

The Prohibition Against Unsolicited Communications **Guidance**

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The Prohibition Against Unsolicited Communications

The Danish Consumer Ombudsman

Carl Jacobsens Vej 35

2500 Valby

Tel.: +45 41 71 51 51

Email: forbrugerombudsmanden@forbrugerombudsmanden.dk

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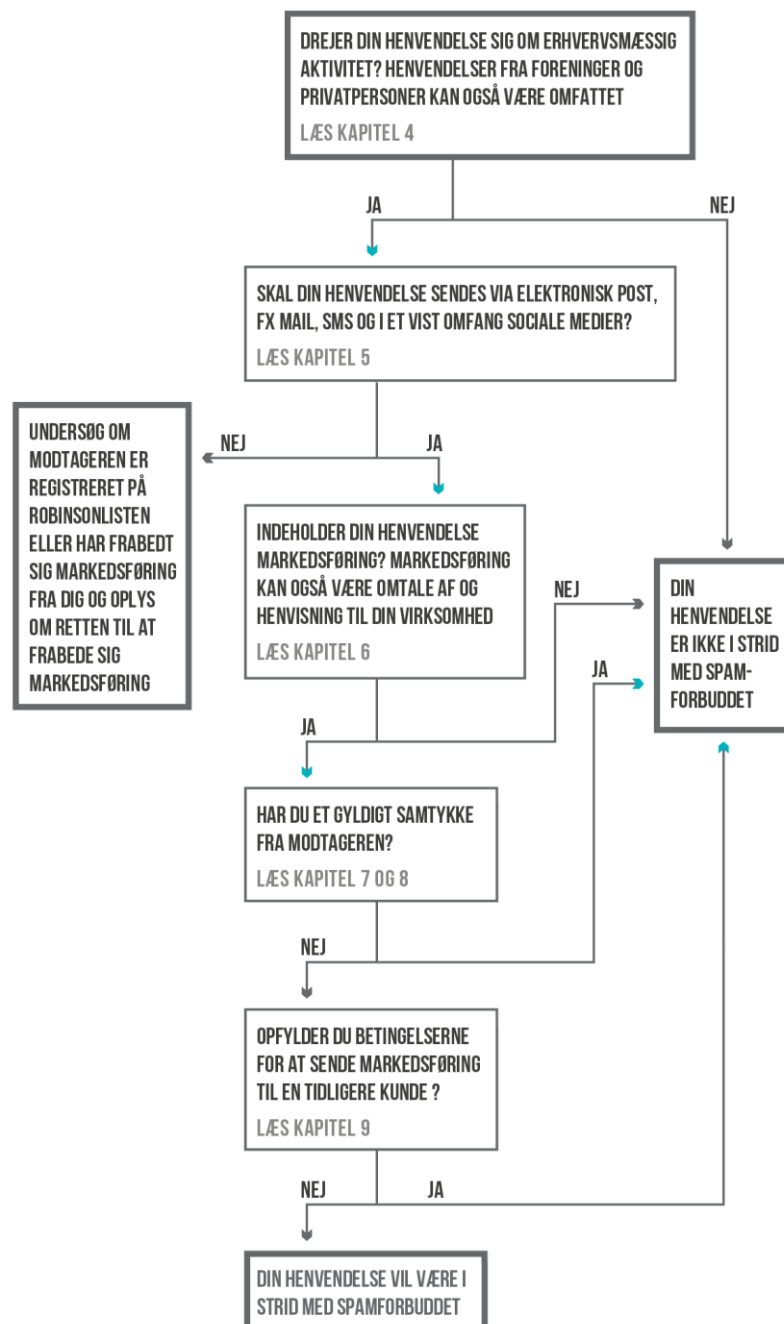
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Chapter 1

Quick Guide

How to avoid infringing the prohibition against unsolicited communications ("PUC")

Are you uncertain about when you are permitted to send email, text messages or the like? Then read the Danish Consumer Ombudsman's Guidance on Unsolicited Communications. Start by gaining an overview of the PUC here.



Chapter 2

Background

In 2002, the Danish Consumer Ombudsman published a guidance paper entitled (in English) “Unsolicited communications with specific customers” called the Guidance on Unsolicited Communications. This guidance has since been revised several times following amendments to the legislation and subsequent policies established by the Danish Consumer Ombudsman and case law precedents.

On 1 July 2017, a new Marketing Practices Act came into force. The Danish Consumer Ombudsman has consequently decided to replace the previous Guidance on Unsolicited Communications with a new one.

Unlike its predecessor, the new Guidance on Unsolicited Communications deals exclusively with the prohibition against unsolicited communications (“PUC”), i.e. communications from traders by means of electronic media such as email, text messages and social media. The rules on trader communications by means of media for distance marketing other than by electronic mail, such as by letter with or without a named addressee, by facsimile machine (fax) or telephone are not dealt with in the present Guidance, but these rules are set out on the Danish pages of the Danish Consumer Ombudsman's website FAQ entitled “Hvad gælder?” (“What Applies?”). In addition, the Danish Consumer Ombudsman is expecting to compile a guidance on telephone communications in 2019.

With the present Guidance, the Danish Consumer Ombudsman wishes to provide companies and associations with a practical tool that provides an overview of when and how companies are permitted to send marketing by means of electronic mail.

The Guidance provides specific examples of when communications are covered by the PUC and when they are not. If a communication is subject to the PUC, the example is shown with a ✓, while the example is shown with a ÷ if it is not subject to the PUC.

The Guidance does not contain recommendations with respect to data protection legislation.

Chapter 3

The legislation

Section 10(1) of the Marketing Practices Act

The prohibition against unsolicited communications (PUC)

Companies are prohibited from communicating emails, text messages and other electronic mail to anyone for the purposes of marketing intended for specific recipients (direct marketing), unless the recipient has consented to such communication.

This prohibition (referred to in this document as the “PUC”) is stated in Section 10(1) of the Marketing Practices Act:

“A trader must not approach anyone by means of electronic mail, an automated calling system or a facsimile machine (fax) for the purposes of direct marketing unless the party concerned has given his prior consent. The trader must allow free and easy revocation of consent.”

The PUC applies to all recipients, i.e. regardless of whether the communication is sent to a consumer, a company, a public authority, etc.; this ensues from the word “anyone”. It is also of no significance whether the communication is addressed to a general email mailbox, e.g. info@company.dk, to a main email mailbox, or to a personal recipient, such as a director or employee of a company.

A communication is subject to the PUC if

- The communication is sent by a trader; see [Chapter 4](#).
- The communication is transmitted by electronic mail; see [Chapter 5](#);
- The communication is for the purposes of marketing to specific recipients (direct marketing); see [Chapter 6](#);

If a communication is subject to the PUC, it may only be transmitted to recipients who have consented to it.

Consent must be obtained before the trader approaches its intended recipient. Such consent must be a freely given, specific and informed indication of the intended recipient's wishes; see [Chapter 7](#).

The option must exist to withdraw consent easily and free of charge; see [Chapter 8](#).

Section 10(2) of the Marketing Practices Act

According to Section 10(2) of the Marketing Practices Act, companies are, however, permitted to send marketing to a previous customer concerning products similar to those purchased by the customer, without the customer's consent. However, this entails that a number of conditions have all been met; see [Chapter 9](#).

Section 10(3) of the Marketing Practices Act

Section 10(3) of the Marketing Practices Act, lays down a number of conditions regarding the content of any electronic communication for the purposes of marketing to specific recipients (direct marketing); see [Chapter 10](#).

The company must be able to document that it has obtained valid consent or that the conditions for transmitting marketing to a previous customer have been met; see [Chapter 11](#).

Violation of Section 10(1)-(3) of the Marketing Practices Act is punishable by a fine; see [Chapter 12](#).

Section 10 of the Marketing Practices Act entered into force on 1 July, 2017. This provision reiterates Section 6 of the preceding Marketing Practices Act save for certain primarily linguistic changes.

Section 10 of the Marketing Practices Act implements Article 13 of EU Directive 2002/58/EC on the prohibition against unsolicited communications for direct marketing purposes by means of electronic mail, as amended by Directive 2009/136/EC. The EU is in the process of negotiating an ePrivacy Regulation to replace this ePrivacy Directive. Once the regulation has been adopted, the Danish Consumer Ombudsman will update this Guidance as necessary.

Chapter 4

Who is subject to the PUC?

The PUC applies to all *traders*.

