

The Consumer Ombudsman's guidelines on price information in marketing

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The Danish Consumer Ombudsman

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[[Guidelines/Memorandum/Guidance](#)] prepared by the Danish Consumer Ombudsman

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Background

On the basis of negotiations with the Danish Consumer Council, the Danish Chamber of Commerce, the Danish Brewers Association, The Danish Automobile Dealers Association, the Association of Danish Travel Agents and Tour Operators, Danish Sports Traders, the Association of Danish Law Firms, the Danish Driving Instructor Association, the Danish Grocers Association, the Danish E-commerce Association (FDIH), the Association of Manufacturers and Importers of Domestic Electrical Appliances, the Association of the Hotel, Restaurant and Tourism Industry, the Danish Federation of Small and Medium-Sized Enterprises, Creativity and Communication, Telecommunication Industries and Coop Danmark, and after having consulted the authorities concerned, the Consumer Ombudsman (DCO) has issued the following guidelines, cf. section 24(1) of the Danish Marketing Practices Act.ⁱ

In 1997 the DCO issued a guidance paper for marketing and price information for the first time. This guidance paper was revised in 2002. Since 2002 there has been a technical, societal as well as judicial development including the adoption and implementation of the European Union's Unfair Commercial Practices Directiveⁱⁱ. Furthermore, it has been necessary to specify several concepts and messages, which are frequently used in connection with marketing and price information. Therefore, the Consumer Ombudsman decided to reconsider the existing guidance paper. The negotiating parties agreed on the content. Based on the established consensus between the DCO and the negotiating parties, the DCO issued guidelines within the area concerned.

Pursuant to the evaluation clause of the guidelines, they were revised at 1 July 2013 based on experience with the guidelines in practice and with due consideration to new legal developments in the area.

The object of these guidelines is partly to protect consumers against misleading advertising, and partly to ensure a fairer and more loyal competition in business and trade through clear and uniform rules. Consumers are entitled to truthful, clear and unambiguous information on prices and other real facts and must be able to rely on statements indicating that savings and very favourable offers presented by traders are in fact true, fair and real. It is important for one to keep in mind that marketing and price information is assessed on basis of the over-all impression it immediately conveys to consumers including wording, layout, interplay between different means of marketing etc.

With the guidelines it is the DCO's wish to help business and trade clarify to what extent they are allowed to market themselves on the basis of comparisons in terms of prices and other promotional expressions related to the price of the product or service without violating the Danish Marketing Practices Act. This will create due process within the area of marketing and price information. More precise rules within the area will be beneficial for business and trade as well as consumers.

Price comparisons can provide excellent and important information to consumers prior to a purchase of a product or service. However, it is a presumption that the comparison referred to is correct, relevant and capable of being substantiated by documentation and that the saving deriving from the comparison is real. In case of the contrary, the comparison may be misleading and disloyal to competitors. Therefore, requirements are made for the basis of the comparison whether this concerns the trader's own or the competitors' prices and price level.

It is noted that a trader's marketing and price information always should be subjected to a case-by-case assessment in order to establish whether a violation of fair trading practices or misleading advertising exists, cf. section 1 and section 3 of the Danish Marketing Practices Act. This is in consequence of the above-mentioned Unfair Commercial Practices Directive according to which the misleading character of a matter - except from a number of actual factors, which in all circumstances are considered as a violation of the Directive, cf. below, - should be subjected to a case-by-case assessment. As the Directive is a total harmonisation directive the Danish Marketing Practices Act should be interpreted in conformity with it.

Section 1 and section 3 of the Danish Marketing Practices Act do not apply to businesses subject to the Financial Business Act to the extent that the Minister for Economic and Business Affairs has issued regulations in the areas concerned, cf. section 2(2) of the Danish Marketing Practices Act. Therefore, the guidelines do not apply to financial businesses which are covered by this exemption.

Legislative framework

The basis of all commercial activity is section 1 of the Danish Marketing Practices Act: Section 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.

In connection with marketing and price information section 3(1) of the Danish Marketing Practices Act is of particular relevance:

Traders may not use misleading or undue indications or omit material information if this is designed to significantly distort consumers' or other traders' economic behaviour on the market.

Note further the documentation requirement in section 3(3) of the Danish Marketing Practices Act:

Where factual statements are made, these must be capable of being substantiated by documentation.

On special offers, the provision in section 9(2) of the Danish Marketing Practices Act is applied:

If a trader offers products or services at a particular price and has reasonable grounds for supposing that he will not be in a position to satisfy demand in a quantity that is reasonable in relation to the offer and the scope of its marketing, the trader shall include a clear proviso to this effect in such marketing.

The European Union's Unfair Commercial Practices Directive is implemented in the Danish Marketing Practices Act by Act No 1547 of 20 December 2006 to amend the Danish Marketing Practices Act and by Executive Order No 1084 of 14 September 2007 concerning unfair business- to-consumer commercial practices, both of which became effective as of 1 December 2007. Section 2 of the Executive Order provides that all commercial practices on the Black List to the Executive Order are, *in all circumstances*, considered as unfair business-to-consumer commercial practices.

Thus, the practices on the Black List are prohibited and further assessment is not necessary, including assessment of for example whether any misleading of consumers in specific cases has taken place. In these guidelines the Black List to the Executive Order is enclosed as [Annex 1](#).

Examples of uncommercial practices in No 5, 7, 15 and 20 on the Black List are of particular relevance:

(v) Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising).

(vii) Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed decision.

(xv) Claiming that the trader is about to cease trading or move premises when he is not.

(xx) Describing a product as "gratis", "free", "without charge" or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.

The guidelines consist of the following main sections

The Consumer Ombudsman's guidelines on price information in marketing

I Price Comparisons

I.I Chapter 1. Comparisons that indicate general low price policy 7

- Normal price-sale price, was-now, reduction etc.
- Special offers

I.II Chapter 2. Other promotional expressions etc..... 12

- Gratis
- “Only”, “unbelievable price”, “on offer” etc.
- Discount vouchers
- Clearance sale
- Factory sale, wholesale prices etc.
- Second-hand, exhibits, seconds

Chapter 3. Comparisons with price levels and prices charged by competitors..... 14

- Comparisons with the price charged by competitors
- General expressions about inexpensiveness
- Price guarantees

Chapter 4 . Comparisons with market prices 16

- Comparisons with the market price and the recommended retail price

II. Other Marketing requirements..... 17

- Layout, text and graphics
- Clubs, bonus schemes etc., loyalty programmes and the like

III. Responsibility and documentation 18

- Third-party liability
- Documentation requirement

IV. Other Provisions..... 19

- Commencement
- Evaluation clause

I Price Comparisons

Chapter 1.

Comparisons that indicate general low price policy

Comparisons with the trader's own price levels

1. Chapter 1 contains expressions where the trader directly or indirectly states his own previous price (normal price) for example "normal price/sale price", "was-now", "save xx percent", "save DKK xx" etc.

2. If nothing else is stated, the price comparison will be considered as a comparison with the trader's own normal price.

Duration of a normal price

3. Comparison between a normal price and a reduced price may not be misleading.

3.2. A price comparison is not considered misleading provided that

- (i) the normal price used as a basis for the comparison has been in force for a longer period of time immediately prior to the time of the advertisement, however, cf. point 10, and
- (ii) the requirements regarding the duration of the offer period have been met cf. point 4

3.3. A longer period of time is defined as a period of at least 6 connected weeks, however, cf. point 14.1 on basic household commodities and seasonal products.

3.4. In case the price has varied in the preceding longer period of time, only comparison with the lowest price in the period of time concerned is allowed.

3.5. The trader may launch marketing campaigns of shorter duration, that is of up to 3 days, which inform about a saving on the entire product range, parts of the product range or a specific product line, even though the normal price for a few products has not been effective for a longer period of time. A campaign of this nature will not result in cancellation or suspension of the longer period of time.

Duration of an offer period

4. A price may only be marketed as a reduced price for a short period of time; however, cf. points 4.3 and 4.6.

4.2. A short period of time is defined as a period of up to 2 weeks, however, cf. point 14.2 on basic household commodities and seasonal products.

4.3. A price may be marketed as a reduced price after the expiration of the short period of time provided that the trader both in the beginning of the offer period and

in connection with repeated advertising informs of the duration of the offer period. Information must appear clearly and be in immediate relation to the offer.

4.4. In all circumstances, marketing of a price as a reduced price may at the most not exceed half of the period in which the normal price has been effective.

4.5. In case of non-compliance with points 4.1- 4.4, the reduced price will be considered as a new normal price.

4.6. As regards products still outstanding and surplus stocks, i.e. products which are to be deleted from the trader's product range, the price may be marketed as a reduced price until the products have been sold or the stock has been cleared. No new products may be included in that connection. The second sentence also applies for sale. As regards "clearance sale" reference is made to point 19.

Documentation

5. The trader must be able to substantiate by documentation that the product has been sold or offered on sale at the stated normal price for a longer period of time, cf. point 3.

5.2. 5.2 Offered on sale implies that the product has been accessible for the consumer in such a way that the consumer has been able to make a purchase and familiarise himself with the price.

Comparison with a recommended retail price

6. The trader may only use a recommended retail price (RRP) as a basis for a comparison provided that the product has been sold or offered on sale from the trader at this price for a longer period of time immediately prior to the time of the advertisement, cf. point 3.

