

1 July 2010

## **Unsolicited Commercial Communications to Targeted Recipients**

The Danish Consumer Ombudsman's guidance paper on section 6<sup>1</sup> of the Danish Marketing Practices Act – (unsolicited commercial communications to targeted recipients)

### **Content**

- 1: Section 6 of the Danish Marketing Practices Act – an overview
- 2: Section 6 of the Danish Marketing Practices Act – a review of the provision based on legislative material, legal practice and the DCO's practice
- 3: Section 6(1) of the Danish Marketing Practices Act – Ban on use of email, fax etc.
- 4: Section 6(2) – Exemption from the ban on unsolicited commercial communication by electronic mail
- 5: Section 6(3) of the Danish Marketing Practices Act – Other means of direct communication
- 6: Section 6(4) of the Danish Marketing Practices Act – Request to receive direct communications
- 7: Section 6(5) of the Danish Marketing Practices Act – Information on the option to decline communications
- 8: Section 6(6) of the Danish Marketing Practices Act – No payment for revoking consent or declining communication
- 9: Section 6(7) of the Danish Marketing Practices Act – Administrative rules
- 10: Consent to receive marketing material by email, fax, letter etc.
- 11: The DCO's enforcement of section 6 of the Danish Marketing Practices Act

### **1: Section 6 of the Danish Marketing Practices Act – an overview**

Section 6 of the Danish Marketing Practices Act limits traders' possibility to distribute marketing material. For example, as a rule there is a ban on unsolicited distribution of marketing material by means of email, SMS text messages, MMS messages and facsimile machines (fax). However, as a rule it is legal to distribute marketing material by letters, addressed marketing material or other direct marketing methods to targeted recipients, unless a recipient has declined such communications by request. Unaddressed, door-to-door distributed marketing material as well as marketing material on the Internet is not covered by the provision. Approach by telephone or in person ("door-to-door selling") directed at consumers are covered by the Danish Act on Certain Consumer Contracts and by the duty pursuant to section 6(3) of the Danish Marketing Practices Act

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<sup>1</sup> The Danish Consolidation Act No 839 of 31 August 2009

to consult the so-called Robinson List prepared by the Central Office of Personal Registration [CPR]. The Robinson List is an opt-out list of people who do not wish to receive addressed marketing material.

The provision covers commercial communications in a broad sense – i.e. advertising specific products or services but also communications with the sole purpose of directing attention to the trader's brand (branding).

#### Spam etc.

Section 6(1) of the Danish Marketing Practices Act bans use of *email, fax or automatic calling systems* for unsolicited marketing purposes. However, the ban does not apply if the recipient has previously requested such communications. The ban applies notwithstanding whether the recipient is a consumer, a trader or a public authority.

Section 6(2) of the Danish Marketing Practices Act is an exclusion of subsection 1. A trader that has received a customer's electronic contact details in connection with a previous sale may market his own – equivalent - products or services to that customer by electronic mail, provided that the customer has the option of declining commercial communications. That applies both when giving his contact details to the trader and in the event of subsequent approach.

#### Other means of direct communication

Section 6(3) of the Danish Marketing Practices bans a trader from approaching a person by means of letters or other direct mail if the person concerned has declined such communications from the trader. Persons may decline commercial communications either by informing the trader or by signing up to a list prepared by the The Central Office of Personal Registration (CPR) (the Robinson List). The Robinson List is published each quarter. The trader has a duty to consult the Robinson List prior to sending commercial communication to recipients.

However, a trader should not consult the Robinson List prior to distributing marketing material by letter etc. to a person who has previously requested the communication from the trader, cf. section 6(4) of the Danish Marketing Practices Act which is an exemption to subsection 3.

The first time a trader makes a communication as referred to in subsection (3) with a person who is not on the Robinson List, the trader should inform the person in question clearly and comprehensibly of his right to decline communications from the trader, cf. section 6(5) of the Danish Marketing Practices Act. At the same time, the person concerned should be offered an easy manner of declining such approaches.

#### Revocation of consent etc.

Section 6(6) of the Danish Marketing Practices stipulates that a trader may not request payment for receiving or noting information to the effect that a request under subsection (1) is being revoked or that communications as referred to in subsection (3) are being declined. The person concerned should be offered an easy manner of declining such communications without any fees as in connection with revocation of consent pursuant to subsection 2.

#### Penalty

Violation of the rules in section 6 of the Danish Marketing Practices Act is punishable by fine.

## **Rules supplementing section 6 of the Danish Marketing Practices Act:**

### Telephone sales and door-to-door selling

Section 6 of the Danish Act on Certain Consumer Contracts stipulates that traders may not *communicate in person or by telephone* with a consumer at his residence or workplace or another place to which there is no public access with a view to obtaining an offer to conclude a contract.

Furthermore, there are a few exemptions to the ban on telephone sales: Subsection 1 does not apply to communications by telephone concerning ordering books, subscribing to newspapers, weeklies and periodicals, brokering insurance contracts and subscribing to rescue services or ambulance transport unless a person has declined direct communications for example by signing up to the Robinson List. However, the ban on unsolicited door-to-door selling is mandatory.

An equivalent ban applies to door-to-door selling of insurances pursuant to the Danish Insurance Contracts Act. However, telephone sales of insurances are legal unless the consumer has declined direct commercial communications, cf. section 6 of the Danish Marketing Practices Act.

