aside a contest for a car, which retailers could participate in by purchasing one unit among a number of specified products. The contest was organised to the effect that each retailer had one lot for each unit of the product item purchased (98-521-92).

5.4 Rewards not concealed from the subsequent customer

A vendor rewarding campaign in which prizes are awarded without the campaign being concealed, but where the customers (consumers) are aware of its existence, may be lawful. That is not to say that the prohibition against vendor rewarding may be circumvented simply by formally informing customers (consumers). The deciding factor is whether, because the customers are aware of its existence, the reward system is not designed to have a negative effect on the correct customer care and guidance. No example of this has yet been presented to the Consumer Ombudsman for the very reason that what characterises vendor rewarding is that it is concealed. Even if the campaign is out in the open, it should still be considered whether the campaign could involve a risk of customers receiving non-objective guidance.

5.5 Rewards for private use

Rewards offered in connection with unlawful vendor rewarding consist of benefits in kind that are normally meant for private consumption by the vendors or their employees, e.g. spirits, sports equipment, or the like. Rewards may also take the form of services, such as holidays.

5.6 Rewards for corporate use

Rewards actually used in the vendor's business, but where such use is not part of the marketing of the product to be resold, are also prohibited. For example, a reward in the form of a coffee machine used in the vendor's canteen would be unlawful. It may, on the other hand, be lawful to grant an additional benefit to be used for marketing purposes in the resale of the main product.

Such additional benefits will normally be in the form of marketing material or other promotional material, including products to be used in displays. The consideration of whether a reward is intended for private use or as promotional material will, among other things, be based on an assessment of whether it is specified in the specific marketing campaign that the additional benefit must be used for the vendor's marketing activities.

The Consumer Ombudsman found a wholesaler's offer of a colour TV set for retailers purchasing a full range of watches to be contrary to section 1 of the Marketing Practices Act. The wholesaler had claimed that the TV set was to be used to show adverts for the watch brand in question and that the additional service was therefore part of the marketing activities. On his part, the Consumer Ombudsman considered the fact that the advertising brochure did not specify that the colour TV set on offer was to be used as part of the vendor's marketing of the watches, and that such use also required a video player and advertising videos, neither of which were mentioned (case no. 89-541-28).

5.7 Rewards of insignificant value

If the value of the reward is so insignificant as not to be designed to be detrimental to correct customer care, such vendor rewarding is lawful. The determination of the value is based on the market value of the reward rather than its purchase price. It is not possible to set a specific price limit to determine when a reward is lawful. This is assessed on a case-by-case basis.

5.8 Giveaways

Gifts that are not subject to the vendor purchasing or selling anything are normally lawful. For example, it will normally be lawful for a company to offer Christmas gifts or other gifts to potential customers, as long as such gifts are not contingent on the purchase or resale of products. It is also allowed to offer a gift to thank vendors for e.g. participating in a market survey or filling in a questionnaire.

5.9 Discounts – monetary rewards

Additional rewards of a nature similar to the main service or in the form of a monetary amount is normally considered a lawful discount. It is lawful to offer a price reduction on the purchase of large quantities, e.g. in the form of a purchase bonus, an annual bonus or a cash discount. It may also be lawful to give vendors a choice between benefits in kind of a different nature than the main product and a cash benefit, provided the value of the two benefits is the same. The value of the benefit in kind is determined on the basis of its market value.

With purchases of his products, a confectionery wholesaler handed out bonus vouchers redeemable in the form of either a premium bond with a nominal value of DKK 50 or DKK 50 in cash. The Consumer Ombudsman did not find this to constitute unlawful vendor rewarding. If the monetary benefit is not connected to the vendor's purchase of the main product because it does not become payable until the vendor resells the products, it is not considered a discount in the traditional sense. Such marketing activities closely resemble unlawful vendor rewarding and may be contrary to section 1 of the Marketing Practices Act.

It should also be noted that where a discount is given to the employees and this is concealed from the owner, this may constitute a secret commission, which is a punishable offence. Pursuant to section 299 of the Penal Code, both those granting and those accepting such secret commission are liable to punishment.

5.10 Arrangement of sales

In the traditional sense of vendor rewarding, the reward is contingent on a purchase. As in the case of a gift with purchase, the reward is thus an additional benefit in association with a main product. Accordingly, if a company has an agreement with a vendor to the effect that the vendor is paid to arrange sales of the company's products and the company still offers a reward in connection with the sale, this constitutes unlawful vendor rewarding. However, often there is no agreement for the vendor to be paid to arrange such sales, and in such cases rewarding will not fall within the traditional definition of vendor rewarding. In such cases, the reward is not an additional benefit in association with a main product.

Even though it does not constitute vendor rewarding in the normal sense, such an arrangement may be contrary to the principles of good marketing practice. If the reward arrangement



is concealed from the consumer, there is a risk, as in the case of unlawful vendor rewarding, that such reward may have a negative effect on the correct customer care. Accordingly, such reward arrangements are normally contrary to section 1 of the Marketing Practices Act on good marketing practice.

An example of this is an insurance company or a financing company rewarding retailers for arranging sales of the company's insurances or loans in connection with sales of its own products.

The Consumer Ombudsman stated that a prospective reward arrangement, in which a financing company wished to reward car dealers by way of an additional benefit based on the number of car loans the car dealer arranged, constituted concealed vendor rewarding and was therefore contrary to section 1 of the Marketing Practices Act. In the opinion of the Consumer Ombudsman, the financing company should, as a minimum, inform the borrowers that the car dealer is rewarded separately for arranging the financing company's loans, and the consumers should also be given an indication of the size of such reward (case no. 1999-116/5-181).

The Consumer Ombudsman also found a vendor contest organised by a financing company, by which the car vendors participated in a prize draw for holidays abroad, gaining one lot for each loan arranged by the salesman, to be unlawful (case no. 1999-521-130).

Agreements to reward vendors payment/commission to arrange a sale, e.g. a car dealer earning commission on the sale of car insurance or on arrangement of a loan, does not in itself constitute unlawful vendor rewarding. There is no additional benefit, only a main product. However, depending on the circumstances, such arrangements may be contrary to good marketing practice if the purchaser of the product is not aware that such collaboration exists.

5.11 Commission arrangements as remuneration of own employees

A vendor's use of various commission arrangements as remuneration of own employees falls outside the rules on vendor rewarding. However, it cannot be ruled out that, in individual cases, commission arrangements under which sales assistants are rewarded for the sale of certain items may be worded or structured in such a way that they are contrary to good marketing practice. In such cases, importance is attached to whether or not the arrangement is generally subject to significant risk of misguidance of consumers, particularly where the reward is significant in size.