6.2. In case the comparison with a recommended retail price is used when comparing with the price level of other traders or with a market price, the matter is to be governed by point 24.4 and point 29.2, respectively.

Product requirements

7. When a reduced price is compared with a normal price, the comparison must relate to an identical product.

"Package offers" and "combination offers"

8. As regards "package offers" and "combination offers", meaning two or more individual products that are sold collectively, and where a total price has been stated, this total price may only be compared with the sum total of the prices for the individual products if these have been sold or offered on sale for a longer period of time, cf. point 3, at the stated prices immediately prior to the time of the advertisement.

8.2. A “package offer” or a “combination offer” will not result in cancellation of the longer period of time, cf. point 3.

Quantity discount

9. In connection with advertisement of a quantity discount, i.e. in cases where a statement indicating savings refers to the normal unit price, this normal price must correspond to the price at which the product concerned has been sold or offered on sale for a longer period of time, cf. point 3 immediately prior to the time of the advertisement.

9.2. A quantity discount will not result in cancellation of a longer period of time, cf. point 3.

9.3. Quantity discount implies that consumers receive a discount when purchasing multiple items of the same product.

Introduction discount

10. Traders are allowed to conduct price comparisons even though the product has not been sold or offered on sale for a longer period of time, cf. point 3, immediately prior to the time of the advertisement, provided that the advertisement clearly states that it is an opening sale or an introduction discount, and

- (i) the product immediately after the expiration of the introduction discount is sold or offered on sale for a longer period of time at the stated normal price from the trader concerned, or
- (ii) it is substantiated that the product immediately prior to the time of the advertisement has been sold or offered on sale for a longer period of time at the stated normal price in other stores belonging to the same retail chain.

Marketing of future prices

10a. If the trader markets a product with information that the price will rise in the foreseeable future, the marketing could be misleading if the future price is not the price indicated unless this is due to external circumstances which the trader at the time of marketing could not have reasonably foreseen.

“Price guarantees”

11. In case a normal price, which is stated in an advertisement, has not been effective for a longer period of time, cf. point 3, immediately prior to the time of the advertisement in consequence of a price reduction whose implementation was necessitated due to a price guarantee, cf. point 28, in the period of time between ordering the advertisement and the date when the advertisement is made, the statement in advertisements concerning savings is not considered misleading provided that the trader

- (i) in immediate connection to the advertisement has taken clear and unambiguous reservations about the possibility that the stated normal price has

-
- not been effective for a longer period of time prior to the advertising due to the price guarantee, and
- (ii) can substantiate by documentation that the price guarantee alone is the reason why the normal price has not been effective for a longer period of time.

"Price wars"

12. In case the normal price stated in the advertisement has not been effective for a longer period of time, cf. excess point 3, immediately prior to the time of the advertisement as a consequence of the trader's necessity to reduce his price in the period between ordering the advertisement and the date when the advertisement is made due to a price war, the announcement of the statement indicating a saving is not considered misleading provided that the trader can substantiate by documentation that solely a price war is the reason why the normal price has not been effective for a longer period of time.

12.2. "Price war" implies that one or more of the trader's competitors extraordinarily reduce their prices, and subsequently, that the trader for competitive reasons has to reduce his prices.

12.3. It is for the trader to prove that a price war exists.

Statements indicating savings in chain stores

13. Voluntary chains, combined capital and voluntary chains and capital chains where there is occurrence of significant price variations in the chain's individual stores are allowed to use a true and fair savings statement including a "savings margin" (e.g. Save DKK 70-100), a "save up to"- message or a "save at least" -message when comparing a normal price with a reduced price.

13.2. The normal price used as a basis for a comparison must have been effective in a representative number of the chain's members in the country in order for the savings statement to be based on a relevant, true, fair and loyal representation of the chain's price conditions.

13.3. In case the chain uses a "save up to"-message, consumers must be able to obtain a saving which does not differ significantly from the stated maximal saving in the vast majority of a representative number of the chain's stores.

13.4. If the chain draws comparison to a recommended retail price, the recommended retail price must be the recommended price at which a representative number of the chain's stores has sold products or offered products for sale.

13.5. Clause Point 13.1. applies for the general advertising of the offer e.g. in catalogues, on TV and on bill boards (large posters hanged or placed outside the store) made by the chain. As regards the actual product in the individual store, it must appear clearly how much the consumer saves in connection with the purchase.

Basic household commodities and seasonal products

14. As regards basic household commodities and seasonal products a period of at least 4 connected weeks is considered a longer period of time, cf. point 3.

14.2. The price may only be advertised as a reduced price for a shorter period of time, cf. point 4. For basic household commodities and seasonal products a short period of time is a period of up to 1 week.

14.3. Otherwise, the rules in this chapter apply to basic household commodities and seasonal products.

14.4. The expression basic household commodities must be interpreted in accordance with section 9(2)(i) of the Danish Act on Certain Consumer Contracts as food and other products for the households' current consumption.

14.5. A seasonal product implies that the product is sold only for a very limited period of time in the course of a year, and this is due to the character and practical application of the product.

Exemption from the guideline's rules on comparison between a normal price and a reduced price

15. The rules on comparison between a normal price and a reduced price do not apply to real property, fuel, accommodation in hotels and the like as well as package travels.

Special offers

16. If the trader has probable cause to believe that he will not be able to meet the demand in a quantity which is in reasonable relation to the offer and the extent of its advertising the trader must make clear reservations about this in the advertising, cf. section 9(2) of the Danish Marketing Practices Act. A reservation cannot exempt the trader from responsibility if he has already sold the product prior to the beginning of the offer period or if the trader is not in possession of the product in consequence of a non-existing relevant delivery agreement before the advertising of the offer.

16.2. In his assessment of whether or not he should make a reservation in the advertising, the trader must attach importance to the nature, quality and price of the product together with the scope of the advertising, which has been launched to promote the offer, cf. the legislative material for section 9(2) of the Danish Marketing Practices Act. The trader must also attach importance to whether the trader previously has experienced failure in connection with delivery from the same supplier, whether an identical product has been sold out in a very short period of time and whether the product is a typical seasonal product.

16.3. The reservation must be in immediate connection to the offer, cf. the legislative material for section 9(2) of the Danish Marketing Practices Act, and it must appear clearly and conspicuously.

16.4. The reservation can be made by stating e.g. “until stocks are exhausted” or “limited quantity”, cf. the legislative material for section 9(2) of the Danish Marketing Practices Act.

16.5. If the quantity is very limited, it must be stated in the advertisement how many items of the product are on offer for sale (usually, a requirement if the number is below ten) or simply be stated that there are very few items available in the individual stores.

Chapter 2

Other promotional expressions etc.

Gratis

17. The expressions “gratis”, “free”, “without charge” or the like may only be used if the trader does not demand that the consumer pays anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the product, cf. section 2 of Executive Order No 1084 of 14 September 2007 concerning unfair business-to-consumer commercial practices, cf. No 20 in the annex to the Executive Order.

Only, unbelievable price, bargain, campaign price etc.

18. Promotional expressions such as “only”, “unbelievable price”, “bargain price”, “campaign price” etc. may only be used if they have real substance, i.e. the purchase must be particularly favourable.

18.2. If in addition a reduced price is stated indirectly in connection with the expressions in the specific context, the rules in chapter 1, including points 3 and 4 on duration of a normal price and a bargain price, must be observed.

Discount vouchers

18a. Savings statements relating to the use of discount vouchers must not be misleading and must be in accordance with the applicable rules.

18a.2. A discount voucher is a proof on paper or in another form, including electronically, entitling the consumer to a price reduction on a product or a subsequent reimbursement when the voucher is redeemed. Discounts offered as part of a loyalty programme are not comprised by this point.

Clearance sale, liquidation sale, sale in connection with ceased trading or relocation to other premises, renovation sale and the like

19. No new products may be added to a clearance sale.

19.2. Notwithstanding point 19.1, the trader may add new products ordered before the clearance sale began and which he is liable to pay for.

19.3. Expressions such as “clearance sale” may only be used if there is a guarantee that the enterprise will cease trading, cf. section 2 of the Executive Order 1084 of 14 September 2007 concerning unfair business-to-consumer commercial practices, cf. No 15 in the annex to the Executive Order.

19.4. When advertising a sale in connection with relocation to other premises, renovation or the like, a relocation or renovation must be imminent, cf. the in point 19.3 mentioned section 2 of the Executive Order, cf. No 15 in the annex to the Executive Order, and the advertising must be terminated when the relocation or renovation has been completed.

Factory outlet and the like

20. Use of promotional expressions such as “factory sale”, “factory price”, “wholesale price”, “stock sale”, “Factory Outlets” etc. may only be used provided that the consumer is not going to pay more than the retailer usually must pay for the product.

20.2. In connection with use of expressions mentioned in point 20.1, the trader must be able to substantiate his profit calculations by documentation, and these may not include an extraordinary large producer’s profit.

20.3. A retail store may only use expressions such as “factory price” if the trader can substantiate by documentation that he sells the products without charging any type of profit.

20.4. In case a retail store uses the expression “stock sale”, it must clearly be stated that it is the retail store’s own stock that is on sale.

Used products

21. The trader may only use promotional expressions such as “was-now” or the like (relating to the price level) in connection with used products if the previous price which is stated is the price at which the product previously has been on offer for sale as used from the trader. The rules in point 3 shall have the same message impact.