Traders are defined as those engaging in “a private business activity or public activity to the extent that products are offered in the market”.¹

The decisive factor is whether the communication transmitted is a manifestation of a business activity, i.e. whether it relates to a financial activity that is commercial in nature (a commercial activity).

A trader may be an entity other than a “conventional” company, and may therefore be required to comply with the PUC. Associations, foundations, etc. may also be 'traders' if they transmit communications concerning a commercial activity. See Section 4.1 below for details. The same is true of public authorities.²

On a case-by-case basis, natural persons may also be construed as 'traders'. In assessment of such instances an intention to gain a profit from the activity is of no consequence. Equally, it is of no consequence whether the activity pertains to fulltime employment or a sideline. However, the activity must have a certain ongoing character (conducted over a sustained period of time) and operate on a not insubstantial scale.³

If a trader offers an incentive, such as a reward, for an individual or other non-trader to market the business or its products, it is the trader's responsibility to ensure that the individual (or non-trader) complies with the law, including the PUC. See Section 4.3 below for details.

4.1 Associations and foundations

Non-profit associations and foundations

Associations and foundations whose objects are charitable, religious or political will, in principle, not be subject to the PUC, as they do not engage in commercial activity.

However, activities that are construed as being in the nature of business activities are subject to the Marketing Practices Act and thus also to the PUC.⁴

Activities in which associations and foundations offer products on an equal footing with private companies constitute commercial activities subject to the PUC. This would be the case, for example, for an association's sale of trips or books. Such activities will also be subject to the PUC even if the surplus from such trading exclusively benefits non-profit purposes.

¹ See the comments on Section 1(1) of the Marketing Practices Act.

² See the Danish Consumer Ombudsman's Decision [15/09442](#)

³ See the comments on Section 1(1) of the Marketing Practices Act.

⁴ See the comments on Section 1(1) of the Marketing Practices Act.

An association using electronic communication for purposes of membership recruitment or fundraising will not be subject to the PUC if the main purpose of the association is charitable, not-for-profit, religious or political.

If, however, the membership recruitment is for an association that generally conducts business for commercial purposes, then such recruitment will be subject to the PUC. Such cases will be subject to an overall assessment taking into account the purpose of the association, as described in its charter, for example.⁵

Associations or organisations serving the interests of members

Unsolicited communications from associations serving the interests of their members are not subject to the PUC provided that the communications are for the purpose of serving their members' interests. If, on the other hand, the association contacts a member for the purpose of selling products, such communication will, in principle, be subject to the PUC.

This applies both to associations that serve members' private interests, such as homeowners' associations or cooperative housing societies, and to trade organisations that serve their members' trade interests by means of newsletters and contributions to the political debate.

Trade unions

Trade unions are not subject to the PUC in so far as they engage only in the traditional core activities of trade unions, these being the conclusion of collective agreements on wages and working conditions for union members.

The recruitment of members to trade unions engaged in traditional core activities is not subject to the PUC.

Trade unions are subject to the PUC, however, when they serve the interests of their members in the form of, for example, individual legal advice, trade-related assistance, loyalty programmes and similar commercial activities.⁶

4.2 Examples of commercial activity

The Danish Consumer Ombudsman found, for example:

- ✓ That a trade association's marketing to its members of courses and conferences, which were generally offered for sale in the market, was a commercial activity subject to the PUC.⁷
- ✓ That a trade association's emails containing offers from individual members or branding of individual members was commercial activity subject to the PUC.⁸
- ✓ That a local authority's emailing of a "Welcome to the Municipality" message containing marketing for local businesses was commercial activity subject to the PUC.⁹

⁵ See the comments on Section 1 of the Marketing Practices Act.

⁶ See the comments on Section 1 of the Marketing Practices Act.

⁷ See the Danish Consumer Ombudsman's Decision [16/02218](#)

⁸ See the Danish Consumer Ombudsman's Decision [14/13335](#)

⁹ See the Danish Consumer Ombudsman's Decision [15/09442](#)

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- ÷ That a local authority youth vocational institution's sending of newsletters concerning the institution's free activities and events to which all citizens were eligible did not constitute commercial activity subject to the PUC.¹⁰
 - ÷ That a trade association's emails to its members about the association's activities and events, such as a Christmas party and member meetings, did not constitute a commercial activity subject to the PUC.¹¹
 - ÷ That a non-profit consumer policy association's promotion of membership of the association did not constitute a commercial activity subject to the PUC regardless of the fact that the association engaged in a commercial activity, as long as the membership was separate from the commercial activities.¹²

4.3 Private individuals

The PUC applies solely to communications from traders. Thus, an electronic communication from a private individual will, as a rule, not be subject to the PUC.

However, if a company uses private individuals (or other non-traders) to send communications that the company cannot send itself, the company may be liable for infringement of the PUC.¹³ In Case U2002.2277/2 SH, a telecommunications company used the members of a sports club for marketing phone subscriptions. The Maritime and Commercial High Court ruled that the telecommunications company must comply with the PUC, regardless of the fact that the telecommunications company was making use of non-traders, i.e. private individuals, to market its services.

A trader uses a private individual (or other non-trader) to market its services when the trader creates an incentive, such as a reward, for the private person (or non-trader) to share or disseminate the marketing. For an explanation, see below.

“Tell-a-friend” marketing

Many traders have an option on their website or app whereby users can share content from the company, such as offers or articles, with the users' friends via social media or email.

In principle, if an undertaking has a share feature on its website or app this is not an infringement of the PUC.

However, if an undertaking offers an incentive, such as a reward, for users to “tell-a-friend” about the company's marketing, the Danish Consumer Ombudsman regards the trader as the sender of the communication. This communication to the friend(s) is thus subject to the PUC. This means that the company must ensure that the user's friends have consented to receive electronic marketing from the company. Otherwise, communications sent by means of a “tell-a-friend” feature will be unsolicited (spam), for which the company is liable.

The Danish Consumer Ombudsman found, for example:

¹⁰ See the Danish Consumer Ombudsman's Decision [17/06740](#)

¹¹ See the Danish Consumer Ombudsman's Decision [14/13335](#)

¹² See the Danish Consumer Ombudsman's Decision [18/08380](#)

¹³ See the comments on Section 2, No. 2 of the Marketing Practices Act.

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- ✓ That a gift card awarded by a trader to its customers if they share an email which contains marketing is a reward.¹⁴
 - ✓ That a donation to charity by a trader is a reward subject to the PUC if the donation is conditional on using the “tell-a-friend” feature.¹⁵
 - ÷ That no reward/incentive subject to the PUC is involved if a consumer organisation urges members to share information emails on the negotiation of electricity prices, with the wording: “The more there are of us, the better the terms we can negotiate.”¹⁶

Since, in practice, it is difficult for an undertaking to ensure that the user’s friends have consented to receiving electronic marketing from the trader, the Danish Consumer Ombudsman recommends that traders refrain from offering an incentive, such as a reward, to users who “tell-a-friend”.

Friend-to-friend solicitation

Friend-to-friend solicitation is a feature where an undertaking encourages users to share their marketing. Friend-to-friend solicitation differs from other referral marketing such as “tell-a-friend” in that users are only rewarded if the targeted friend also becomes a customer of the trader.

If a trader rewards someone for recruiting a new customer without having instructed them on how to make contact lawfully, the trader’s actions may, in principle, be contrary to good marketing practices.¹⁷

If the user contacts a friend, the user must comply with the same rules that the trader itself is bound by (e.g. the PUC). The trader could be held liable for any violation of the law by the user.

Therefore, if a trader wishes to employ friend-to-friend solicitation, it must inform users of the rules regarding unsolicited approaches and advise them that it would, for example, be contrary to the rules regarding unsolicited approaches if the user contacts friends or other people in person, by phone, text message or email for the purpose of marketing products from the trader.¹⁸

Friend-to-friend solicitation poses a problem because the person who is contacted is placed under duress due to a reluctance to disappoint their friend, who has been promised a reward, and because it is difficult for the trader to ensure that users do not approach friends in a manner that would be an unlawful marketing practice if attempted by the trader itself.

In the Danish Consumer Ombudsman’s opinion, friend-to-friend solicitation is lawful if the trader refrains from rewarding the user and solely rewards the friend.

The Danish Consumer Ombudsman therefore recommends that traders refrain from rewarding users for friend-to-friend solicitation.