### Unaddressed mail

Consumers may decline *unaddressed, door-to-door distributed advertisements and weekly magazines etc.* by signing up to the schemes “Do not deliver - Advertisements” and ”Do not deliver - Advertisements and free newspapers.” The schemes are part of the DCO’s guidelines on good marketing practice in connection with distribution of unaddressed mail which are not available in English.. The mentioned unaddressed mail is not covered by section 6 of the Danish Marketing Practices Act. Traders who distribute unaddressed mail are not obliged to consult the Robinson List in order to check whether the consumer is registered unless the recipient’s name or address appears from the marketing material.

## **2: Section 6 of the Danish Marketing Practices Act – a review of the provision based on legislative material, legal practice and the DCO’s practice<sup>2</sup>**

### **The rule only covers approaches from “*businesses and traders*”<sup>3</sup>**

Pursuant to section 2 of the Danish Marketing Practices Act a trader is defined as anyone who engages in private business activity and public activity to the extent that products and services are offered in the market.

The decisive factor is whether economic activity of commercial character is exercised. However, it is not an unconditional requirement that the business is run with a view to generate a profit. Likewise, it is of no importance whether the activity concerns fulltime-work or a sideline. The business activity should be of continuous character and be exercised to a certain extent.

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<sup>2</sup> The published practice can be read on the website [www.forbrugerombudsmanden.dk](http://www.forbrugerombudsmanden.dk) under ”cases and practice” – “Marketing Practices Act” – “Spam etc/ unsolicited commercial communications” as well as under “News”. The mentioned decisions can be found on the website by using the stated case number. (*Only available in Danish*)

<sup>3</sup> See the explanatory notes to section 2 of the Danish Marketing Practices Act on what is considered an economic activity, cf. Bill L 13 Folketingstidende 2005-2006 - an official report of parliamentary proceedings. (*Only available in Danish*)

*Associations whose object is charitable, political or religious and public utility societies* are usually<sup>4</sup> not considered as businesses or traders as regards their fundraising activities. This implies among other things that fundraising by public utility societies including soliciting of members and activities of political associations are not covered by section 6 of the Danish Marketing Practices Act, while activities of a more economic character - e.g. sale of books, clothing and travels or other equivalent activities usually exercised by businesses are covered by the Danish Marketing Practices Act. This applies even though profit from sale is donated to charity.

*Associations, societies or organisations which safeguard private interest of members – e.g. cooperative societies or homeowner’s associations* – are not covered by the rules to the extent that they safeguard interest of members according to the association’s mission statement. However, activities of commercial character are covered by the provision. For example an association’s sale to its members would be considered as economic activity.

*Trade organisations* are covered by the Danish Marketing Practices Act when the organisations exercise economic activity but not when the organisations safeguard member’s interests by participating in political discussions. Distribution of magazines and news letters to members containing information on new legislation, hearing statements, contributions to political discussions etc. which is of relevance to the membership is not covered by the provision concerning communications with a view to sell products or services. However, if the organisation advertises products or services (including discount schemes) of other traders to members such approaches would be covered by section 6(1) of the Danish Marketing Practices Act. Likewise, *trade associations* are covered by the Act when they safeguard interests of members among other things by advertising a city’s stores and their offers on products and services.

*Activities of trade unions and unemployment insurance funds* have traditionally not been considered covered by the Danish Marketing Practices Act when acting in their traditional capability. However, it is the DCO’s perception that trade unions and unemployment insurance funds which offer services on market terms or terms corresponding to the market terms to their members would be covered by the rules in the Danish Marketing Practices Act, and that their soliciting of new members also may be covered by these rules. For example, the DCO has stated that an unemployment insurance fund’s rewarding of members who solicited new members in ways which involved violation of the rules in the Danish Marketing Practices Act and the Danish Act on Certain Consumer Contracts was contrary to good marketing practice. Furthermore, the DCO has informed a trade union that distribution of marketing material for a book club to members who had registered to the Robinson List prepared by the CPR was contrary to section 6 of the Danish Marketing Practices Act.

*Foundations* may be covered by the rules in the Danish Marketing Practices Act if they engage in economic activity.

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<sup>4</sup> In case public utility societies leave the fundraising to a private business which is rewarded for its work, this business may be covered by the rules in the Danish Marketing Practices Act, cf. The Copenhagen City Court’s enforcement court decision of 18 September 2009, where Aidonline’s activity was considered covered by section 1 of the Danish Marketing Practices Act, even though the fundraising was conducted on behalf of a number of charitable organisations. In an unreported decision by the Danish Maritime and Commercial Court, Save the Children Denmark was considered covered by the Danish Marketing Practices Act. The decision is referred to by Palle Bo Madsen in the book “Markedsret”, 5<sup>th</sup> edition, 2007, part 2, page 19. (Only available in Danish)

Further information on cases illustrating when charitable and political organisations, trade unions and unemployment insurance funds, municipalities, foundations etc. exercise activities that are covered by the rules in the Danish Marketing Practices Act can be found on [www.forbrugerombudsmanden.dk](http://www.forbrugerombudsmanden.dk). (*This information is only available in Danish*)

As a rule *the reference of private persons to products and services* is not commercial and such reference is not covered by the ban in section 6 of the Danish Marketing Practices Act.