21.2. If the trader wishes to compare the price of a used product with the price of a new product, expression such as “was-now” or the like may not be used in that connection, and it must be stated clearly that the comparison is based on a used and a new product, respectively, as must be stated that it is the trader’s own new price, the new price of other traders or the new price on the market that is the basis for the comparison.

Exhibits, ex-display models and the like

22. If the trader wishes to compare the price of an exhibit with the price of a new product it must be stated clearly that the low price is due to the classification as an exhibit. Expressions such as “was- now” and the like may not be used.

Seconds

23. If the trader wishes to compare the prices of grade A products and seconds it must be stated clearly that there is a difference in the quality. Expressions such as “was-now” and the like may not be used in connection with comparisons between grade A products and seconds.

Chapter 3

Comparisons with price levels and prices charged by competitors

Own price for a specific product compared with the price for the product charged by other traders

24. It must be stated clearly in the advertisement if the price the trader draws comparison to is a price charged by another trader, cf. point 26.

24.2. The trader must be able to substantiate by documentation that a representative number of the stores it is reasonable and relevant to compare with sell the product at the price which the trader draws comparison to. If it is specified which trader's prices the comparison is based on, the documentation must only be related to the prices of these traders.

24.3. The prices which the comparison is based on must be obtained simultaneously.

24.4. A statement concerning the prices or price level of other traders cannot be substantiated by referring to a recommended retail price unless the requirements to the comparison with this price have been met, cf. point 29.2.

24.5. In case the trader compares his own bargain price with the normal price of other traders, this must appear clearly from the context.

General statements indicating a low price policy – comparison with the price level of other traders

25. In case a trader uses a general statement indicating that he is inexpensive or most inexpensive, the trader must be able to substantiate by documentation that the low price policy applies to all products from a representative number of the retail

stores which are relevant and reasonable to draw comparison to. If it is specified which trader's prices the comparison is based on, the documentation must only be related to the prices of these traders.

25.2. In case the trader markets himself as inexpensive or in any other way conveys an impression of a general low price policy, the trader must be able to substantiate by documentation that his prices generally are on a low level in relation to the level on that part of the market which is reasonable and relevant to draw comparison to.

Identical products and conditions of sale

26. In case the trader compares his prices to the prices of other traders, the products that are the basis for the comparison must be of the same nature and quality, and in essence be sold on equal terms. In case a product which is not entirely identical with the marketed product is the basis of the comparison, the difference must be clearly specified in the advertisement.

Current prices

27. Prices which are the basis of a comparison must be current. The requirement is met in case the prices

- (i) are effective at the time of the advertisement, or
- (ii) have been obtained simultaneously and immediately prior the time of the advertisement, the time of the obtainment is clearly stated in the advertisement, and the trader neither knew nor should have known that the prices were going to change.

Price guarantees

28. A price guarantee places the trader under obligation in accordance with the content of the guarantee statement.

28.2. The expression price guarantee must not be used if the guarantee can only be enforced before the purchase.

28.3. The guarantee may not contain any limitations which make it appear illusory, and it may not be used in connection with products that are advertised by the trader concerned.

28.4. The requirements to the consumer's documentation for a lower price elsewhere must not be excessive. In case the consumer can substantiate by documentation - e.g. by presenting an advertisement - that it is possible to purchase the product in another retail store at a lower price and that the requirements for obtaining the guarantee have been met, the trader is placed under obligation by his guarantee commitment.

28.5. The validity of the guarantee must be reasonable, so that the consumer is given an opportunity to claim his right against the trader according to the guarantee.

28.6. In case the trader wishes to conduct a geographical restriction in connection with the price guarantee, the restriction must be defined clearly.

28.7. In case the trader wishes to exempt certain selling methods e.g. mail order, online trading or special offers from competitors, this must be stated clearly in the guarantee provisions, and the trader must provide a reasoned statement.

28.8. In case a consumer asserts his rights in accordance with the price guarantee for a product, the trader must, simultaneously with meeting the obligations in accordance with the price guarantee, reduce his price for the product to the lower price which has been substantiated by documentation. In addition, the trader must make an effort to keep his prices on a level which is in accordance with the lowest prices on the market.

28.9. In case the trader compares his prices with the prices of other traders in connection with a price guarantee, he must be able to substantiate this statement by documentation.

Chapter 4

Comparisons with market prices

Comparison with a market price and a recommended retail price

29. The trader may only compare his price with a market price if it can be substantiated by documentation that the product is sold or offered on sale at the stated market price from a representative number of stores on that part of the market which is reasonable and relevant to draw comparison to.

29.2. The trader may only use the expression “recommended retail price” or the like in connection with a comparison if the recommended retail price in fact is the market price as defined in point 29.1.

29.3. The word “market price” may not be used about an average price. In case comparison is drawn to an average price that expression must be used.

II. Other Marketing requirements

Layout, text and graphics

30. In case the trader depicts a product, consistency between layout and text or speak must exist, however cf. point 30.2. There should be no doubt as to how much of the depicted is covered by the stated price.

31.2. The requirement regarding consistency, cf. point 30.1, may be derogated from in specific cases, if

- (i) the difference between the depicted product and text or speak appears clearly,
- (ii) layout and text or speak have the same message effect, and
- (iii) the advertising otherwise is not misleading.

Clubs, bonus schemes etc., loyalty programmes and the like

31. As regards price transparency reference is made to the DCO's guidance paper on sales promotion activities and the guidance paper on "Loyalty programmes in marketing" from the Nordic Consumer Ombudsmen.ⁱⁱⁱ

III. Responsibility and documentation

Third-party liability

32. A third party, who has contributed to the trader's advertising, can be made liable for the advertising according to the general provisions of the Danish Penal Code.

Editor's liability

33. The editor of a media, which is covered by the Danish Media Liability Act, is, pursuant to section 27(2) of the Act, jointly liable for the content of advertisements according to the general rules. In case the editor does not perform his information duty, pursuant to section 4 and section 6 of the Danish Media Liability Act, the editor is liable for the content in the advertisement, even though he has not acted intentionally or negligently.

Documentation requirement

34. All statements on factual conditions must be capable of being substantiated by documentation, cf. section 3(3) of the Danish Marketing Practices Act.

IV. Other Provisions

Commencement

35. The guidelines are effective as of 1 July 2013.

Evaluation clause

36. The guidelines are to be evaluated two years after the commencement date.

Upon issuance of these guidelines the Consumer Ombudsman's guidelines on price information in marketing from 3 December 2009 are repealed.

Explanatory notes

Point 1

The rules in chapter 1 apply in case a trader directly or indirectly states his own previous price (normal price).

A direct statement with indication of own normal price could for example be “Was DKK 1000. Now DKK 500.”

An example of an indirect statement indicating own normal price could for example be “Save 50%”, without any indication of the normal price. Based on information about the bargain price and the saving of 50 percent in proportion to the normal price, the consumer would be able to calculate the normal price. Therefore, the rules also apply to such statements.

In addition, the chapter covers many promotional expressions such as “sale”, “reduced”, “discount”, “initial price” etc. as long as a normal price is stated directly or indirectly, for example “Sale, save 50%”. However, the chapter does not cover the expression “sale” if there is no direct or indirect indication of a normal price. That specific matter will be covered by point 18.

Point 2

It is not required that the trader states that it is his own normal price that is the basis for the comparison. However, if there is any question of doubt, the trader should explicitly state in his advertisement activities if he draws comparison to his own normal prices.

Point 3

For the comparison with the trader's own normal price to be relevant, and for the impression of a particularly favourable offer which the trader wishes to create in connection with the price comparison not to be misleading, it is important that a stable, long lasting and real basis exists prior to the time of the advertisement which the comparison can be based on. Only thereby, the saving the consumer obtains and the trader's statement indicating this will be *real*.

In case such a stable and long lasting basis for comparison does *not* exist, it can be accidental whether the saving the consumer is promised will indeed hold good and whether the savings statement is relevant. Likewise, if the current offer was effective in one or more periods of time shortly prior to the reduction – or if the item was

even more inexpensive – the impression of a “here and now” – saving is *not* real, but can rather be an expression of coincidental pricing. Therefore, it is required that an identical product or service has been sold or offered on sale at the stated normal price for a longer period of time immediately prior to the time of the advertisement, cf. point 5.

If the product has been offered for sale for at least six weeks immediately prior to the time of the advertisement, the requirement stating that the product must have been sold or offered on sale for a longer period of time will be considered met. Thus, in proportion to a year’s 52 weeks, six weeks must be considered a longer period of time. That is the prevailing general rule but it cannot be excluded that extraordinary cases can occur in which the price comparison may be considered misleading, even though the product has been sold or offered on sale for at least six weeks immediately prior to the time of the advertisement. An example of that could be that the price of a product through the year has been DKK 1,000, but for six weeks the trader raises the price to DKK 1,500 and subsequently reduces it to DKK 1,000 in order to advertise the product with a saving of DKK 500. In that case the DKK 1000 would be considered the normal price of the product. Therefore, it would be considered misleading to market the price as a reduced price indicating a saving of DKK 500 in relation to a normal price of DKK 1,500, even though the product has been sold or offered on sale at DKK 1,500 for six weeks immediately prior to the advertising of the offer.