¹⁴ See the Danish Consumer Ombudsman’s Decision [15/01842](#)

¹⁵ See the Danish Consumer Ombudsman’s Decision [16/05707](#)

¹⁶ See the Danish Consumer Ombudsman’s Decision [12/08744](#)

¹⁷ See U.2002.2227 SH (Maritime and Commercial Court ruling)

¹⁸ See the Danish Consumer Ombudsman’s Decision [16/10856](#)

4.4 Undertakings outside Denmark

If an undertaking transmits marketing by electronic mail to Danish recipients, it will be subject to Danish rules, i.e. to the Danish Marketing Practices Act's prohibition against unsolicited communications (PUC), regardless of whether the trader is established in or outside Denmark.¹⁹

¹⁹ See [Sections 3-5, E-Commerce Act](#)

Chapter 5

Which means of communication are subject to the PUC?

Not all means of communication are subject to the PUC. The PUC only applies to communications transmitted by means of *electronic mail*.

5.1 Electronic mail

Electronic mail means “any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient”. This is stated in Section 2, No. 15 of the Marketing Practices Act.

The definition of electronic mail is technology-neutral and is subject to broad interpretation. The purpose of the definition is to ensure that individuals achieve the same privacy protection, regardless of the technology used.²⁰

A communication is sent by means of electronic mail when all of the following elements are present:

1. The communication is in text, voice, audio, picture or video format.
2. The communication is sent over a public communications network. This is the case if the communication is via an online (internet) service which is not restricted in advance to a certain group of end users. An intranet²¹, however, is not a public communications network.
3. The communication can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient. Whether or not a communication is actually stored is irrelevant as long as this is technically feasible.
4. The communication is sent to a specific recipient's electronic address.

Email, text messages, MMS and other similar means of communication used for sending messages in which picture, audio and text content, for example, can be combined, over the internet or by mobile telephony, are comprised by the term electronic mail. This also applies to online email services, such as gmail.com and hotmail.com²².

²⁰ See the comments on Section 2, No. 15 of the Marketing Practices Act.

²¹ An intranet is a private network that only a limited group (typically the employees of a company) can access. A member portal etc., where members, subscribers, users etc. can sign in and access content is not an intranet.

²² See the comments on Section 2, No. 15 of the Marketing Practices Act.

Marketing that depends on the recipient being online and which disappears when the recipient is no longer online is not covered by the definition of electronic mail. This means, for example, that pop-up advertisements and advertisements via a user's news feed on Facebook are not electronic mail.²³

The term electronic mail is a dynamic concept that must be interpreted in light of the market trends and technological advances prevailing at any time.

The Danish Consumer Ombudsman found, for example:

- ✓ That push notifications from apps are electronic mail.²⁴

Comments: A push notification is a text message that an app “pushes out” if the user has enabled push notifications in their phone settings. The push notification is stored on the user's phone until the notification is opened. How exactly the notification is displayed depends on the phone's operating system, but the user will typically not be able to re-access the notification.

- ✓ That the digital mail that Danish citizens and businesses receive from public authorities through e-Boks is electronic mail.²⁵
- ✓ That completing a contact form on a company's website is electronic mail. This would be of relevance, if, for example, an undertaking uses another undertaking's contact form for marketing its products.
- ÷ That communications via Bluetooth are not sent over a public communications network. Communications via Bluetooth are therefore not electronic mail. However, in the Consumers Ombudsman's opinion, marketing via Bluetooth could be contrary to good marketing practice.²⁶

5.2 Social media

Corporate communications by means of social media may be subject to the PUC.

Many different means of communication exist on social media. Not all means of communication come under the definition of electronic mail. Also, not all communications constitute marketing to specific recipients (direct marketing).

Appendix 1 to this Guidance provides a description of various means of social media communication, indicating whether or not they are subject to the PUC.

²³ See the comments on Section 2, No. 15 of the Marketing Practices Act.

²⁴ See the Danish Consumer Ombudsman's Decision [18/05121](#)

²⁵ See the Danish Consumer Ombudsman's Decision [15/03380](#)

²⁶ See the Danish Consumer Ombudsman's Decision [18/05647](#)

Chapter 6

What is direct marketing?

Direct marketing is marketing sent to one or more specific recipients.

It is of no consequence whether the communication is sent to a consumer, a company, a public authority, an employee, a main email mailbox, etc.

It is also of no consequence whether the message sent to multiple specific recipients is identical or not.

Blanket communications to non-specific group of potential recipients are not direct marketing. The Danish Consumer Ombudsman has assessed that a communication sent to anyone within a radius of approximately 100 metres who has an Android phone on which Bluetooth is activated is a communication sent to a non-specific group of potential recipients. Such communication is therefore not *direct* marketing²⁷.

6.1 Marketing

The PUC covers all forms of marketing, including image marketing. This means that not only are communications containing offers relating to the trader's product classified as marketing, but so are those containing mention of the trader (branding) or the trader's branding.

Below are some examples of what, in the Danish Consumer Ombudsman's opinion, does and does not constitute marketing:

- ✓ If an undertaking sends an offer to enter a competition, the purpose of the competition will typically be to brand the trader or its products and, this is therefore marketing subject to the PUC.
- ✓ If an undertaking sends out electronic newsletters, the newsletters will generally be for the purpose of branding the undertaking and its products, and the newsletters will therefore be marketing subject to the PUC.
- ✓ If an undertaking emails a previous customer to remind the customer about the undertaking ("it's been a while since you shopped with us" emails), the email will be marketing subject to the PUC.
- ✓ If an undertaking emails a discount code to a previous customer for use in the company's online store, the email will be marketing subject to the PUC.

²⁷ See the Danish Consumer Ombudsman's Decision [18/05647](#)

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- ✓ If a clothing retailer emails a request for donation of used clothing stating that donors will receive a 10% discount on merchandise, the email will be marketing subject to the PUC.²⁸
 - ✓ If an undertaking texts homeowners and mentions a property brokerage service that is free of charge for the homeowner to use, the text message will be marketing subject to the PUC.²⁹
 - ✓ If a photographer sends out an email containing a link to free shots of a running event to the participants, the email will be marketing subject to the PUC.³⁰
 - ÷ If an unemployment fund emails businesses an offer of recruitment to help fund members gain employment, this is not subject to the PUC.³¹
 - ÷ If an undertaking sends a job advertisement to a potential candidate for the job, this is not marketing subject to the PUC.
 - ÷ If an undertaking emails a request that is necessary for a contractual relationship, this is not marketing subject to the PUC.
 - ÷ If a company sends press releases or invitations to launches, events, etc. to the media in the hope of achieving media coverage for the company or its products, this communication will not be marketing subject to the PUC unless the purpose is to sell the company's products to the media.
 - ÷ If a company sends a service message, this is not marketing subject to the PUC. See Section 6.2. What the undertaking happens to call its communication is not decisive.

Market research

A market research survey, etc. is not marketing subject to the PUC if the purpose of the survey is to research specific market factors. If, on the other hand, the purpose of the survey is to sell products or brand a business, the survey will be subject to the PUC.

The survey must not contain unnecessary descriptions of the company or any other form of branding. If it does, then it is marketing subject to the PUC. The same applies to the content of any communication, such as an email providing a link to the survey. The communication is, however, allowed to contain a strapline, logo, etc., identifying the company. The logo is allowed to contain a neutral reference to the company's website or another online site confirming the identity of the company. The logo must not contain any other marketing of the company or its products. A prize draw may be offered in appreciation of the time spent by the survey respondents, and this may be specified in the communication³².

If the survey communication contains a link to a website, etc., that website must not contain marketing.³³

²⁸ See the Danish Consumer Ombudsman's Decision [13/12874](#)

²⁹ See the Danish Consumer Ombudsman's Decision [18/10231](#)

³⁰ See the Danish Consumer Ombudsman's Decision [15/08448](#)

³¹ See the Danish Consumer Ombudsman's Decision [14/13459](#)

³² See the Danish Consumer Ombudsman's Decision [15/11580](#)

³³ See the Danish Consumer Ombudsman's Decision [10/09223](#)

The Danish Consumer Ombudsman found, for example:

- ✓ That a company was not allowed to send out a survey, as it contained a needlessly detailed description of the company and its mission, thus making it marketing subject to the PUC.³⁴
- ✓ That an entrepreneur was not allowed to send a questionnaire to prospective clients, as the questionnaire contained information about the business and a positive write-up of the business's products, thus making it marketing subject to the PUC.³⁵

Customer satisfaction surveys

A customer satisfaction survey is not marketing subject to the PUC if the purpose of the survey is to research customer satisfaction. If, on the other hand, the purpose of the survey is to sell products or brand a business, the survey will be subject to the PUC.