#### *Use of non-traders in advertising*

A trader who uses a non-trader to take action the trader himself is not able to take would in the circumstances be subject to punishment for violation of section 6 of the Danish Marketing Practices Act and section 6 of the Danish Act on Certain Consumer Contracts (door-to-door selling etc.) if the non-trader addresses someone in a way which is covered by the provisions. In that connection see case U2002.2277/2 SH in which a telephone company used the members of a sports club to advertise telephone subscriptions. The Danish Maritime and Commercial Court stated that the telephone company should observe section 6 of the Danish Marketing Practices Act regardless of the use of non-traders to market its services (in Danish only)

#### *Tell-a-friend services*

Many traders have a tell-a-friend service on their website which enables someone to send a greeting to a friend via the trader's website. The services often referred to as "tell-a-friend services" or the like imply that a consumer who makes use of the service sends marketing material or a link to the trader's website to a person who has not requested such commercial communication by email. In some cases the consumer is rewarded for passing on information to a friend.

By providing "tell-a-friend services" you could say that the trader encourages a private person to send marketing material to a person who has not requested such material. However, it is the DCO's perception that the trader is not in violation of section 6 of the Danish Marketing Practices Act only for providing such a service. This presupposes that the trader does not contribute with marketing material in the email which is sent to the third party. That the "tell-a-friend service" contains a link to the trader's website is accepted by the DCO. However, if the consumer is otherwise encouraged to - or rewarded for - using the website, the trader will be in violation of section 6 of the Danish Marketing Practices Act if the recipient of the email has not requested such commercial communications by email. For example, the DCO intervened when a business that encouraged private persons to surprise family members, friends and colleagues by sending an electronic "dancing Christmas card" with a product's brand. At the same time, persons who sent the Christmas card participated in a competition (Case No 08/08679).

#### *Friend-to-friend solicitation*

"Friend-to-friend solicitation" is characterised by rewarding a member (or a customer) for soliciting new members (customers) (e.g. se Case No 08/08678). "Friend-to-friend solicitation" is similar to the "tell-a-friend services" but more explicit as the member is only rewarded if the solicitation results in a friend's subsequent membership. Unlike "tell-a-friend services" where the trader makes sure that advertising material is forwarded by email, the customer is not instructed to contact a friend in a certain way.

"Friend-to-friend solicitation" is problematic partly because the person contacted is under pressure as he does not want to disappoint his friend who is to receive a reward, and partly because the friend

is approached in a way which would not be legal for a trader in connection with an ordinary sale to a consumer. Thus, the trader may not communicate in person or by telephone with a consumer at his residence or workplace or another place to which there is no public access. Furthermore, he may not make enquiries by email. However, he may send a letter provided that he consults the Robinson List. Therefore, “friend-to-friend solicitation” may imply an evasion of the rules in the Danish Act on Certain Consumer Contracts and the Danish Marketing Practices Act.

The business’s object of using “friend-to-friend solicitation” is to advertise a product or service and solicit a customer. A trader who rewards a person for soliciting a new customer without informing him of a lawful way of approaching someone would usually have acted contrary to good marketing practice<sup>5</sup>, and if the customer approaches someone unlawfully the business would in the circumstances violate section 6 of the Danish Marketing Practices Act and section 6 of the Danish Act on Certain Consumer Contracts. The person instructed to solicit a new customer cannot be punished for violating the Danish Marketing Practices Act unless he exercises business activity.

It is the DCO’s perception that “friend-to-friend solicitation” can be used lawfully only if the trader informs of a lawful way of approaching new customers or if the customer is only rewarded for informing of a potential customer’s name and the trader subsequently approaches the person concerned lawfully. Furthermore, it is the DCO’s perception that – similarly to “tell-a-friend services” - is legal to use “friend-to-friend solicitation” if the trader does not reward his customer for soliciting a new customer but perhaps only rewards the new customer.

#### ***What approaches are covered by section 6 of the Danish Marketing Practices Act***

Section 6 of the Danish Marketing Practices Act covers approaches “*with a view to the sale of products, real property, other property etc.*” This means that it is prohibited to distribute specific offers on products or services.

However, commercial communications which do not mention specific products or offers are also covered by section 6 of the Danish Marketing Practices Act if their object is to sell the trader’s products eventually. See case U.2007.2905H in which an e-business was convicted of forwarding invitations by email to a computer fair with free access. Except from the company’s name, no information about specific products or the trader’s company was mentioned in the email – but the invitation also contained the names of manufacturers who were to exhibit products at the fair. The Supreme Court stated the following reasons for the decision: “*[The trader] who sells computer equipment was also the organiser of the fair where a number of businesses exhibited products which to a certain extent were distributed by [the trader]. Definitely, in these circumstances, the Supreme Court agrees that the email was forwarded to the customers concerned with a view to the sale of products etc.*”

It is the DCO’s perception that actual “branding” of the trader’s name is covered by the ban as the branding is conducted with a view to sell products. For example the DCO has stated that a company’s forwarding of electronic Christmas cards to the company’s customers indicated general promotion contrary to section 6 of the Danish Marketing Practices Act (Case No 08/06749). There may be cases in which the forwarding of a Christmas card would not imply violation of section 6 of the Danish Marketing Practices Act, for example if a trader who has ongoing customer relations with another trader, and as a gesture, sends an ordinary Christmas card to the customer which he

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<sup>5</sup> See U2002.2227 SH, mentioned above in the paragraph “Use of non-traders in advertising”

due to technological development has proceeded to sending it electronically. However, that presupposes that the Christmas card does not contain any advertisements.