The “six week rule” does not prevent the trader from launching campaigns of short duration in which a statement indicating savings on all products, a product line (e.g. -20% on all duvets) or parts of the product range is included. In connection with savings on the product range it is emphasised that this does not apply to offers relating to a single product or a “package offer”; instead it must be an offer relating to a plurality of products (e.g. -20% on all organic products). Such a campaign will not result in cancellation or suspension of the longer period of time. After the short campaign it is not necessary for the trader to wait six weeks before he can make use of a comparison with his own normal price.

Point 4

When a trader compares his reduced price with his normal price, the reduced price may only be effective for a short period of time if the trader wishes to prevent the reduced price from being considered a new normal price. Thus, a “favourable offer” will not continue to be favourable but instead it will gradually be classified as normal, and in consequence it would be misleading to advertise the new normal price as a reduced price.

A period of two weeks at the most is considered a short period of time compared to the six weeks in which the product has been sold or offered on sale at the normal price. Thus, a product may be advertised with e.g. “was DKK 400, now DKK 300 – save DKK 100” two successive weeks but not in the third week, unless the trader

already in the beginning of the offer period states that the offer is effective for three (or more) weeks.

The trader may advertise an offer after the second week if he both at the beginning of the offer period and in connection with repeated advertising draws attention to the duration of the offer. This implies that the trader is not allowed to advertise a product in week 3 (or later) in the offer period in such a way that it appears to be a new offer.

This is of particular relevance in connection with offer periods that last multiple weeks. Information on duration of an offer and particularly favourable prices in connection with repeated advertising may for example appear in the form of a text stating "Special promotion prices in April". Information must appear clearly and be in immediate relation to the offer.

It is for the trader to decide exactly how he wishes to display the mentioned information as long as it appears clearly that it is not a new offer but a continuation of an offer period.

If the offer period is of longer duration than the period in which the product is offered for sale at the stated normal price it is not reasonable to refer to the compared price as the normal price of the product. Therefore, the offer period may not exceed half of the period in which the product has been sold or offered on sale at the normal price.

New products may not be added to a sale due to the fact that the expression "sale" implies that the trader sells off products previously held in stock. At the same time, the definition of the expression "sale" implies that the trader is not allowed to supply new products to his store with a view to sell the products under the expression "sale". During the sale, if the trader already owns or has at his disposal products which physically are located elsewhere than in the store, e.g. in a storage facility, these may be included in sale.

In addition, the general rules in chapter 1 apply to sale, including the requirements concerning the duration of a normal price, cf. point 3.

Point 5

Pursuant to section 3(3) of the Danish Marketing Practices Act factual statements must be capable of being substantiated by documentation.

It cannot be required that the trader actually has sold the product at the stated normal price but merely that the product has been offered on sale. However, specific sales can serve as documentation for the normal price.

“Offered on sale” implies that the product has been available for the consumer in such a way that the consumer has been able to make a purchase, and that the consumer has been informed of the price. In that connection it is not of importance whether the trader has the product in stock or whether the product, after the purchase agreement has been entered into, will be delivered from for example central storage facilities or the supplier’s own storage facilities (the latter is of particular importance in relation to e-businesses). For example, if a product solely has been in stock without being advertised it will not be considered actually having been offered on sale.

Point 8

One of the rules in point 8 stipulates that in case the trader sells two or more products collectively (“package offer,” “combination offer” - also called “bundling”) and a total price is stated, this total price may only be compared with the total sum of the prices for the individual products, if the requirements in point 3 concerning the individual products have been met. An example of such a bulk purchase could be the bulk purchase of a TV and a DVD recorder.

A “package offer” or a “combination offer” will not result in cancellation of the longer period of time, cf. point 3. Thus, the trader is allowed to advertise a product with indication of a saving in relation to the normal price which has been effective for a longer period of time prior to the time of the advertisement (was/now), even though the product in the longer period of time has been advertised as part of a “package offer” or a “combination offer”.

This is because two different offers are concerned. In connection with the advertising of the “was/now” price, it is possible to purchase one product at the reduced price, while in connection with the previous “package offer” or “combination offer” it is necessary to purchase the product together with one or more additional products in order to obtain the saving.

In addition, reference is made to the last paragraph in point 9 of the explanatory notes.

Point 9

In case the trader wishes to advertise a saving in the form of a quantity discount, e.g. “1 item DKK 200, 2 items DKK 300”, the normal price referred to in the advertisement must have been effective for a longer period of time, cf. point 3, immediately

prior to the time of the advertisement. That implies, among other things, that the trader is not allowed to advertise such a quantity discount if the unit price for the product concerned has been reduced stating a saving in relation to the normal price (“was/now”) in the mentioned previous longer period of time.

For example, if a shirt has been advertised with a saving in relation to the normal price – e.g. “Was DKK 400, now DKK 350, save DKK 50 – the trader is not subsequently allowed to advertise a saving in the form of a quantity discount relating to the same product – e.g. “1 shirt DKK 400, 2 shirts DKK 700, save DKK 100” – if a longer period of time has not passed, cf. point 3, until the shirt was advertised with the “was/now”- price.

The rule does not affect the trader’s possibility to advertise an individual quantity discount with a savings statement directed at a buyer who wishes to purchase multiple products from the trader.

A quantity discount will not result in cancellation of a longer period of time, cf. point 3. Thus, the trader is allowed to advertise a product stating a saving in relation to the normal price which has been effective for a longer period of time prior to the time of the advertisement (“was/now”), even though the product in the longer period of time has been advertised with a quantity discount.

This is because two different offers are concerned. In connection with the advertising of the “was/now” price, it is possible to purchase one product at the reduced price, while in connection with the previous quantity discount it is necessary to purchase the product together with one or more additional products in order to obtain the saving.

For example, if a trader advertises a quantity discount stating “1 Shirt DKK 400, 2 shirts DKK 700, save DKK 100”, subsequently the trader is allowed to advertise the same shirt drawing comparison to the normal price which was effective prior to the advertising of the quantity discount - “Was DKK 400, now DKK 350, save DKK 50”- even though a longer period of time has not passed, cf. point 3, between the quantity discount and the comparison with the normal price.

Under special circumstances in which the use of quantity discounts on a product is very common and where the consumption pattern – for example on account of the size of the discount – is of such a nature that the product is more or less only bought under such a quantity discount (for example a product that is nearly always sold in twos and almost never as a single item), it may be misleading practice to use the normal price for a single product as a basis of comparison in connection with the use of savings statements.

Furthermore, a comparison with a normal price can be misleading even though the relevant period of reference has been kept, if the price of a product is reduced so often, either as an offer ("was/now"), as a quantity discount or as part of a package offer, cf. point 8. That is because the price is reduced so often that the product cannot be considered as having a fixed price.

Point 10a

If the trader markets a product as a particularly good offer with information that the price will rise in the foreseeable future, the marketing communication provides the consumer with a special incentive to take a quick transactional decision.

It is therefore important that the statement in the marketing communication is correct and that a de-facto price change is involved. Conversely, the statement would be suitable for causing the consumer to take a transactional decision that the consumer would not otherwise have made, and, based on a specific assessment, this could be misleading. See section 3 of the Danish Marketing Practices Act and article 6 of the Unfair Commercial Practices Directive.

However, this does not apply if, subsequent to the advertising of the offer, circumstances have arisen which the trader at the time of marketing could not have reasonably foreseen, and as a result of which the trader has not been able to raise the price as indicated. Such circumstances could be the outbreak of a price war. See point 12.2.

Traders should generally be cautious about advertising future prices if market developments are subject to uncertainty.

Furthermore, traders using price guarantees should be cautious when advertising future prices as there is a material risk that the trader will not be able to abide by his statement because of the price guarantee. See point 28.8.

Point 11

The requirement stipulating that a product must have been sold or offered for sale at the normal price which is the basis for the comparison immediately prior to the time of the advertisement may create difficulties for traders who make use of price guarantees. Thus, if a trader was necessitated to reduce the price of a product, cf. point 28, before the offer – the production lead time of an advertising flyer etc. taken into consideration – is announced as a consequence of information from a customer that the product is sold at a lower price in another store, in the circumstances the requirement that a product must be sold or offered on sale for a longer period of time immediately prior to the time of the advertisement can be discounted.

However, that presupposes that the trader is able to substantiate by documentation that the reason why the stated normal price has not been effective in the entire period is in fact the price guarantee. Therefore, when using both price guarantees and a comparison with own normal prices, the trader must make clear and unambiguous reservations in the advertisement or in immediate connection with it indicating that the stated normal price - due to the traders price guarantee - may have been lower than the price stated in the advertisement. In that connection, the trader can state in the advertisement that the stated normal price is the price which was effective at the time he ordered the advertisement e.g. "Normal price in week 8".

Point 12

"Price wars" between traders may, like price guarantees, have the effect that the trader unexpectedly is necessitated to reduce the price of a product in the period between ordering the advertisement and the date the advertisement is released. Furthermore, it can also have the effect that the price stated in the advertisement thus has not been effective for a longer period of time immediately prior to the effective date of the offer. In such cases a dispensation can be granted as previously described in connection with price guarantees provided that the trader can substantiate by documentation that the reason why the offer has not been effective for a longer period of time immediately prior to the effective date of the offer is a consequence of a "price war".