Customer satisfaction surveys are particularly relevant in ongoing customer relationships. Regarding requests for user ratings, see below.

The survey must not contain unnecessary descriptions of the company or any other form of branding. If it does, then it is marketing subject to the PUC. The same applies to the content of an email, etc. which links to the survey, but a strapline, logo, etc. identifying the company is allowed. The logo is allowed to contain a neutral reference to the company's website or another online site confirming the identity of the company. The logo must not contain any other marketing of the company or its products.

The Danish Consumer Ombudsman found, for example:

- ÷ That on closing a deal, a real estate agent was allowed to email the seller and the buyer a link to a customer satisfaction survey, as the email did not contain any request to make a purchase or branding of the real estate agent and was therefore not marketing subject to the PUC.³⁶
- ÷ That a company was allowed to send a request to customers to rate the company on a rating portal, as the request was not marketing subject to the PUC. See below.³⁷
- ÷ That a customer club was allowed to email its members to ask them to rate their experience by providing a score of between 1 and 5, as the email was not marketing subject to the PUC.³⁸

User rating of purchase experience on rating portals

In the opinion of the Danish Consumer Ombudsman, a communication from an online store (or rating portal on behalf of the online store) to a customer soliciting their rating of a specific shopping experience on a rating portal is not marketing subject to the PUC if:

1. The online store has sold a product to the customer;
2. The online store solicits the rating immediately following the sale;

³⁴ See the Danish Consumer Ombudsman's Decision [10/09158](#)

³⁵ See the Danish Consumer Ombudsman's Decision [15/08087](#)

³⁶ See the Danish Consumer Ombudsman's Decision [09/00787](#)

³⁷ See the Danish Consumer Ombudsman's Decision [12/13564](#)

³⁸ See the Danish Consumer Ombudsman's Decision [16/06125](#)

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3. The communication solicits a rating of the shopping experience in question on the rating portal; and
 4. The communication does not contain marketing, but comes across as entirely neutral.³⁹

The communication is, however, allowed to contain a strapline, logo, etc., identifying the online store and the rating portal. The logo is allowed to contain a neutral reference to the online store confirming its identity. The logo must not contain any other marketing of the online store or its products.

If the online store sends a communication soliciting a rating for a shopping experience despite the recipient having previously declined to receive such communications from the company, this will be contrary to good marketing practice; see Section 3(1) of the Marketing Practices Act⁴⁰ However, an online store may have a clause in its sale of goods agreement stipulating that the customer must agree to receive a request soliciting a rating of the shopping experience, unless that clause is deemed unfair by a specific assessment. That being the case, the customer cannot decline to receive that type of communications from the online store.

For customer satisfaction surveys in other cases, e.g. in ongoing customer relationships, see the section above on “customer satisfaction surveys”.

6.2 Marketing or service message

If a company sends a service message, this is not marketing subject to the PUC.

Such messages are particularly relevant in ongoing customer relationships.

When assessing whether a communication is marketing or a service message, special emphasis must be given to whether the purpose of the communication is to mention additional products.

What the undertaking happens to call its communication is not decisive.

The communication will be construed as a service message and not marketing if an undertaking emails its customers to advise them of amendments to the customer's policy or an increase in the price of the customer's subscription. On the other hand, it will not be a service message, but marketing, if the company emails a customer inviting them to purchase additional products.

Communications concerning new legislation applicable to the customer's agreement, for example new rules on travel insurance, would be service messages and not marketing. If new legislation means that the customer now has an inappropriate insurance policy, the company may advise the customer to that effect, but the company must not at the same time offer alternative products or other insurance services. The same applies if the company is subject to an advisory obligation to the customer. If so, a communication containing advice to the customer would also be a service message. In both situations, however, it is a condition that the communication does not go beyond its purpose, otherwise the communication will be marketing subject to the PUC.

³⁹ See the Danish Consumer Ombudsman's Decision [18/06294](#)

⁴⁰ See [The Danish Consumer Ombudsman's guidance on publishing user ratings](#), Section 7

If a company adds new features, etc. related to a subscription, a communication to the subscriber about any such feature etc. will, as a rule, be subject to the PUC. This would be the case, for example, if a company launches a new free app enabling cloud storage of phone numbers⁴¹. A communication concerning a new feature, etc. may, however, exceptionally be a service message. This might be the case, for example, for a feature that allows the subscriber to continuously monitor their usage or receive an alert if their usage suddenly increases.

Useful, non-commercial advice in an ongoing customer relationship, such as how to generally reduce energy consumption or avoid storm damage, will be a service message and not marketing. However, this entails that the communication does not contain or refer to the company's products. The communication is allowed to link to the section on the company website where the useful advice can be read.

If an undertaking's communication is a service message, the communication may include a strapline, logo, etc. identifying the undertaking. The logo is allowed to contain a neutral reference to the company's website or another online site confirming the identity of the company. The logo must not contain other marketing of the company or its products – if it does, the communication will no longer be a service message but marketing subject to the PUC.

The Danish Consumer Ombudsman found, for example:

- ✓ That a company's message to convene an eye test for previous customers who had bought glasses at its store was not a service message but marketing subject to the PUC, as any change in vision would imply a need to purchase new glasses/lenses.⁴²
- ✓ That a car dealership's emails about car servicing, tire storage and expiry of the manufacturer's warranty were not service messages, but marketing subject to the PUC, if the company's services were simultaneously mentioned or the recipients were urged to contact the company.⁴³
- ✓ That a taxicab company's text message advising that the company had cancelled its agreement with a provider of a taxi booking app and where the recipient of the text was encouraged to use the company's own app for booking taxis in the future was not a service message, but marketing subject to the PUC.⁴⁴
- ÷ That a company's message to convene an eye test for customers with a rolling contact lens subscription was a service message not subject to the PUC, as any change in vision would solely entail an adjustment in the subscription (consisting of different dioptr lenses).⁴⁵
- ÷ That an electricity utility's notification of power outages was a service message not subject to the PUC.⁴⁶

⁴¹ See the Danish Consumer Ombudsman's Decision [18/05510](#)

⁴² See the Danish Consumer Ombudsman's Decision [18/06364](#)

⁴³ See the Danish Consumer Ombudsman's Decision [16/03545](#)

⁴⁴ See the Danish Consumer Ombudsman's Decision [13/11385](#)

⁴⁵ See the Danish Consumer Ombudsman's Decision [18/06364](#)

⁴⁶ See the Danish Consumer Ombudsman's Decision [14/09592](#)

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- ÷ That a concert organiser's email to ticket holders containing relevant information about, for example, programme times and transportation options was a service message not subject to the PUC.⁴⁷
 - ÷ That a parcel distributor's message about delivering a parcel was a service message not subject to the PUC.⁴⁸
 - ÷ That a message from a district heating company about a texting service whereby end users would receive alerts if their radiators had an excessive return temperature which would cause the end user to be billed for excess heating was a service message not subject to the PUC.⁴⁹

“Abandoned cart” feature

Some online stores have a so-called “abandoned cart” feature. This feature automatically emails a “reminder” to anyone who visited the online store and placed items in the digital shopping cart without completing a purchase. The “reminder email” typically contains a link to the “cart”, which is clickable if the shopper wishes to complete the purchase.

This type of communication is not a service message but marketing subject to the PUC.⁵⁰

This means that if an online store wishes to issue an “abandoned cart” reminder, it must obtain prior consent to do so. They are permitted to obtain such consent to cover “generally in future”, meaning that a certain recipient may consent to receive a reminder email from a specific online store each time they visit the store, place items in the cart and exit without completing a purchase. However, the consent must be revocable at any time. Learn more about consent in Chapters 7 and 8.

⁴⁷ See the Danish Consumer Ombudsman's Decision [15/06107](#)

⁴⁸ See the Danish Consumer Ombudsman's Decision [16/06077](#)

⁴⁹ See the Danish Consumer Ombudsman's Decision [18/19109](#)

⁵⁰ See the Danish Consumer Ombudsman's Decision [15/09634](#)

Chapter 7

Valid consent

A company may send marketing to a specific recipient (direct marketing) by means of electronic mail, subject to the recipient's prior consent.

The consent must be lawfully obtained.

Prior consent means that a company is not allowed to contact someone by means of electronic mail to request their consent to marketing from the company.⁵¹ This is because any unsolicited communication in which a company requests consent is in itself marketing.