#### *Participation in competitions*

Unsolicited approach with enquiry for participation in a competition is according to the DCO's perception contrary to section 6 of the Danish Marketing Practices Act as competitions usually are held to direct attention to the company's name and/or products.

#### *Newsletters*

Forwarding of newsletters by traders would usually be covered by section 6 of the Danish Marketing Practices Act as the object of the letters typically is to advertise own products or direct attention to the trader's name. See part 10 on opt-in consent in connection with news letters and part 8 on opt-out consent.

#### *Ongoing customer relations*

Approaches in connection with ongoing customer relations are covered by the provision if the object of the approach is to sell one or more products or services. Distinction between service announcement and advertising should be made. When assessing whether an approach is covered by the rule it is important to assess the amount of self-interest involved on the part of the trader in connection with a customer's dispositions. If the trader's sales of own products is in focus, it is considered advertising.

Approaches which are necessary in order to meet requirements pursuant to legislation, approaches in connection with fulfillment of a contract as well as approaches deriving from nonperformance and practical service announcements such as change of address and renewal/change of contract/policy are not covered by section 6 of the Danish Marketing Practices Act<sup>6</sup>.

According to the DCO's perception it is possible for e.g. an insurance company to approach a customer as part of an ongoing customer relationship to inform him that his policy due to changes in legislation is unacceptable. On the other hand, it is the DCO's perception that it would be contrary to section 6 of the Danish Marketing Practices Act if the company at the same time (in connection with the approach) offers alternative products or other services.

In cases where for example a product has been sold a trader may lawfully inform a former customer who still has a right to invoke lack of conformity that he has relocated to other premises, merged with another company or has a new address. However, the trader is not allowed to take the opportunity to advertise his business or products.

Furthermore, the DCO has stated that an email forwarded to a customer in connection with confirmation of an agreement concerning participation in a concert may not contain a link encouraging customers to read further about another event (Case No 09/06857). On the other hand the email may contain factual information which is of relevance to the agreement and therefore is not sent with a view to the sale of products etc.

#### *Market surveys*

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<sup>6</sup> See FT 1999-2000, Bill L213, explanatory notes, point 3.2 and reply from the Danish Minister of Justice to the Legal Affairs Committee's question 5. (*Only available in Danish*)

Actual market surveys are not covered by section 6 of the Danish Marketing Practices Act if they are not sent with a view to sell products or services but to disclose specific market conditions. If the object of the survey is to “brand” a trader or advertise the trader’s products the approach would be covered by section 6 of the Danish Marketing Practices Act<sup>7</sup>. As an example from practice it can be mentioned that the DCO did not consider an estate agent’s forwarding of a link to a survey (satisfaction survey) immediately after a real estate deal was closed as an approach with a view to sell products etc. provided that the survey did not contain encouragement to make a purchase or praising words about the estate agent (Case No 09/00787).

*Electronic member’s magazines, daily magazines etc.*

Advertisements in member’s magazines forwarded to members by an association are, as a rule, not covered by the ban<sup>8</sup>. That also applies to electronic news papers. Section 6 of the Danish Marketing Practices Act applies in case the main object of the approach is the message of the advertisement<sup>9</sup>.

*Blogging, Facebook profiles etc.*

A trader who blogs is not covered by section 6 of the Danish Marketing Practices Act. However, the trader must observe the rules in the Danish Marketing Practices Act, including the rules in section 4, according to which an advertisement should be framed in such a way that it will be clearly understood to be an advertisement.

If a trader uploads a profile on Facebook, the rules in the Danish Marketing Practices Act should likewise be observed - i.e. among other things the trader cannot reward his “friend” for notifying other friends about the profile.

*Press releases*

If a trader forwards a press release to the media with a view to obtain press coverage of his business or his products, the approach would, as a rule, not be covered by section 6 of the Danish Marketing Practices Act. On the other hand, if the press release is forwarded to potential distributors of the trader’s products, the approach would be in violation of section 6 of the Danish Marketing Practices Act if the object is to advertise products or services to the recipient.

*Purchase of products and services*

Unsolicited communication to someone with a view to *purchase* products or services would according to the wording of the provision not be covered by the rule unless communication is made with a view to sell own products or services. Communications by electronic mail to a consumer with a view to purchase products may in specific cases be contrary to section 1 of the Danish Marketing Practices Act. Unsolicited *telephone communications* to consumers with a view to purchase products or services would be in violation of section 6 of the Danish Act on Certain Consumer Contracts.

### **3: Section 6(1) of the Danish Marketing Practices Act – Ban on use of email, fax etc.**

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<sup>7</sup> For more information on the issue see the explanatory notes to section 2 of the Danish Marketing Practices Act (now section 6) on ban on unsolicited telephone communication for marketing purposes, cf. FT 1977/78, schedule A, page 744-745

<sup>8</sup> Reply from the Danish Minister of Justice to the Legal Affairs Committee’s question 2 (FT 1999-2000 Bill L213). (Only available in Danish)

<sup>9</sup> Reply from the Danish Minister of Justice to the Legal Affairs Committee’s question 14 (FT 1999-2000 Bill L213). (Only available in Danish)

(1) A trader must not approach anyone by means of electronic mail, an automated calling system or facsimile machine with a view to the sale of products, real property, other property, labour and services unless the party concerned has requested him to do so.