Point 13

Voluntary chains may have the same interest in distributing joint advertising material as capital chains. In a voluntary chain, the individual stores cannot be committed to sell the products at a certain price. If required, this would possibly be contrary to Danish competition law. This could possibly mean that the normal price in the individual stores is different than the one stated by the chain in e.g. TV ads and advertising flyers. The same may apply to a combined capital and voluntary chain. Likewise, significant price variations between individual stores may occur in some capital chains.

Therefore, it is possible for those chains to use "savings margins" (e.g. save DKK 70-100) or "save up to" messages (e.g. "save up to DKK 100"/"save up to 20 percent") in their advertising under certain conditions.

The expression "vast majority" in point 13.3 implies that it must include considerably more than half of the stores.

It is presupposed that information on normal prices is collected in conformity with the Danish Competition and Consumer Authority's guidelines for voluntary chains from 2005, including part 7.

Point 14

The six weeks which constitute a longer period of time, cf. point 3, have been determined based on the assumption that a period of time of such duration compared to a year, in general and for those product lines - including durables in particular- in relation to which savings statements are particularly interesting, would provide sufficient time to form a true and fair basis of comparison.

As regards basic household commodities, savings statements are not considered misleading, even though the normal price has not been effective for six weeks. This is due to the fact that the products are purchased several times in the course of a year. Therefore, it can be reasonable to use shorter periods of reference for this particular product line. In such cases nothing hinders basic household commodities from being sold as e.g. "this week's offer" with indication of a saving in relation to the normal price with intervals which are shorter than six weeks.

As regards this product line the longer period of time is considered, cf. point 3, as a period of at least four weeks.

It is noted that the mentioned alteration of the length of the period of reference is related to the character of the *product* and not the store. A store that sells groceries as well as e.g. consumer electronics or other durable consumer goods, typically a supermarket of a certain scale, cannot in its advertising of such products use other or shorter periods of reference than the store which has consumer electronics as its only or primary product line.

Furthermore, the above-mentioned alteration of the length of the period of reference may be applied to typical seasonal products. That is because the product type is offered for sale for a much shorter period of time than other products, and because the period of reference seen in relation to a year can be equally shorter.

As regards this product line, savings statements can be used provided that the normal price used as a basis for comparison has been effective for at least four weeks prior to the time of the advertisement.

The expression basic household commodities is defined in section 9(2)(i) of the Danish Act on Certain Consumer Contracts. The definition covers products which are *consumed* e.g. kitchen roll but not products that are used e.g. kitchen appliances.

As for other exemption rules, the Consumer Ombudsman will interpret the concept of “seasonal products” in the strict sense.

Examples of products that are covered by the expression “seasonal products” include Christmas decorations, Halloween decorations and annual publications (“Hvem”, “Hvad”, “Hvor” – an annual publication on significant events issued by the Danish newspaper Politiken- and the like).

As examples of products that are *not* considered seasonal products school bags, pencil cases and the like can be mentioned, even though these are sold particularly prior to the first day of school.

It is noted that even though a product is sold all year round in a *few* stores the product can meet the requirements to the definition of a seasonal product on a different part of the market where the product is sold in a very limited period of time, and this is due to the character of the product and practical application. E.g. Christmas decorations would in general be considered seasonal products even though an individual store sells them all year round. However, a product cannot be considered a seasonal product in individual stores that only sell the product in a very limited period of the year if it is established practice on the vast part of the market that the product is sold all year round regardless of the character of the product.

Point 15

Real property and fuel are exempted from the rules in the guidelines concerning comparison between a normal price and a reduced price as it is found unsuitable for the rules to be applied to these products due to their character and price structure.

Furthermore, accommodation in hotels and the like as well as package travels are exempted from the rules concerning comparison between a normal price and a reduced price.

Package travels are defined in section 2(1) of the Danish Act No 472 of 30 June 1993.

As regards these products, in consequence of a number of factors the prices vary to such an extent that they cannot be considered fixed prices. Thus, several different factors have an effect on the price which can change from day to day, e.g. the time of the accommodation or the travel, current supply/demand and how and when the order has been placed.

Therefore, the rules on specific periods of reference are not appropriate as regards these products. However, it is noted that even though the rules do not apply the use of savings statements in connection with sale of the above-mentioned products must be true and fair and not misleading.

Point 16

Section 9 of the Danish Marketing Practices Act on information duty in connection with commercial practices (1) and a specific information duty in connection with advertising of “special offers” (2) came into force as of 1 January 2007.

From section 9(2) of the Danish Marketing Practices Act it appears that if a trader offers products or services at a particular price and has reasonable grounds for supposing that he will not be in a position to satisfy demand in a quantity that is reasonable in relation to the offer and the scope of the marketing, the trader should include a clear proviso to this effect in his advertising.

The provision is to be interpreted in compliance with the Directive on Unfair Commercial Practices, including No 5 on the Black List to the Directive. The Black List has been implemented in Danish law by Executive Order No 1084 of 14 September 2007 on unfair business-to-consumer commercial practices. Presumably, this implies that the trader is not necessitated to make a special reservation if he can engage another trader to deliver the advertised product or an “equivalent” product, cf. No 5 on the Black List to the Executive Order.

As the possibility of supplying an equivalent product and the possibility of procuring another trader to supply the product constitutes an exemption, it must be subjected to a strict interpretation.

For a product to be considered equivalent, it must be of the same or higher quality. For example, it is not possible to substitute a product from a well-known brand with a product from a different brand.

The possibility of procuring another trader to supply the product must be interpreted to the effect that it covers a situation in which the trader has the product delivered via another trader to his own store. On the other hand, it should not be considered to comprise situations in which the trader refers the consumer to contact another trader in order to buy the product.

The provision in section 9(2) of the Danish Marketing Practices Act is of particular relevance in connection with advertising of special offers, i.e. particularly favourable

offers which is advertised on a large scale and in itself is qualified to attract customers to the store.

The object of the adoption of the specific information duty was according to the legislative material behind section 9(2) of the Danish Marketing Practices Act to ensure that the trader clearly informs consumers of limitations in connection with special offers. Thereby, consumers are ensured the best possible basis to assess their possibilities of purchasing a product or service at the favourable price and not return empty-handed. Clear information indicating that the offer is only available in a limited number must be placed in immediate relation to the offer according to the legislative material.

It appears from the legislative material to section 9(2) of the Danish Marketing Practices Act that the information duty comes into force if the trader has reasonable grounds for supposing that that he will not be in a position to satisfy demand in a quantity that is reasonable in relation to the offer. In the assessment of whether or not reservations should be made as regards the limited number importance should be attached to the nature, quality and price of the product or service together with the scope of the advertising deployed to promote the offer. According to the legislative material it will be of importance whether the offer has been promoted once in a local newspaper or whether a massive advertising campaign in door-to-door distributed advertising flyers and TV-ads has been launched.

Consequently, a trader must always conduct a case-by-case assessment of whether he has sufficient items to meet the demand which can be expected due to the advertising of the special offer. In that connection - besides the nature, quality, price and favourable expressions of the offer as well as the scope of the advertising of the product or service - it can be relevant to attach importance to whether the trader previously has experienced failure in connection with delivery from the same supplier. Likewise it could be relevant to attach importance to whether and identical product has been sold out in a very short period of time. It would also be of importance whether the product is a typical seasonal product.

In case a trader based on these assessments has reasonable grounds for supposing that it will not be possible for him to meet the demand a clear reservation concerning the limited number must be made in the advertising. That can be done by stating "until stocks are exhausted" or "limited quantity".

If the quantity is very limited, it must be stated in the advertisement how many items of the product are on offer for sale (usually, a requirement if the number is below ten) or simply be stated that there are *very few* items available in the individual stores.

As it is the case with the DCO's practice applied so far, information concerning reservations must appear clearly and conspicuously. This means that it must be *specific* and appear in immediate connection to the special offer. A *general* reservation, e.g. on the front or the back of advertising material will therefore not meet the requirement.

A reservation in the advertising stating that a product is not in stock and therefore has to be purchased entails that the product does not have to be physically present in the store. However, the trader must be able to supply the product if it is ordered by a consumer in adequate volumes to meet demand. If the trader is unable to supply the product in an adequate volume, he must make reservations concerning the limited number in the marketing communication. A reservation in the advertising stating that a product is not in stock and has to be purchased does not in itself make up a reservation under section 9(2) of the Act.

It is noted that the question concerning the significance of a reservation as to observance of section 9(2) of the Danish Marketing Practices Act is only of relevance in situations where the demand exceeds the number of items the trader has offered for sale *in the offer period*, and the product therefore is likely to be sold out very quickly or the lacking possibility to meet the demand is due to external conditions e.g. supplier failure. The trader cannot refer to a reservation and thereby be exempted from liability - if he has already sold the product prior to the beginning of the offer period (whether sold at a normal price or reduced price) or if the trader is not in possession of the product because he did not secure a relevant delivery agreement prior to advertising the offer. In both cases the advertising will be considered misleading and contrary to section 3 of the Danish Marketing Practices Act.

The requirement concerning reservations pursuant to section 9(2) of the Danish Marketing Practices Act and the general responsibility not to mislead customers concerning the existence of the offer is unconditional – i.e. it also applies to bargain offers, wholesale goods and the like which are not necessarily part of the store's usual product range. In addition it also applies to remnants/surplus stocks which are available to a limited extent only.

In chain stores, a marketed special offer may not be sold in all of the stores of the chain.