Such consent must be a freely given, specific and informed indication of the intended recipient's wishes; see Sections 6.3-6.5 ^{52,53}

The consent must be revocable easily and free of charge; see [Chapter 8](#).

Not later than at the same time as someone gives their consent, the company must advise them that they may revoke their consent.⁵⁴ This information should be provided in the consent text itself, meaning that it is not sufficient for it to be stated in a text in a link.

Consent must be given by the person who has access to the email address, the phone number, etc. i.e. who uses it daily. This applies regardless of whether the person who has access to the email address or phone number is employed in a company, institution, etc. and therefore uses an email address provided by an employer. ⁵⁵

7.1 Freely given

Freely given consent means that the person who is invited to give their consent must have a genuine and free choice.

Therefore, the purchase of a product or the conclusion of an agreement must not be conditional on the simultaneous consent to receive marketing. If so, the consent would not be freely given. ⁵⁶

⁵¹ See the comments on Section 2, No. 14 of the Marketing Practices Act.

⁵² See Section 2, No. 14 of the Marketing Practices Act

⁵³ The Danish Consumer Ombudsman has consulted the Ministry of Justice as to whether the definition of a consent in the EU General Data Protection Regulation (GDPR) should prevail over the definition of consent in the Danish Marketing Practices Act. In accordance with Article 4 (11) of the GDPR, consent must also be "unambiguous". However, the Danish Consumer Ombudsman is of the opinion that, in practice, the addition of the word "unambiguous" would scarcely be significant.

⁵⁴ See the principle in Article 7(3) of the [General Data Protection Regulation](#).

⁵⁵ See the Danish Consumer Ombudsman's Decision [18/13486](#)

⁵⁶ See the principle in Article 7(3) of the [General Data Protection Regulation](#) and the Danish Consumer Ombudsman's Decision [15/01605](#)

A company is, however, allowed to some extent to motivate someone to give their consent by offering a benefit for consenting. However, a lack of consent must not carry adverse consequences, such as additional costs.⁵⁷

The Danish Consumer Ombudsman finds that it is permissible to offer a discount to people who, at the time of purchase, say “yes please” to receiving marketing from the company. However, this is conditional on the person also having the option of purchasing the product at the company’s usual price without having to say “yes please” to marketing.⁵⁸

A company is allowed to reward someone for consenting to receive marketing by giving them a prize draw ticket. See the Danish Consumer Ombudsman’s guidance on [“Use of competitions and the like in obtaining consumer consent for marketing”](#).

If a company markets a product as “free” or otherwise gives the impression that a product can be acquired free of charge, for example a gift, receipt of the product must not be conditional on marketing consent. Otherwise, the company’s marketing is misleading⁵⁹. This is because, in the Danish Consumer Ombudsman’s view, giving consent is equated with a monetary reward⁶⁰.

7.2 Informed

Informed consent means that the person consenting must be aware that they are giving their consent and of what they are consenting to.

This means that a company must ensure that the person asked to consent has sufficient information to decide whether or not to consent.

One implication of this is that consent must be an active indication of choice. Therefore, consent obtained by means of a pre-ticked box is not informed consent.⁶¹

Consent requests must be separate from the company’s other terms and conditions, otherwise the consent would not be informed. This is to ensure that the person giving the consent is aware that he/she is consenting to receive marketing.⁶²

If consent is given in connection with participation in a competition, it must be equally clear that the consent is given both to receive marketing and to the prizes the consenter stands to win. Learn more about the information requirement for requesting consent for competitions in the Danish Consumer Ombudsman’s guidance on [“Use of competitions and the like in obtaining consumer consent for marketing”](#) [only available in Danish].

7.3 Specific

Specific consent means that it must be clear what the person is consenting to.

⁵⁷ See the principles in [The Danish Data Protection Agency’s and Ministry of Justice’s guidance on consent](#) from November 2017, page 8.

⁵⁸ See the Danish Consumer Ombudsman’s Decisions [15/02855](#) and [14/03912](#)

⁵⁹ See the Danish Consumer Ombudsman’s Decisions [15/08448](#) and [18/05068](#)

⁶⁰ See the principles of the General Data Protection Regulation.

⁶¹ See the comments on Section 2, No. 14 of the Marketing Practices Act.

⁶² See the principles in Article 7(2) of the [General Data Protection Regulation](#) and [the principles in the Danish Data Protection Agency’s and the Ministry of Justice’s guidance on consent](#) from November 2017, page 4.

It must be clearly transparent which companies the person will receive marketing from

The person giving the consent must be aware of which company/companies they are consenting to receive marketing from.

This means that the consent text must state which companies the consenting party may receive marketing from, unless clearly apparent from the context. If, for example, a company on its own website offers the opportunity to subscribe to “our newsletter”, it is clear from the context that it is the company behind the website from which subscribers will receive marketing.

Consent will not be adequately specific if it is only stated that the consent-giver will be contacted by “affiliates” or “other companies within the group” without naming such companies. Similarly, a list of companies must not be incomplete with wording such as “not limited to”, “not exhaustive” or the like.

A parent company and a subsidiary or affiliates are not allowed to use each other's consent databases without the data subject's consent to receive marketing from all of the named entities in the group.

If a legal entity has multiple brands, for example because that entity operates multiple stores, etc. with different names under the same entity, and the individual brands will be the sender of the communication, the consent must be obtained for each individual brand. This means that if, for example, a telecommunications company has a main brand that is identical to the company name and the telecommunications company also has several brands with separate names, consent must also be obtained to receive marketing from the individual brands if the individual brands intend to send communications.

If it is *clearly* stated that the person is consenting to receive marketing from multiple companies, specific identification of these may be achieved by means of a mouse-over function or a link to a site or a listing of names of the companies that the person consents to receive marketing from. The information in the link is allowed to be just a single click away. They must be immediately available when the link is clicked and the listing must be clearly laid out and comprehensive.

If consent is given to receive marketing from multiple companies, for example, “competition sponsors”, etc., and if the number is not naturally delimited in the form of the entities within a group, the number of entities must be presented together with the information that consent is being given. It is not sufficient for the number to appear in the mouse-over text or the wording in the link. For example, it will be sufficiently specific if the reader is informed that consent will be given to “the 15 sponsors of the competition” with a link stating who these companies are. It will also be sufficiently specific if the reader is informed that consent will be given to “the companies in the X group” with a link stating who these companies are.

If a person has consented to receive marketing from Company A, the marketing from Company A must not contain marketing from other companies. See, however, Section 7.6.

It must be made clear how the person will be contacted

It must be stated whether the company will send email, texts or other electronic mail. It must be stated in the consent text, i.e. it is not sufficient for it to be stated in a link, etc. The information that the company will “contact you by electronic mail” or “send marketing” will not be sufficiently precise.⁶³

It is also not sufficiently specific if the consent text states that the company will send marketing “via social media”. As a rule, it will also not be sufficiently specific if the consent text states only which of the social media the consenter will receive marketing in, without being specific about how the marketing will be received, e.g. by means of private messages or notifications.

If the company has stated that it will send marketing by email, text, etc., then the consent may only be used for sending marketing by email and text, meaning that the use of “etc.” is not allowable for extending the means of communication.

A consent to receive marketing by email may not be extended to SMS text marketing or other means of communication.

If someone has consented to receive electronic marketing to an email address they have provided or to receive text messages to a specific phone number, then *only* that email address or phone number may be used by the company for sending marketing. However, if the intended recipient has personally notified the company that they can now be contacted on a different phone number or at another email address, the company is then permitted to market itself using that new phone number or new email address.

It must be made clear which products or categories of products the company's marketing messages will concern

Companies may only send marketing messages within the product categories for which recipients have consented to receive marketing. If a company sends marketing communications concerning products for which the recipient has not given their specific consent, the communication will be unlawful.⁶⁴

However, product categories may be described relatively broadly. If it is generally known which product categories the company has in its range, the company need do no more than obtain marketing consent “within the company's product range”.

A supermarket chain or DIY store, for example, may obtain consent for marketing of their product range.⁶⁵ The same applies to a telecommunications business offering telephony, broadband and television, where the business can only obtain marketing consent within “our product range” if it is generally known that the business offers these product categories.

If, for instance, a supermarket chain under the same legal entity also has products that are not normally associated with a supermarket's product range, such as flights or banking products, it must be specified if the consent will also be used for sending marketing about these product categories. See also the foregoing on specific information about brands.