***What communication techniques are covered by the ban?***

There is a ban on distribution of unsolicited commercial communication by means of electronic mail, automated calling systems and fax.

“*Electronic mail*” implies any approach in the form of a text, voice mail, sound or picture forwarded via a public telecommunications network, and stored in the telephone grid or in the recipient’s terminal equipment until it can be collected by the recipient<sup>10</sup>. Thus, the ban does not only apply to emails but also to for example SMS text messages and MMS messages and can also apply to other types of mail in which picture, sound and text can be combined via Internet or mobile phones. *Automated calling systems* imply automatic transfer of calls to a phone number.

**Advertising on Facebook and other social media sites**

It can be questioned whether social media is covered by section 6(1) of the Danish Marketing Practices Act.

In order for social media to be covered by the rule it is presupposed that the trader has “*approached anyone*” by means of “*electronic mail.*”

Section 6 of the Danish Marketing Practices Act governs direct marketing. From the legislative material to the provision it appears that direct marketing implies that the trader approaches one or more targeted recipients, a targeted postal address, a targeted phone number or the like. This requirement should be considered met as approach is made to a targeted addressee/profile on Facebook.

Advertisements on Facebook, both changing advertisements in the right side of the wall, advertisements on the wall and in the inbox are considered covered by the definition of electronic mail as they are stored on a webserver on the Internet until collected by the recipient.

It is the DCO’s initial perception that changing advertisements in the right side of the wall cannot with adequate security be considered covered by section 6(1) of the Danish Marketing Practices Act as the advertisements in the circumstances should be considered as banners and as part of the medium just as they according to an teleological interpretation cannot be considered covered by the ban in section 6(1) of the Danish Marketing Practices Act.

On the other hand, advertisements on the wall – i.e. that part of the wall the owner of the Facebook profile uses to communicate with his friends – are in the DCO’s opinion covered by the provision. The same undoubtedly applies to commercial communications forwarded to the inbox. This means that traders are not allowed to forward unsolicited advertisements to a wall.

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<sup>10</sup> See the definition in Directive 2002/58/EF, article 2, litra h.

In a specific case, the DCO has stated that rewarding a person for using a Facebook icon<sup>11</sup> on for example a website and subsequently sharing information with friends via his own wall is contrary to section 6(1) of the Danish Marketing Practices Act if the message contains advertisements. This is due to the fact that the message which is posted on the wall is automatically sent to the profile owner's friends and appears on the page which contains news. This corresponds to the "tell-a-friend services".

***Who is safeguarded by the ban on unsolicited commercial communication?***

A trader must not approach *anyone* by means of electronic mail, an automated calling system or facsimile machine. This means that every recipient is protected whether a trader, consumer or a public authority and regardless of whether it is a natural or legal person.

Violation of the ban in section 6(1) of the Danish Marketing Practices Act is punishable by fine. In case I U2005.790 H the Danish Maritime and Commercial Court stated that in connection with assessing whether section 6(1) was violated or not it was of no importance whether the message was received by the recipients it was sent to, cf. the wording in the provision "approach"<sup>12</sup>.

**Previous request to receive commercial communications by means of email, fax etc.**

The ban does not apply if the recipient has requested that the trader sends commercial communications by means of email etc. The same applies if the trader has obtained the recipient's consent to distribute commercial communications in such a way. For further information on how to obtain consent and what requirements should be met in order to obtain consent please see part 10. Every time the trader makes use of consent he should inform the recipient of the possibility to withdraw the consent. For further information see part 8.

**4: Section 6(2) – Exemption from the ban on unsolicited commercial communication by electronic mail**

*(2) Notwithstanding subsection (1), a trader that has received a customer's electronic contact details in connection with the sale of products or services may market his own similar products or services to that customer by electronic mail, provided that the customer has the option, free of charge and in an easy manner, of declining this both when giving his contact details to the trader and in the event of subsequent communications.*

The exemption from section 6(1) of the Danish Marketing Practices Act enables traders to send commercial communications by electronic mail (email, SMS text messages, MMS messages etc.)<sup>13</sup> to a former customer, even though the customer has not given his consent<sup>14</sup>.

An example could be: A customer purchases a blouse in a web-shop. In connection with the purchase she states her email address in order to receive information about the right of withdrawal etc. When stating her email address clear and unambiguous information appears and she is informed that her email address will be used to send to her commercial communications regarding other

<sup>11</sup> An icon could for example be the "I Like" application.

<sup>12</sup> The Supreme Court did not decide on this matter, as the decision only was appealed claiming mitigation.

<sup>13</sup> Cf. Act No 450 of 10 June 2003 to amend the Act on Competition and Customer Matters on the Telecommunications Market with further Acts. (Implementation of EU's framework for electronic communications services "The 1999 Communications Review"). The exemption was implemented with effect from 25 July 2003.

<sup>14</sup> For further information on the requirements concerning consent to receive marketing material please see part 10.

equivalent products by email, unless she declines. At the same time she gets the option to “tick off an acceptance box” or in another easy manner decline further such communications. If she does not decline commercial communications from the trader in that connection, she has accepted that the trader sends commercial communications for blouses and other clothing to her by email. However, the trader should give her the possibility, free of charge and in an easy manner, of declining commercial communication in every subsequent email.