If that is the case, it follows from section 12a(1)(ii), cf. Article 7(4)(b) of the Unfair Commercial Practices Directive that the marketing communication must provide information about which of the stores of the chain sell the product, or which of the stores of the chain do *not* sell the product in question.

It is noted that it does not necessarily constitute a violation of the Danish Marketing Practices Act if a special offer is sold out quickly. The decisive factor is whether the

trader has conducted a reasonable assessment of his ability to meet the demand. If the trader has assessed that he is able to meet the demand, but it turns out that his assessment was wrong e.g. due to an extraordinarily large demand for the product which the trader could not have reasonably foreseen, the Danish Marketing Practices Act is not necessarily violated, even though the trader has not made reservations as to the limited quantity in his advertising.

Point 17

As of 1 December 2007 the use of the expression “gratis” is specifically governed by No 20 on the Black List to the Executive Order No 1084 of 14 September 2007 concerning unfair business- to- consumer commercial practices.

No 2 on the Black List stipulates that

describing a product as "gratis", "free", "without charge" or similar is in all circumstances considered unfair if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.

Section 2 of the Executive Order stipulates that those types of commercial practices which appear on the Black List *in all circumstances* are considered unfair business-to-consumer practices.

The Executive Order is an implementation of the European Union’s Unfair Commercial Practices Directive. As the Directive is a total harmonisation directive this means that EU Member States, including Denmark, neither uphold nor implement stricter or easier rules within the area.

The wording of No 20 on the Black List implies that the trader as a rule may use the expression “gratis” and the like, even though payment for unavoidable costs of responding to the practice and collecting or paying for delivery of the product is charged. On the other hand, the trader is not allowed to use the expression “gratis” and the like if payment for any other costs than the costs mentioned in the Black List is charged. Thus, the new wording is in principle an easing of the practice applied so far according to which legality of the expressions depended on non-delivery of any type of trade-offs.

“Unavoidable costs of responding to the commercial practice” may for example be general charge for calling a trader or payment of postage when sending in a coupon from a coupon sheet.

As the provision in the Executive Order explicitly stipulates that use of the expression “gratis” and the like is allowed, even though the trader charges payment for delivery of the product free of charge, nothing hinders usage of a statement such as “Gratis – You only pay the postage”. This presumes that the trader does not charge payment for a product wholly or partially via the postage costs, and that there are no other circumstances which make the advertising as misleading or in violation of the Executive Order.

On 3 December 2009, the European Commission issued an unofficial guidance on the implementation/application of the Unfair Commercial Practices Directive^{iv}. The guidance sets out that the Black List does not necessarily prevent traders from using the word gratis even when the consumers are required to buy other items to obtain the free product (e.g. “free wall-chart when you buy today’s paper”) or where the part that is free forms a part of the product to be paid (e.g. “25% extra free”, for a bottle of shampoo). The former example requires that the paper is sold without a wall-chart on other days for the same price. The latter example requires that the bottle contains 25% more shampoo than is usually supplied at that price.

In its guidance, the Commission sets out criteria that should be used when assessing whether the word “gratis” is misleading in connection with the marketing of combined offers:

- Traders must not try to recover their costs by reducing the quality or composition or by inflating the price of any product that must be bought as a pre-condition for obtaining the free item
- Traders should not describe an individual element of a package as “free” if the cost of that element is included in the package price.

Reference is made to item 3.4. of the guidance, which is reproduced as [Annex 2](#) to these guidelines.

Point 18

Even though it is not clearly stated in connection with these expressions that the price of the product usually is higher it gives the consumer an impression of a particularly favourable purchase. These expressions may therefore not be used – solely because of their promotional effect - if there is no substance in them. For example a product may not be advertised with the expression “offer” if it is usually sold at the stated price.

In case a normal price indirectly appears from expressions used in that *specific connection*, the general rules concerning such price comparisons apply.

Point 18a

On 1 July 2011, the ban on discount vouchers set out in the Danish Marketing Practices Act was repealed, and discount vouchers may now be used in marketing communication. However, savings statements relating to the use of discount vouchers must not be misleading and in violation of section 3 of the Marketing Practices Act.

An assessment of whether this is the case will include an examination of whether the extent of marketing of discount vouchers is so large that it must in fact be equalled to a reduction of the normal price of the product to the effect that points 3 and 4 of the guidelines on duration of a normal price and bargain price will apply. If that is the case, it would also entail that the longer period (see point 3) is interrupted.

Elements to be included in the assessment of whether the use of discount vouchers has reached the above-mentioned extent could be whether the vouchers are directed at a broad or limited group of recipients, how accessible the discount vouchers are, how many discount vouchers are offered and in which media they are marketed.

The use of discount vouchers will not be deemed to interrupt the longer period (see point 3) if the discount voucher has exclusively been available for a very insignificant proportion of the trader's potential customers.

Since this is a new area in which no practice has been established, the Consumer Ombudsman is prepared to reconsider the use of discount vouchers when more experience has been gathered in the area. In this context, reference is made to the evaluation clause in point 36.

Point 19

A time limit concerning the duration of a clearance sale cannot be fixed. As no new products may be included in a clearance sale, the clearance sale is terminated when all products have been sold. In case the clearance sale applies to an entire chain, products from one of the chain's stores may be transferred to another.

However, expressions such as "clearance sale" may only be used when it becomes certain that the store will cease trading, and if the clearance sale has lasted more than three months the trader must be prepared that the requirement as regard documentation for ceased trading will be made more rigorous.

Point 20

Expressions such as “factory sale” and the like may only be used if the consumer is not charged a higher price than the price the retailer usually is to pay for the product. The trader must substantiate his profit calculations by documentation, and in that connection the trader is not allowed to charge an extraordinarily large producer profit - wholly or partially- in return for the profit which the consumer was usually to pay if he bought the product in a retail store.

As regards the so-called *factory outlets* in particular, it is noted that “factory outlets” consist of retail stores operated by the individual manufacturers sell their stock, i.e. surplus stock, collections from previous seasons or products that have not been sold in a sufficient amount in retail stores, directly to consumers through their own branded stores. Usually, the products are advertised with large savings.

The DCO has no practice as to the selling method. However, it is the DCO’s perception that the selling method – except from the fact that often many factory clearance sales are gathered in one place - does not differ significantly from the usual factory clearance sales/factory sales. Therefore, the same rules apply to factory outlets as to factory clearance sales/factory sales.

Point 21

The trader is allowed to compare a reduced price of a used product with the normal price of the used product, e.g. by using the expression “was/now” provided that the general rules regarding periods of reference have been complied with. However, it cannot be excluded that the use of the expression “was/now” in connection with a price reduction may become misleading if the price reduction solely covers a decrease in value and not an actual favourable offer.

Point 24

Unless otherwise indicated, the consumer must assume that the trader’s own previous prices are the basis of the comparison. See point 2. Therefore, it must appear clearly from the advertisement when comparison is drawn to the normal price charged by other traders. This can for example be done by using the expression “normal price charged by other traders” unless it appears from the circumstances in connection with the advertisement boards or the advertising.

In connection with such a comparison with the normal price of other traders the trader must be capable of substantiating by documentation that a representative selection of the stores which in the circumstances it is reasonable and relevant to draw comparison to sell the product or service at the stated price. In that connection it can be mentioned that in cases where comparison is drawn between own

price and the normal price of other traders, the consumer gets the impression that you can save the difference relating to other traders who distribute the product. When marketing oneself in the entire country one must be capable of substantiating by documentation that the stated price is effective in a representative section of competitors in the entire country so that a relevant, true and loyal representation of the price conditions on the market is provided. On the other hand, if you advertise yourself within a smaller geographical area you must be capable of substantiating by documentation that the product is sold at the stated normal price from a representative section of competitors in the area concerned.

If it is specified which traders comparison is drawn to the documentation should only concern the normal price of those traders.

Point 25

Statements indicating a general low price policy are statements relating to factual conditions which must be capable of being substantiated by documentation, cf. section 3(3) of the Danish Marketing Practices Act.

This concerns statements that directly or indirectly draw comparison to the price level of other traders relating to one or more product lines or one or more products. Statements such as “We are the most inexpensive”, “We have the lowest prices” and the like must be perceived as general, i.e. that the general low price policy applies to all products from a representative section of the stores on that part of the market which is reasonable and relevant to draw comparison to.

Statements may not exceed what a price study has substantiated. For example if it has been substantiated by documentation that you are the most inexpensive as regards all products in a *product line* or that on average you are more inexpensive than the competitors you draw comparison to nothing else must appear from the statement. Thus, it would be misleading if you state that you are the most inexpensive as regards all products compared to all other traders if you do not have documentation for this general inexpensiveness concerning all products in your price studies.

Point 26

The comparison may not be misleading. Products or services that are the basis of the comparison must be of the same nature and quality and in essence sold on equal terms. This implies that a purchase made on the Internet or via mail order cannot be compared with a purchase from a competitor's store – and reversed – unless it is clearly stated in cases where it is of relevance. If comparison is drawn to the normal price of another trader's product which is not *completely* identical with the advertised product - e.g. in terms of quality, - including material and production quality, selling method and quantity - it must appear *clearly* from the advertising.