⁶³ See the Danish Consumer Ombudsman's Decision No. [15/06999](#)

⁶⁴ See FT 2003-04, Supplement A, sp. 7585 (Office of the Folketing Hansard).

⁶⁵ See the comments on Section 2, No. 14 of the Marketing Practices Act.

Transfer of consent

Any consent given to a specific, named trader is not transferable to another trader for marketing purposes unless that other trader has taken over the commercial activity in question and otherwise only engages in marketing within the limitations of the original consent. A trader may only acquire the rights of another trader's right to make use of a consent if the original trader's assets and liabilities are acquired. A trader is not permitted to make use of a marketing consent list acquired from a bankruptcy estate without the trader having otherwise taken over the commercial activity to which the marketing consent list is linked.⁶⁶

7.4 Updating of consent

If a company wants to update a consent to send marketing, for example by adding new means of communication or product categories to the consent, the company must, in principle, obtain a new consent from the recipient by lawful means.

If, however, a company has obtained consent to send marketing, for example by email, to a recipient, in the Danish Consumer Ombudsman's view, the company is allowed to email (but not text message, for example) the recipient and request them to update their consent via a link, including if updating that consent would thereby entail an extension of the originally given consent in relation to new means of communication or new product categories. The company is also allowed to send a text about the same if the company has obtained consent for marketing via text messaging.

In its consent request, the company might write: "You have signed up for email marketing of news and offers within our product range. If you also wish to receive marketing from us by text message, please update your consent by clicking here".

The option of lawfully updating a consent cannot be extended to the trader also being allowed to request the recipient to consent to receive marketing from other traders, such as group affiliates or business partners. However, the consent is allowed to be updated to add marketing from new brands within the same company.

The updated consent must naturally comply with the consent requirements, meaning that it must be freely given, specific and informed. This means that it is not permissible to state, for example: "We have updated your consent, if you do not respond, the new consent will apply", as the resulting default consent would not be an active indication of choice.

7.5 Deal sites and benefit programmes and the like.

Companies providing websites containing offers and discounts from different companies and which send the offers to recipients (so-called deal sites), cannot by their very nature obtain consent specific to all the companies someone might receive marketing about.

Where such specific consent is not possible to obtain, a deal site is allowed to send marketing on behalf of other companies if:

1. Freely-given, informed consent has been obtained from the intended recipient;
2. The marketing communications are sent solely by the company behind the deal site;

⁶⁶ See the comments on Section 2, No. 14 of the Marketing Practices Act and the Danish Consumer Ombudsman's Decision No. [18/12248](#)

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3. The marketing communications are solely sent by the means to which the intended recipient consented to receive marketing by, such as by email; and
 4. The communications only market products within the product categories about which the recipient has consented to receive marketing.

The same applies if someone signs up for a benefit programme or the like which gives members discounts from different partners. Here, the company behind the benefit programme only needs to obtain consent to the member's receipt of marketing from the benefit programme with information on the partners' discounts, without having to state in the consent text who the partners are. The consent cannot be extended to allow the affiliates to send marketing to the member.

7.6 Advertising in electronic member magazines and newspapers

Membership magazines from associations are not normally subject to the PUC. The member magazine can legally contain advertisements without thereby being subject to the PUC.⁶⁷ However, the main content of the member magazine must be editorial.⁶⁸

The same applies in principle to electronic newspapers if the recipient subscribes to the electronic newspaper, i.e. has requested receipt of the electronic newspaper.

7.7 Children and teenagers

Children under the age of 13 cannot consent to receive electronic marketing. If a child is under 13, the consent must be given or approved by the child's parents.⁶⁹

For more information on marketing to children and adolescents, see [the Danish Consumer Ombudsman's guidance on children, adolescents and marketing](#).

⁶⁷ The Minister for Justice's reply to the Parliamentary Judicial Committee's Questions 2 and 14 (Office of the Folketing Hansard 1999-2000, Bill L213)

⁶⁸ See the Danish Consumer Ombudsman's Decision [17/01269](#)

⁶⁹ See the principle in Section 6(3) of the [Danish Data protection Act](#).

Chapter 8

Termination of consent

8.1 How may consent be revoked?

It must always be possible to withdraw consent. It follows that an agreement that consent cannot be revoked has no validity.

If a company is notified that someone wishes to revoke their consent, the consent is revoked from the time at which the company receives the notice. If longer processing time is required due to reasonable and duly justified procedures or technical arrangements, this is acceptable. For example, extended processing time will be justified if consent withdrawal is submitted by email on a Friday evening, and the company first sees the email on Monday morning, when the company's staff start work, whereupon the withdrawal is implemented.

When the withdrawal is implemented, the company should send a confirmation that the withdrawal has been recorded.⁷⁰

Withdrawal of consent must be easy and free of charge.

Easy

There must as a minimum be an option to withdraw consent on the same media from which the marketing is sent. If a company sends SMS text marketing, the recipient must be able to withdraw their consent by text message.⁷¹

However, the company is allowed to offer additional marketing opt-outs if this is easier, for example by means of an unsubscribe link.⁷²

The company is responsible for ensuring that the unsubscribe link works.⁷³

If someone revokes their consent by emailing the company, the company must not decline to accept the revocation, even if the company prefers for consent to be revoked by means of an unsubscribe link.

If someone has consented to receive marketing by email and text messages and they opt out of marketing by clicking on an unsubscribe link in an email, the unsubscribe will apply only to marketing by email unless otherwise stated. In other words, in that case, the company will continue to be able to use the consent to send marketing by text message.

If, however, a user states that they “no longer wish to receive further marketing from the company”, the company must consider it a revocation of all consent to receive marketing from the company, i.e. by email, text message, phone, etc. The user's marketing opt-out will also include

⁷⁰ [The Joint Position of the Nordic Consumer Ombudsmen on Marketing in Social Media of 3 May 2012.](#)

⁷¹ See the comments on Section 10(1) of the Marketing Practices Act.

⁷² See Section 10(3), No. 5 of the Marketing Practices Act.

⁷³ See the Danish Consumer Ombudsman's Decisions [08/04742](#) and [14/03578](#)

marketing in a personally-addressed letter which is compliant unless the recipient has opted out of such communications. For any other wording, the effect of the user's opt-out must be assessed on a case-by-case basis.

Free of charge

Companies are not permitted to demand payment for receiving, processing, recording or respecting any consent revocation communication.

This means that a company is not permitted to charge any amount for unsubscribing to SMS text marketing. However, it is lawful for the phone company to charge the standard text-message rate for transmission of an unsubscribe message.⁷⁴

If the user has gained a benefit, this cannot be forfeited. This means that if a user has gained a benefit from giving their consent, the company cannot withdraw that benefit if the user revokes their consent. If the company were to withdraw that benefit, it would then not be free of charge to revoke consent.⁷⁵

Example:

- ÷ If a company has rewarded someone with a prize draw ticket or their consent to receive marketing, the company may not cancel the prize draw ticket if the person withdraws their consent.
- ÷ If a company has provided a guarantee in return for consent to receive marketing, the company cannot withdraw the guarantee simply because the consent has been revoked.⁷⁶

However, a company is allowed to make a prize-draw ticket conditional on non-revocation of consent given in connection with entering the prize draw before the user receives any marketing. Such a condition must be clearly stated; it is not enough for it to be stated in a link. The amount of marketing the user will receive must also be clearly indicated.⁷⁷ It would be considered an unreasonable condition if the user is to receive more marketing than the prize draw ticket is worth. Naturally, the user may withdraw their consent at any time, but would then forfeit their prize-draw ticket if they have not yet received the contingent volume of marketing.

8.2 Who should be contacted for revocation of consent?

A person's consent may be revoked by contacting the company which, on the basis of the consent, sends marketing, or the company which obtained the consent.

If Company A obtained the consent on behalf of Company B, for example as part of a competition hosted by Company A, then the consent can be revoked by contacting either Company A or Company B.

If the consent has been transferred to a third party who approaches users on behalf of the two companies, e.g a call centre, the consent can also be revoked vis-à-vis that third party.

⁷⁴ See the Danish Consumer Ombudsman's Decision No. [15/04173](#)

⁷⁵ See the Danish Consumer Ombudsman's Decision No. [14/03912](#)

⁷⁶ See the Danish Consumer Ombudsman's Decision No. [08/05752](#)

⁷⁷ See [the Danish Consumer Ombudsman's guidance on obtaining consent in competitions, etc.](#)

8.3 What happens to a consent that is not used?

Consent is not indefinite; it expires as a result of inaction.