The following requirements should be met in order for the trader to be able to send commercial communications by electronic mail without consent:

1. The recipient of commercial communications must *previously have purchased* a product or service from the trader. Addresses stated in connection with receipt of a free gift, free consultancy, participation in competitions or the like cannot form the basis for commercial communications by electronic mail pursuant to subsection 2. In such cases the trader should obtain consent (see part 10). That the customer makes use of the right of withdrawal does not mean that the trader cannot send commercial communications any longer. In that case the customer should make use of the option to decline any subsequent commercial communication.
2. The recipient of commercial communications must in connection with the purchase independently have stated his electronic address i.e. email address or phone number (in order to receive SMS text messages and MMS messages). Thus, the trader is not allowed to use electronic addresses which have been stated by others or which the trader has obtained lawfully for other marketing purposes.
3. The recipient of commercial communication *must in connection with the purchase clearly and unambiguously have been informed that the electronic address could possibly be used for commercial purposes.*
4. When giving his contact information, the recipient of commercial communication should be informed clearly and unambiguously that he has an option to decline such communication free of charge and in an easy manner. Thus, the recipient should have the option to decline commercial communication by electronic mail right away. Therefore, agreeing to receive marketing materials by electronic mail must not be set as a precondition for entering a contract.
5. If the customer does not decline commercial communication when stating an address he or she *should be informed of the option of declining subsequent communication every time he or she receives commercial communication by electronic mail.* The customer should get the option of declining commercial communication free of charge and in an easy manner. If commercial communication is distributed by email the recipient should have the option to decline such communication by means of a link which should appear in every email. If commercial communication is distributed by SMS text messages the recipient should get the option to decline such communication by means of a SMS text message or via the trader’s website.

6. The exemption only opens up for the possibility of distributing commercial communication by electronic mail – not by facsimile machines, automated calling systems, telephone calls, letters etc.
7. The trader may only advertise his *own* products or services. The customer’s electronic mail address may not be used to advertise other traders’ products or services. In that connection it is decisive whether the person in question is a legal person. For example, a subsidiary of the trader, which the customer has purchased products from, may not use the electronic address to distribute commercial communication. Furthermore, the trader, which the customer has purchased products from, may not advertise the subsidiary’s products.
8. Products or services advertised for by the trader must be *equivalent to the products or services the customer previously has purchased from the trader*. However, the expression equivalent products or services should not be understood as identical products or services – but equivalent product groups.

Below examples are listed of what in the DCO’s opinion would be or would not be allowed:

- If the customer has purchased a pair of pants, the trader may advertise other clothing<sup>15</sup>.
- If the customer has purchased a CD, the trader may advertise music (notwithstanding whether it is on a CD, DVD or MP3), but he may not advertise a CD player.
- If the customer has purchased toys, the trader may advertise other toys, but he may not advertise other products for children.

The exemption from the general ban on unsolicited distribution of commercial communication by electronic mail applies even if the customer at the time when he stated his electronic mail address was registered to the Robinson List prepared by the CPR

The exemption in section 6(2) of the Danish Marketing Practices Act applies to all customers notwithstanding whether the customer is a consumer, trader, or public authority and notwithstanding whether the customer is a natural or legal person.

#### **5: Section 6(3) of the Danish Marketing Practices Act – Other means of direct communication**

*(3) A trader must not approach a specific natural person using other means of remote communication with a view to sales as referred to in subsection (1) if the person concerned has declined such communications from the trader, if it may be seen from a list prepared each quarter by the Central Office of Personal Registration (CPR) that the person concerned has declined communications for such marketing purposes, or if the trader, by consulting the CPR, has become aware that the person concerned has declined such communications. Telephone communications are also subject to the regulations governing unsolicited communications in the Act on Certain Consumer Agreements.*

#### **“Other means of remote communication”**

<sup>15</sup> The example comes from the legislative material which also states that if the customer has bought a suitcase the trader may not advertise shoes.

Subsection 3 covers *other direct means of communication* than electronic mail etc. as mentioned in subsection 1. Direct means of communication implies that the trader's commercial communication is sent to a targeted person whether it is a targeted name, address, phone number or the like. That implies that addressed letters or addressed marketing material is covered by the provision. Telephone communications to traders is also covered by the provision. Telephone communications are covered when it in exceptional cases pursuant to the Danish Act on Certain Consumer Contracts is lawful to approach consumers unsolicited by telephone. Envelope content i.e. enclosed advertisements in an envelope containing a statement of account are also covered by the provision. However, unaddressed mail, advertising flyers, TV ads and the like distributed to an undetermined number of possible purchasers are not covered by the provision<sup>16</sup>.

Advertisements in newspapers, member's magazines etc. which are sent or distributed to members would not be covered by the provision unless the advertisement is considered the main objective of the approach or otherwise it is an independent element<sup>17</sup>.

Advertisements inserted in newspapers which are distributed free of charge are not covered by section 6 of the Danish Marketing Practices Act. Instead they are governed by the DCO's guidelines on unaddressed mail. For further information please see: <http://www.forbrugerombudsmanden.dk/Love-og-regulering/Retningslinjer-og-vejledninger/Markedsfoeringsloven/retningslinjeadresseloseforsend> (*Only available in Danish*)

The provision in section 6(3) only safeguards natural persons, i.e. consumers and traders. A trader in this context is understood as a natural person in his or her capacity as a self-employed businessman or businesswoman. However, legal persons such as private and public limited companies and public authorities are not protected by the provision<sup>18</sup>.