Point 27

As regards a comparison with the normal price charged by competitors, the stated normal price must in principle be correct at the time of the advertisement. However, in some cases it can cause problems for traders. If a trader for example wishes to compare his prices with the prices of other traders in a newspaper advertisement some time may pass between the ordering of the advertisement and the newspaper being published. In that period of time the competitor's prices may change and the stated price in the advertisement will therefore not be correct at the time of the advertisement. The same problem may occur in connection with TV commercials. This can be accepted provided that the prices which the comparison is based on have been obtained simultaneously and prior to the ordering of the advertisement/commercial and that it is clearly stated in the advertisement/commercial when the prices have been obtained. Furthermore, it is a requirement that the trader neither knew nor should have known that the prices would change.

Point 28

Typically, a price guarantee gives the consumer who can prove that it is possible to obtain the product at a lower price elsewhere the right to receive payment for the difference as well as possibly XX per cent in addition.

The expression price guarantee must not be used if the guarantee can only be enforced before the purchase. In that case, it will not be a guarantee but merely an acknowledgement from the trader that he is prepared to sell the product at a lower price than initially indicated if the consumer finds the same product at a lower price with another trader. In these cases, the consumer could merely opt to buy the product from the other trader who sells the product at a lower price.

As regards geographical restrictions of a price guarantee no doubt must arise as to where the price guarantee applies. E.g. information about geographical restrictions can appear in the form of postal codes.

It is required that the trader has a reasoned statement if he wishes to exempt certain selling methods from the price guarantee. If the trader exempts many selling methods the entire concept may be without any content. A statement concerning a price guarantee may only be used as a promotional expression – it should be of real substance. Otherwise, the statement could be misleading. A reasoned statement for exempting a selling method could be exemption of online trading because the e-business does not have costs relating to tenancy of business premises. On the other hand, this would usually not be the case if a trader beside his physical store has an e-business. Therefore, the trader is not allowed to exempt his own e-business from

the price guarantee, unless the e-business is advertised (*branded*) under a different name than the name of the trader's physical store.

The expression "price guarantee" is perceived as a signal implying that the prices of the trader concerned as a general rule are on a level with the lowest prices on the market, and as an indirect promise that the product cannot be found – at least not easily – at a lower price elsewhere. Many consumers would probably omit to make enquiries about the competitors' prices in reliance on the price guarantee.

As soon as a consumer asserts a right under the price guarantee of a product, the trader must reduce his price for the product in general so that it corresponds to the price substantiated by documentation.

If the trader includes the bargain price of other traders in his price guarantee, which is assumed in case he does not make reservations as to this, cf. point 28.six, the trader must reduce his price to the bargain price substantiated by documentation.

The trader is allowed to raise his price once the competitor's offer has been terminated – however, the price of the product must be as low as the competitor's price.

It is noted that a price guarantee also applies to chains. If the chain advertises itself based on a price guarantee, and a consumer can substantiate by documentation that another of the chain's stores has a lower price, the price of the product in the more expensive store must be reduced to the price substantiated by documentation.

It is noted that in case a trader in connection with a price guarantee draws comparison to the prices of other traders, it is a statement on factual conditions which must be capable of being substantiated by documentation, cf. section 3(3) of the Danish Marketing Practices Act. In case the trader uses statements such as "most inexpensive" or other statements concerning a low price policy in his advertising of a price guarantee these statements may only be used if substantiated documentation exists.

Point 29

If the trader compares his price with a market price it must be substantiated by documentation that the product is sold or offered on sale at the stated market price from a representative section of that part of the market which is reasonable and relevant to draw comparison to. Furthermore, it is noted that the expression "market price" should be seen as a reference to the normal price of other traders.

In case the trader in connection with his price comparison uses the expression “recommended retail price” or the like it must be substantiated by documentation that the recommended retail price in fact is the market price as defined in point 29.1.

A recommended retail price is the price at which the manufacturer, wholesaler or importer has recommended the retailer to distribute the product. However, it is the retailer who fixes the price, and the recommended retail price is in principle of no interest to the consumer.

It is far from certain that a product is even offered for sale or sold at the recommended retail price. Therefore, the trader may only draw comparison to a recommended retail price if it is substantiated by documentation that the recommended retail price is in fact the market price.

Point 30

In the circumstances it can be accepted that there is not full agreement between picture and text or speak. E.g. a car may be depicted with options and accessories, and a kitchen may be depicted with white goods provided that it is clearly stated in the advertisement the options and accessories/white goods are not included in the stated price.

Point 32

A third party who has contributed to the trader’s advertising can incur co-responsibility under the Danish Penal Code. Thus, a third party, who can incur joint responsibility under the Danish Penal Code, could for instance be an agency that has made an advertisement or advised the trader in connection with his advertising.

Code, could for instance be an agency that has made an advertisement or advised the trader in connection with his advertising.

Point 33

Pursuant to section 27(2) of the Danish Media Liability Act the editor can incur joint responsibility for an advertisement under the general rules of the legislation. Thus, the editor can incur responsibility for complicity under the Danish Penal Code. Thus, the editor can incur responsibility for complicity under the Danish Penal Code.

Point 36

The guidelines are to be evaluated two years after the commencement date. Practical experience with the guidelines in practice will be taken into consideration in connection with the evaluation.

Annex 1

Executive Order no. 1084 of 14 September 2007 on Unfair Commercial Practices

[...]

2. Commercial practises listed in this Executive Order are in all circumstances considered unfair.

3. Advertising which cf. section 2 is considered unfair is punishable by fine unless it carries higher penalty according to other legislation.

[...]

COMMERCIAL PRACTICES WHICH ARE IN ALL CIRCUMSTANCES CONSIDERED UNFAIR

Misleading commercial practices

(i) Claiming to be a signatory to a code of conduct when the trader is not.

(ii) Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.

(iii) Claiming that a code of conduct has an endorsement from a public or other body which it does not have.

(iv) Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation.

(v) Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising).

(vi) Making an invitation to purchase products at a specified price and then:

a) refusing to show the advertised item to consumers; or

b) refusing to take orders for it or deliver it within a reasonable time; or

c) demonstrating a defective sample of it, with the intention of promoting a different product (bait and switch)

(vii) Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.

(viii) Undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of the Member State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction.

(ix) Stating or otherwise creating the impression that a product can legally be sold when it cannot.

(x) Presenting rights given to consumers in law as a distinctive feature of the trader's offer.

(xi) Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial). This is without prejudice to Council Directive 89/552/EEC.

(xii) Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product.

(xiii) Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.

(xiv) Establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products, unless the matter is covered by section 5 article a of the Danish Consolidation Act No 555 of 6 June 2006.

(xv) Claiming that the trader is about to cease trading or move premises when he is not.

(xvi) Claiming that products are able to facilitate winning in games of chance.

(xvii) Falsely claiming that a product is able to cure illnesses, dysfunction or malformations.

(xviii) Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions.

(xix) Claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.

(xx) Describing a product as "gratis", "free", "without charge" or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.

(xxi) Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not.

(xxii) Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.

(xxiii) Creating the false impression that after-sales service in relation to a product is available in a Member State other than the one in which the product is sold.

Aggressive commercial practices

(xxiv) Creating the impression that the consumer cannot leave the premises until a contract is formed.

(xxv) Conducting personal visits covered by the injunction in section 6 of the Danish Act on Certain Consumer Contracts to the consumer's home ignoring the consumer's request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation.

(xxvi) Making persistent and unwanted solicitations by telephone which are not covered by the injunction in section 6 of the Danish Act on Certain Consumer Contracts or by fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation.

(xxvii) Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.

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

(xxix) Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer except where the product is a substitute supplied in conformity with a distance contract concerning products or non-financial services.

(xxx) Explicitly informing a consumer that if he does not buy the product or service, the trader's job or livelihood will be in jeopardy.

(xxxi) Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either:

- there is no prize or other equivalent benefit,

or

- taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.

Annex 2

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

[...]

3.4. Annex I, N. 20 – Use of the word "FREE"

3.4.1. Provisions of the Directive

ANNEX I

COMMERCIAL PRACTICES WHICH ARE IN ALL CIRCUMSTANCES CONSIDERED UNFAIR

[...]

N. 20 –Describing a product as "gratis", "free", "without charge" or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.

[...]

3.4.2. Rationale/Preliminary considerations on the prohibition n. 20 in Annex I

Annex I N. 20 of the Directive aims at preventing a specific misleading use of the word "free" in commercial communications and advertising

It prohibits traders from describing a product or service as 'gratis', 'free', 'without charge' or similarly if the consumer is eventually asked to pay a price.

While the appraisal of practices under the prohibition is generally straightforward, combined offers (i.e. when more products and/or services are marketed together) require a more complex case by case assessment based on the specific features of the commercial offer and the product or services involved

3.4.3. Structure of the provision – basic principles and clear cut infringements (the concept of "free" in Annex I, n.20)

This prohibition is based on the idea that consumers expect a “free” claim to be exactly that, meaning they receive something for nothing: no money or other consideration has to be given in exchange.

This is largely reflected in Annex I, n.20 which provides that an offer can be described as free only if consumers pay no more than:

- a) the minimum, unavoidable cost of responding to the promotion (e.g. the current public postage rates , the cost of telephoning up to and including the national rate or the minimum, unavoidable cost of sending a text message);
- b) the true cost of freight or delivery;
- c) the cost, including incidental expenses, of any travel involved if consumers collect the offer.

As a consequence, traders should not charge for packaging, handling or administration.