If a long time elapses from when a person gave their consent until the company makes use of that consent, the person will have an expectation that the company is not going to contact them after all.

If consent is obtained under the terms of a competition where the person consents to receive marketing from many companies, it is the Danish Consumer Ombudsman's opinion that the person would have such an expectation if the company has not used the consent for twelve months after the consent was obtained.

In other instances, a case-by-case assessment will determine whether or not consent has expired due to inaction.

Chapter 9

Marketing to a former customer

If, in connection with a purchase, a customer has provided an electronic address, the seller is permitted to market his own similar products using the electronic address without prior consent. However, the customer must have an opt-out from such communications, both at the time of providing their address and in future communications. This ensues from Section 10(2) of the Marketing Practices Act.

Section 10(2) of the Marketing Practices Act is an exception to the general rule that companies are only permitted to send marketing to recipients who have consented to it.

9.1 Conditions

The following conditions must be met before a company is permitted to send marketing by electronic mail without prior consent:

1. The recipient must have purchased a product from the company.

Comments: If the electronic address is provided by the customer in connection with receipt of a gift, free advice, an offer, the download of a sales quotation or an app, participation in competitions or the like, this does not constitute a purchase, and the company requires the consent of the customer before the company is permitted to send marketing.

2. The customer must personally have provided their electronic address in connection with the sale, e.g. an email address.

Comments: Even if the other conditions are met, the company is still not permitted to contact the customer using an address provided by a third party.⁷⁸ If an electronic address is pre-completed (filled in automatically), for example because the customer has created a user profile with the company, that electronic address will also be regarded as having been provided personally by the customer. However, the use of pre-completed electronic addresses may entail stricter information requirements; see immediately below.

3. The customer must be clearly and unambiguously informed that they will receive marketing from the company to the customer's stated electronic address.

Comments: If an electronic address is pre-completed (filled in automatically), for example, because the customer has created a user profile with the company, the details must be provided at the time of the purchase, when the electronic address is pre-completed.

⁷⁸ See Court of Frederiksberg judgment of 30 November, 2016, Judgment No. 6312/2016

4. When providing the electronic address, the customer must be clearly and unambiguously informed of the easy and free of charge opt-out from marketing.

Comments: A pre-ticked box where the customer can remove the pre-selection if the customer does not wish to receive marketing at the electronic address provided will suffice.

5. In every subsequent communication from the company, the customer must be informed of the option of opting out of future marketing.
6. Such communications may only contain marketing for the company's *own* similar products.

Comments: This means that the company may not send marketing from business partners. The communication must come from the same legal person with whom the customer has entered into the agreement. The company may therefore also not send marketing for a subsidiary's products.

7. The products that are marketed must be *similar* to those that the customer has purchased. See Section 9.2.

Since Section 10(2) is an exception to the general rule in Section 10(1), it must be interpreted strictly.

9.2 Similar products

"Similar products" is understood to mean products within the same product category as those purchased by the customer.

Accessories and relevant equipment for the purchased product will, as a rule, be within the same product category. See the examples below.

The product purchased by the customer is the basis for determining what constitutes similar products. If, for example, the customer has purchased a sofa, care products for the sofa upholstery would be similar products. If, on the other hand, the customer has purchased care products that can be used for a sofa, sofas will not be similar products.

The company must, no later than at the time the electronic address is provided, specify for the customer what is understood by its own similar products. If this is not specified, the term must be interpreted restrictively. Although the company specifies what is meant by its own similar products, this cannot be extended to other product categories.

The necessity of specifying what is meant by "similar products" will be subject to case-by-case assessment, since it will also depend on the customer's expectations. For example, if a company promotes itself as selling weekend trips to European cities, the recipient would not expect a weekend trip to New York to count as "similar products", meaning that it will be necessary to specify this to the customer if the company intends to send marketing communications about weekend trips to New York. The opposite will be the case if the company promotes itself as selling "weekend trips".

Below are examples of what, in the Danish Consumer Ombudsman's opinion, do and do not constitute "similar products" (provided that these are also the company's *own* products).

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- ✓ If a company has sold yarn to a customer, then knitting needles, crochet hooks, yarn bags, knitting patterns and other knitting yarn accessories that the company itself sells will be “similar products”⁷⁹.
 - ✓ If a car dealer has sold a car to a customer, then marketing of servicing, repairs and winter tires for the car will be comprised by the car dealer's “similar products”⁸⁰.
 - ✓ If a customer has purchased an airline ticket to Rome, then an airline ticket to London or New York would be “similar products”.
 - ✓ If a customer has purchased an airline ticket, then add-on purchase of luggage space, inflight meals and ticket upgrades would be “similar products”.
 - ✓ If a customer has purchased a bicycle, then a bell, bicycle helmet, bicycle trailer or servicing of the bicycle would be “similar products”.
 - ✓ If a customer has purchased a mobile phone from a telecommunications company, then a mobile subscription would be “similar products”.
 - ÷ If a customer has purchased an airline ticket to Rome, then a cruise to the Caribbean will not be “similar products”.
 - ÷ If a customer has purchased a piece of furniture in a department store, then saucepans would not be “similar products”.
 - ÷ If a customer has purchased a bicycle, a moped would not be “similar products”.
 - ÷ If a customer has purchased a phone, then a television would not be “similar products”.
 - ÷ If a customer has purchased a mobile phone from a telecommunications company, then a broadband subscription would not be “similar products”.

⁷⁹ See [report on the proposed marketing practices bill of 30 March 2017](#).

⁸⁰ See the Danish Consumer Ombudsman's Decision [16/06617](#) and [report on the proposed marketing practices bill of 30 March 2017](#)

Chapter 10

Requirements for the content of unsolicited communications

Nos 1-5, Section 10(3) of the Marketing Practices Act stipulate a number of conditions regarding the content of unsolicited communications that must be met where an undertaking approaches anyone by electronic mail for the purposes of direct marketing.

- 1) the trader must make the marketing communications clearly identifiable as such to the recipient;
- 2) the conditions for sales promotions – e.g. discounts, gifts, competitions, games – must be easily accessible and be presented clearly and unambiguously;
- 3) the identity of the sender on whose behalf the marketing is communicated must be clear and unambiguous;
- 4) the recipient must not be encouraged to visit websites that do not meet the conditions of (3), Nos 1-3; and
- 5) the trader must provide an address to which the recipient may send a request that communications cease. A link which the recipient can use for opting out of such communications would also meet the requirement for an address.⁸¹

⁸¹ See the comments on Section 10(3) of the Marketing Practices Act.

Chapter 11

Documentation of the consent

11.1 What records should the trader retain in order to document consent?

A trader must be able to document that it has obtained valid consent.

In principle, consent does not need to be given in writing. There are no requirements regarding the format of consent. A person can therefore give his or her consent in writing or orally and also digitally. However, since oral consent is difficult to document, the Danish Consumer Ombudsman recommends that traders rely on written or digital consent.

If a person believes that they have not given consent for a company to contact them, it is the company that must be able to prove that the person has given their consent and that the consent is legally compliant.⁸²

- ✓ To prevent fake subscriptions, identity theft and other misunderstandings and as evidence that the recipient has consented to be contacted, the Danish Consumer Ombudsman recommends a double opt-in process. This means that the person gives their consent twice before the consent can be used. For example, after giving consent, the person may receive an email from the trader, in which he/she must reaffirm their consent by clicking on a link. Only once the person has clicked on the link in the email is consent regarded as given.

Alternatively, the trader may send a confirmation that it has received consent, for example by email, to which the recipient can respond if he/she wishes to revoke the consent or if this is a case of a fake subscription made in the recipient's name. However, a confirmation email is unlikely to have the same evidentiary weight as the double opt-in process, as it does not require affirmative action on the part of the recipient.

Neither the double opt-in process nor a confirmation email can be used to “rectify” consent that is non-compliant, for example because it was not sufficiently informed.

A trader must be able to document the circumstances under which a person consented to receive marketing. It is not sufficient to record the person's data (name, address and telephone number) and the time at which the person's consent was given. The trader must also be able to document the circumstances under which the person gave their consent and what information the person received when the person gave the consent. If the person who gave the consent wishes to be informed of when and how he/she has given the consent, the trader must be able to provide that information.