***If a person has declined direct commercial communication by other means of remote communication***

As a rule a trader is allowed to send letters and addressed marketing material unsolicited to natural persons, cf. section 6(3), per contra.

However, natural persons can decline direct commercial communications from the trader. This can be done either by informing the trader or signing up to the CPR list<sup>19</sup>. The CPR prepares a list of persons who have declined such communications each quarter. The list is also known as the "Robinson List".

A trader who distributes advertisements by means of letters or other addressed marketing material to a person who has declined such communications from the trader or to a person registered to the Robinson List is punishable by fine.

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<sup>16</sup> See FT 1999-2000, Bill L213, general explanatory notes, part 3.2.2, and specific explanatory notes to section 2 the Danish Act on Certain Consumer Contracts as well as the reply from the Danish Minister of Justice to the Legal Affairs Committee's question 2. (*Only available in Danish*)

<sup>17</sup> Reply from the Danish Minister of Justice to the Legal Affairs Committee's question 2 (FT 199-2000, Bill L213 ) (*Only available in Danish*)

<sup>18</sup> Furthermore, legal entities can legally protect business against unsolicited advertising pursuant to section 19 of Consolidation Act No 653 of 15 June 2006 on the Central Business Register (CVR), for further information please see [www.cvr.dk](http://www.cvr.dk).

<sup>19</sup> CPR stands for the Central Office of Civil Registration.

Duty to consult the “Robinson List” (prepared by the CPR)

A trader who wishes to approach persons for marketing purposes must consult the “Robinson List”. If the person appears on the list the trader is banned from unsolicited distribution of commercial communications to the person in question.

Even if a person does not appear on the list because it is prepared each quarter, a trader who continuously compares his mailing list to the CPR and realizes that the person has declined commercial communications must comply with this.

The list can be downloaded free of charge at the website [www.cpr.dk](http://www.cpr.dk). The required password can be obtained from the CPR’s customer service. As an alternative to the Robinson List it is possible for businesses to look up persons via the CPR search product “CPRSøg” or continuously update their customer files via CPR’s products “Personnummerudtræk” or “Adressematch”.

Registration in the CPR implies that the trader is not allowed to pass on information about the person concerned for marketing purposes. Rules on passing on information for marketing purposes are covered in the Danish Act on Processing of Personal Data. The rules are briefly mentioned in part 10.

Telephone communications

Section 6 of the Danish Act on Certain Consumer Contracts sets out that a trader, with a few exemptions, may not communicate by telephone with a consumer at his residence or workplace or another place to which there is no public access with a view to obtaining an offer to conclude a contract<sup>20</sup>. The ban does not apply to the sale of books and subscriptions for newspapers, weekly magazines and periodicals as well as insurance contracts. Furthermore, some traders are allowed to sell subscriptions for rescue services and ambulance transport.

In cases where the trader pursuant to the Danish Act on Certain Consumer Contracts Act is exempted from the ban on unsolicited telephone communications, the trader must prior to his approach consult the Robinson List in order to check whether the person concerned has declined such communications. If the consumer is registered to the Robinson List, the trader is not allowed to contact the consumer by telephone.

Approach as part of current customer relations

Section 6(3) also applies to current customer relations. This means that traders who are not in possession of a specific consent are not allowed to send marketing material to consumers who are registered to the Robinson List. Furthermore, a trader may not inform the customer that his signing up to the Robinson List is of inconvenience. However, traders may send service information which is of importance to existing customer relations, cf. part 2 “*What approaches are covered by section 6 of the Danish Marketing Practices Act*” for more information.

**6: Section 6(4) of the Danish Marketing Practices Act – Request to receive direct communications**

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<sup>20</sup> The DCO has stated that communication by a mobile phone which is not always located at a place to which there is no public access would be contrary to good marketing practice, cf. section 1 of the Danish Marketing Practices Act and in the circumstances it would also be contrary to section 6 of the Danish Act on Certain Consumer Contracts if the phone is located in a place to which there is no public access – e.g. the consumer’s residence or workplace. (Case No 09/05643)

*(4) Subsection (3) does not apply if the person in question has previously requested the communication from the trader.*

A trader does not have to consult the Robinson List as described in section 6(3) if the trader has obtained consent from the recipient of the commercial communications. For further information on the requirements to obtaining consent, please see part 10.

### **7: Section 6(5) of the Danish Marketing Practices Act – Information on the option to decline communications**

*(5) The first time a trader makes a communication as referred to in subsection (3) with a specific natural person who is not on the CPR list, the trader shall inform him clearly and comprehensibly of his right to decline communications from the trader as referred to in subsection (3). At the same time, the person concerned shall be offered an easy manner of declining such communications.*

The first time a trader approaches a natural person who is not on the Robinson List, the trader must inform him clearly and comprehensibly of his right to decline communications from the trader as the Robinson List is only prepared four times a year (each quarter). At the same time, the trader must give the person concerned an option to decline such communications free of charge and in an easy manner.

According to the explanatory notes to the Danish Marketing Practices Act, the above information on the right to decline commercial communications should be emphasized and drawn up in such a way that it is not difficult to acquire. It is *not* sufficient if information only appears in the trader's terms of business which are given to the recipient.