It also follows that a legitimate promotion of free claims requires full price transparency from traders: traders should make clear in all material featuring "free" offers what is the consumer's liability for costs, if any.

An example of a prohibited practice would be where a consumer is offered a "free" product or a gift but then he or she needs to call a premium number to get it.

An example of a straightforward, legitimate free claim is when a trader hands out a free product sample to passers-by in a shopping centre.

3.4.4. Basic criteria in relation to combined offers

The assessment is more complex when the word "free" is used in the context of combined offers, which are commercial offers involving more than one product or service.

The following are the main principles which should be taken into account when assessing combined offers and which are already largely reflected in some advertising regulatory codes:

- Traders must not try to recover their costs by reducing the quality or composition or by inflating the price of any product that must be bought as a pre-condition for obtaining the free item;
- Traders should not describe an individual element of a package as "free" if the cost of that element is included in the package price.

The two categories of combined offers are conditional-purchase promotions and package offers.

3.4.5. Conditional-purchase promotions

Annex I n. 20 does not prevent traders from using the word "free" when customers are required to buy other items (e.g. "buy one get one free" type of offers), provided their liability for all costs is made clear and:

- (a) the quality or composition of the paid-for items has not been reduced and;

(b) the price of the paid-for items has not been inflated, to recover the cost of supplying the free item.

The key distinguishing feature of a conditional-purchase promotion is that the item described as "free" is genuinely separate from and additional to the item(s) that the customer is required to pay for.

A free offer can qualify as a conditional-purchase promotion in either (or both) of two ways:

3.4.6. Limited in time free conditional-purchase promotions

The assessment becomes more complex when free conditional-purchase promotions are run on a time-limited or channel-limited basis, or on an invariable, long-term, channel-neutral basis.

The basic principle remains that when a customer is told that an item is "free" when another item is bought, the customer has the right to believe that the trader will not directly seek to recover any of the "free" item's cost by marking up the item's price that has to be bought or by the substitution of inferior merchandise.

Therefore, it is reasonable to conclude that, to demonstrate that an item is genuinely being supplied for free, conditional on the purchase of another item, traders must be able to show:

(i) either that the free item is genuinely additional to the item(s) usually sold for that price or that the free item is genuinely separable from the paid-for item(s);

(ii) that, unless the customer complies with the terms of the promotion, they do not supply the "free" item with the paid-for item(s); and

(iii) that consumers are aware of the stand-alone price of the item(s) they are paying for and that that price remains the same with or without the free item.

For example, assuming that the paid-for item's quality and composition are not reduced and its price is not inflated to cover the cost of the free item:

– “free wall-chart when you buy Thursday's paper” is justified if the paper is sold without a wall-chart on other days for the same price;

– “25% extra free”, for a bottle of shampoo, is justified if the bottle contains 25% more shampoo than is usually supplied at that price;

– “free travel insurance for customers who book their holiday online” is justified if customers who book the same journey by telephone are offered the same price but not offered free insurance or if internet customers who choose to buy their insurance from a different provider pay the same for their holiday as those who choose to take advantage of the marketer's insurance offer;

– “free delivery for customers who spend over €50 on groceries” is justified if the retailer does not offer free delivery when the grocery spend is less than €50;

– “buy two books and get one free” is justified, even if the promotion is a standard long-term offer, if customers who choose to buy only two books from the marketer and not take a third book pay the same price as those who take all three books;

– customers who choose to buy only the television service pay the same price as those who choose to take both the television service and the separate internet service.

3.4.7. Package Offers

After what has been said about conditional-purchase promotions, it is reasonable to conclude that Annex I n. 20 prohibits the use of “free” to describe “an individual element of a package if the cost of that element is included in the package price.

A package is a pre-arranged combination of features offered for a long-term single, inclusive price where customers cannot exercise genuine choice on how many elements of the package they receive for that price.

For example: if a car is advertised with leather seats, air conditioning and a CD player for a standard price of €10,000, that combination of features is a package. The consumer pays one all-inclusive price for the car as advertised. If any of the advertised features were to be removed, the quality and composition of the car the customer is paying €10,000 for would be diminished.

If he wants to claim that the CD player is free and that the €10,000 relates to the other elements, the trader would need to demonstrate either (a) that the requirements of a conditional-purchase promotion are satisfied, or (b) that the CD player was a new additional feature and that the price of the car had not increased (see below).

To take another example, a mobile-phone subscription offers a certain amount of airtime, a certain number of text messages and a voicemail facility for one all-inclusive price. Each element is intrinsic to the quality and composition of the package being advertised for the package price. Because customers cannot exercise genuine choice over how many elements they receive for the price paid, the elements are all included in the package price and may not be described as “free”.

Within a package, the goods or services that are bundled together and sold for one single inclusive price could be different in nature: for example, if a single monthly subscription price is charged for a package that includes a range of television channels, access to the Internet and “free” calls to other subscribers, those services are intrinsic elements of the service that the customer is buying and, in practice, the customer has to take all three elements to pay the advertised price. Because customers cannot exercise genuine choice over how many elements they receive for the price paid, the elements are all included in the package price and may not be described as “free”.

3.4.8. Standard features of the Package Offers

There is one exception to what stated in the previous paragraph. Traders sometimes add elements to their existing packages without increasing the price of the package or reducing the quality or composition of the elements that are already included in the package. In those circumstances, consumers are likely to regard the element that has been added to the package as additional to the established package for a period after its introduction; once the element has formed part of the package for a long time, consumers are likely to regard it as a standard feature of the package. Annex I

n. 20 should not prevent traders from describing elements that have been added to those pre-existing packages as “free” for a reasonable period (e.g. 6 months) after their introduction.

If the price of a package increases or its quality or composition is reduced after a new element is added, the new element may not be described as “free.”

To summarise, if a package price is payable, marketers, in order to comply with Annex I n. 20, may describe elements that are included in the package as “at no extra cost” or “inclusive” but may not describe them as “free” unless they have been recently added to an established package without increasing its price.

3.4.9. One-off costs for installation and equipment

For both conditional purchase promotions and packages, one-off up-front costs incurred, for example, to buy or install equipment, do not negate claims that products or services supplied without subscription are “free” within the meaning of Annex I, n.20. For example, digital free-to-air television channels are available only to consumers who have the necessary digital receiving equipment and call packages are available only to consumers who have a telephone and line. Other types of one-off, up-front costs, for example connection fees payable to a third party to activate an internet service, will also not negate claims that the internet service is free, provided the price payable has not been inflated to recover the cost of supplying the free service. Traders must nevertheless adequately inform consumers about the requirement for any of such up-front payments.

3.4.10. Introductory offers for new customers

Traders might want to run introductory offers for new customers, for example, “Free calls for the first three months” of a telephone call plan. Or they might want to offer a “free” incentive item with a new product, for example, “Free binder with issue one” of a magazine.

3.4.10.1. New customers of existing products

Annex I n. 20 does not prevent traders to make free claims when they market existing products to potential new customers, as long as the criteria set out above are fulfilled.

Below are two illustrative examples:

“Free sports bag for new members” of a gym would be justified if the sports bag was offered to all new members, who could choose whether or not to take it, and new members paid the same price whether or not they took the bag. The claim “Free calls for the first three months” could be justified, even on an ongoing basis where the paid-for item is a package, if the trader showed that the offer was open only to new customers and that existing customers who paid the same price did not receive inclusive calls but received an otherwise identical service; the trader would have demonstrated that the calls were more than was usually supplied for the price and justified the use of “free”.

“Free broadband for new customers of our anytime call plan” could be justified if, for example, the trader showed that broadband was a new feature added to a pre-existing call plan without increasing its price or reducing its quality, and that only new customers received the broadband feature. In that example, the claim would be valid only for a reasonable period after the broadband was added; after that time, because all new customers automatically receive the broadband element, consumers are likely to regard it as a standard, inclusive element of the package. (If the broadband service was automatically supplied to existing customers as well, the “free” claim would be valid but the implication that it was a special benefit for new customers would not be.)

3.4.10.2. New products

If the introductory offer relates to a product that has never been sold before, the trader cannot demonstrate that the “free” item is more than what is usually supplied for the price or that it has added the item to an established package without increasing the price. Annex I, n.20 of the UCP Directive does not prohibit free claims in relation to new products. However, to justify the use of the word “free” in that situation, the marketer would need to show that customers paid the same price regardless of whether they received the “free” element (i.e. either that the free item is genuinely additional to the item(s) usually sold for that price or that the free item is genuinely separable from the paid-for item(s); that is, satisfying test (i) for conditional purchase promotions).

For example, if the marketer launched a new magazine with the offer “Free binder with issue one” and showed that consumers had a genuine choice of whether they took the binder, that marketer would have shown that the offer was a conditional-purchase promotion and justified the use of “free”.

[...]

ⁱ Consolidating Act no. 58 of 20 January 2012 on the Marketing Practices Act as amended.

ⁱⁱ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC and 2002/65/EC of the European Parliament and of the Council, and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive").

ⁱⁱⁱ The guidance paper is available on the Consumer Ombudsman's website www.forbrugerombudsmanden.dk.

^{iv} The European Commission's guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices, cf. Commission Staff Working Document, KOM no. SEK(2009) 1666 of 3 December 2009. The guidance document is not legally binding but can in a number of ways serve as an aid to understanding and interpreting the Directive.