⁸² See the comments on Section 2, No. 14 of the Marketing Practices Act and the Danish Consumer Ombudsman's Decision No. [12/00588](#).

In the Danish Consumer Ombudsman's opinion, recording an IP address will not be sufficient evidence that a particular person has consented.⁸³

The trader must document that the consent meets the requirements of the Marketing Practices Act for freely given, specific and informed consent. The documentation should therefore also include a printout, video or image series of the place where the consent was given.

It is up to the courts to determine whether sufficient evidence exists to demonstrate that any consent is compliant.

11.2 Marketing communications to a previous customer

If a trader sends marketing concerning similar products to a customer in accordance with the exception set out in Section 10(2) of the Marketing Practices Act, the trader must be able to document that the conditions for the exception were met. This implies, for example, that the trader must be able to document the nature of the purchase flow at the time when the customer provided their electronic address.

11.3 Documentation retention period

A trader should retain documentation of a consent for as long as the trader uses the consent and for up to two years after it was last used. This is because criminal liability is subject to a two-year statute of limitations.

The same applies to documentation that the conditions for sending marketing to a previous customer have been met.

The Danish Consumer Ombudsman is of the opinion that a natural person does not have the right to demand erasure of the personal data pertaining to his/her consent that are necessary in order for an undertaking to prove that it has held compliant consent before any criminal liability lapses under a statute of limitations.⁸⁴

⁸³ See the judgment of Copenhagen City Court of 12 January 2017 and the Danish Consumer Ombudsman's Decision [13/04364](#).

⁸⁴ See Article 17(3), letter (e) of the [General Data Protection Regulation](#).

Chapter 12

Criminal liability and accomplice liability

If an undertaking sends marketing by electronic mail without the recipient having given their valid consent to be contacted, the trader is liable for a fine if the trader has acted negligently. This is stated in Section 37(3) of the Marketing Practices Act.

It is the trader that makes the approach (or upon whose behalf an approach is made) that is liable for ensuring that consent was lawfully obtained and that the approach is correctly undertaken.

The trader must therefore secure documentation that the recipient contacted by the trader has given their valid consent to the trader contacting them for purposes of marketing.⁸⁵

If a company does not itself obtain the consent of an intended recipient to be contacted by the company, but purchases it from a sub-supplier, such as a leads generation company, the trader is still liable for the consent being legally obtained. This means that traders cannot evade criminal liability by having a sub-supplier obtain consent.⁸⁶

If a trader that purchases consents from a sub-supplier wants to avoid criminal liability, the undertaking must have attempted to verify that the purchased consents were lawfully obtained, for example by:

- Giving the sub-supplier clear and unambiguous instructions on how the consent must be obtained for it to be lawful.
- Procuring and retaining documentation that purchased consents are valid.
- Reacting if the trader becomes aware that there are problems with the purchased consents, e.g. because the company receives complaints.

It will be up to the courts to decide whether the trader is liable if it turns out that a consent is not valid. The decisive factor is whether the trader can be said to have acted negligently – i.e. whether the company could and should have refrained from contacting recipients who have not given valid consent.

Traders other than the trader that sends the communication may also be liable for infringement of the PUC. Traders become liable under the rules on accomplice liability. For example, a leads generation company could be jointly liable if it has mounted a competition and obtained

⁸⁵ In the Danish Consumer Ombudsman's Decision No. [12/00588](#) the trader had purchased a number of consumers' consents to receive advertising by email from a Swedish trader. However, in connection with the acquisition, the company had only received an oral affirmation from the Swedish company that the email addresses had been obtained legitimately and had been approved for mailing advertising material. The company had not performed any detailed checks of the purchased consents before mailing newsletters. Thus, since the trader was unable to prove that valid consent had been given, it was in violation of Section 10 (at the time Section 6) of the Marketing Practices Act.

⁸⁶ See the judgment of Copenhagen City Court of 12 January 2017 and the Danish Consumer Ombudsman's Decision [13/04364](#).

consent from entrants to receive marketing in a manner that does not meet the conditions of the Marketing Practices Act. The decisive factor is whether the company has acted negligently.

If an undertaking becomes aware that a person's details have been used for fake subscriptions, identity theft or similar and that a consent that the company has already resold to another company is not valid, the company must notify that other company that the consent is not valid.

Annex 1

Social media

Corporate communications by means of social media may be subject to the PUC.

Many different means of communication exist on social media. Not all means of communication come under the definition of electronic mail. Also, not all communications relate to a commercial activity and include marketing.

The Danish Consumer Ombudsman's opinion as to whether communications by different means of communication on social media are subject to the PUC is set out below.

If a communication by means of social media is subject to the PUC, an undertaking may only contact a recipient if they have consented to such contact.

Private messages

Private messages are direct messages sent to users' inboxes. Such messages will generally be stored both in the user's terminal equipment and on the social media's server.

Private messages are electronic mail. If a company communicates directly with a user by means of private messaging and the communication relates to a commercial activity and contains marketing, then that communication will be subject to the PUC.

If a user has sent a message to the company, the company is permitted to reply. However, the reply must not contain marketing beyond what suffices for a reply. If, for example, the user has inquired: "Do you have size 11 in stock?", then the company is allowed to answer the question, but not to reply "No, but we have a jacket that goes nicely with those in our online store". If the user asked "Can you recommend a good sound system?", the company is allowed to offer recommendations for sound systems and also insert a link to sound systems on the company's website, but the company is not permitted to round off by writing "we also some great mobile phone deals right now".

Notifications

The majority of social media have a means of alerting users to posts or events tailored to the user. This is typically done by means of notifications. When a user receives new notifications, the notifications are typically highlighted, similar to a message in the user's inbox. The majority of social media feature a separate inbox for notifications.

On some social media there is an option to send specific notifications to users. This might, for example, be an invitation to like a site, which is sent to all the users who liked a post on that site.

Communications displayed like a notification are electronic mail. This means that notifications will be subject to the PUC if the communication relates to a commercial activity and contains marketing.

If a company sends a request to a user to like a company site, this will be subject to the PUC.⁸⁷

It is doubtful whether automatically-generated notifications, i.e. notifications generated when a company creates an event or a live video, for example, are subject to the PUC. The Danish Consumer Ombudsman tends to the view that an automatically generated notification is not subject to the PUC.

Posts

A focal element of social media is the opportunity to make posts. A post might be a picture, text or video. A post is posted on the personal page of the poster and under other users' news feed.

Posts that can be viewed on the users' news feed are not electronic mail.⁸⁸

Posts that can be viewed in the users' news feed are therefore not subject to the PUC. Posts will, however, be subject to Section 10(4) of the Marketing Practices Act. This means that a person must have the option of declining that type of communication from a company.

If a post is published on another user's wall, this will be electronic mail to the profile holder. If the post contains marketing it will then be subject to prior consent.

Comments

Comments on social media are public messages associated with a specific post by another user or business.

As a rule, a comment will be directed to a specific person, even if the message is publicly available. The person typically receives a notification that a comment has been posted.

A comment directed at a particular person is subject to the PUC if the comment concerns a commercial activity and is for direct marketing purposes.

If a user has written a comment to the company, the company is permitted to reply. However, the reply must not contain marketing beyond what suffices for a reply. If, for example, the user has inquired: "Do you have size 11 in stock?", then the company is allowed to answer the question, but not to reply "No, but we have a jacket that goes nicely with those in our online store". If the user has asked "Can you recommend a good sound system?", the company is allowed to offer recommendations for sound systems and also insert a link to sound systems on the company's website, but for example, the company is not permitted to round off by writing "we also have some great mobile phone deals right now".

Tags

A tag is a link between a user profile and the post on which the tag is done. When a user is tagged, the user typically receives a notification directing the user to the specific post. A tag is similar to sending a link to a user.

If, for example, a company tags a user in a post that is a commercial activity and contains marketing, the tag will be subject to the PUC.

⁸⁷ See the Danish Consumer Ombudsman's Decision [18/05333](#)

⁸⁸ See the comments on Section 2, No. 15 of the Marketing Practices Act.

If a company holds a competition in which the user must “tag” another user as a condition for competition entry, this will be subject to the PUC. See Section 4.3 on “tell-a-friend”.

Likes

A like is an indication from users that they like a site or a post. Site and posts with many likes have greater visibility in users' news feeds.

Since messages in users news feeds are not subject to the PUC, companies' requests for likes will also not be subject to the PUC.

However, if the company asks the user for a like by sending a notification to the user, the request will be electronic mail subject to the PUC; see above.