The trader must give the person concerned an option to decline direct commercial communications free of charge and in an easy manner. According to the explanatory notes this can be done by enclosing a coupon which the recipient can mark off and return if he does not wish to receive marketing material from the trader. However, it cannot be required that the trader encloses a stamped envelope. It is the DCO's perception that the requirement in most cases can be met more expediently if the person concerned is informed of the option to decline communications via the trader's website, a specific email address or a specific phone number where requests are received and registered.

### **8: Section 6(6) of the Danish Marketing Practices Act – No payment for revoking consent or declining communication**

*(6) No payment may be requested for receiving or noting information to the effect that a request under subsection (1) is being revoked or that communications as referred to in subsection (3) are being declined.*

The trader may not request payment for receiving, handling, noting or complying with a request about revocation of consent pursuant to section 6(1) of the Danish Marketing Practices Act. The same applies if a natural person declines commercial communications pursuant to section 6(3) of the Danish Marketing Practices Act. The same also applies to commercial communications pursuant to subsection 2 of the Danish Marketing Practices Act. In a specific case the DCO has stated that a

trader cannot cancel a guarantee which was given as a reward for consent to receiving a newsletter (Case No 08/05752).

Section 6(6) of the Danish Marketing Practices Act is based on the assumption that it is possible to revoke consent. Therefore, every time a trader makes use of consent in order to send marketing material he must give the recipient an option to revoke the consent. In that connection please see the Nordic Ombudsmen's position on internet commerce and marketing in which it is stated that "any electronic advertising should contain instructions on how to refuse future advertising easily and free of charge. The opt-out system should be designed in such a way that anyone who uses it will receive a confirmation.

Furthermore, the DCO has impressed on a trader that an opt-out system by means of a link should function optimally. In case of the contrary it would be a violation of section 1 of the Danish Marketing Practices Act (Case No 08/04742).

### **9: Section 6(7) of the Danish Marketing Practices Act – Administrative rules**

*(7) The Minister for Economic and Business Affairs may lay down more detailed regulations governing the trader's duty to provide information under subsection (5) and duty to offer an opportunity to decline communications as referred to in subsection (3).*

The authority has not been used.

### **10: Consent to receive marketing material by email, fax, letter etc.**

A trader may lawfully send marketing material by email etc., cf. subsection 1, if consent has previously been obtained. Likewise, a trader can lawfully send marketing material by letter to persons registered to the Robinson List, cf. subsection 3, if the person has requested such communications.

Prior consent is not only concerned in cases where the recipient on his own initiative requests commercial communications but also in cases where the trader has obtained the recipient's consent<sup>21,22</sup>.

#### *How to obtain consent (requirement on previous consent)*

Consent must be obtained legally. It appears from section 6 that consent must be obtained prior to the communications taking place. This implies that the trader is not allowed to send an email or fax to the recipient or contact him by telephone in order to obtain consent to send commercial communications by email, fax or the like. If a person is registered to the Robinson List, the trader is prohibited from sending commercial communications by addressed letter<sup>23</sup>. This also applies to

<sup>21</sup> See FT 199-200, Bill L213, explanatory notes to section 6 of the Bill (section 6 of the Danish Marketing Practices Act)

<sup>22</sup> Consent is defined in Directive 2002/58/EC, article 2, litra f which refers to Directive 95/46/EC, article 2, litra h which states that consent means any freely given specific and informed indication of the consumer's wishes by which the data subject signifies his agreement to personal data relating to him being processed.

<sup>23</sup> Furthermore, see FT 1999-2000, Bill L213, explanatory notes to section 2 of the Bill (section 6 of the Danish Marketing Practices Act) where in connection with previous request reference is made to practice concerning section 2

current customer relations. In connection with current customer relations, the DCO has stated that the trader is not allowed to inform his customer that his registration to the Robinson List is of inconvenience. However, it is possible for traders by means of websites, door-to-door distributed marketing material (if there is no do-not-deliver registry as mentioned in part 1) or advertisements on the radio or TV to encourage consumers to give their consent.

Consent *cannot* be obtained by means of *implied or passive acceptance* – for example if the trader states that the recipient will receive an email unless he declines.

Consent or acceptance should be obtained from the person who is going to be the recipient of the marketing material. Thus, a person cannot give consent on behalf of someone else unless the other party has authorised him to give consent<sup>24</sup>.

#### *Documentation*

The trader has the burden of proof in case a recipient claims that he has not given consent to receiving commercial communications from the trader. Therefore, it is in the businesses own interest to keep documentation in connection with the consent in the period the consent is used. In principle documentation should be kept until liability is withdrawn two years after the consent has been used for the last time. In the end it will be up to the courts to decide whether the trader has made probable that consent was obtained and that it meets the requirements in the Danish Marketing Practices Act as mentioned below.

In order to avoid misunderstandings it is a good idea for the trader to use a double opt-out model. For example the person who gives consent to receive marketing material by electronic mail can subsequently receive an email from the trader in order to confirm the registration. Consent is not given until a link in the email has been activated.

#### *Informed and explicated consent*

From the legislative material to section 6 it appears that consent must be “*informed*” and “*explicated*.” *Informed* consent implies that the customer must be aware that he is giving his consent to receive marketing material. For example, it is not sufficient that consent only appears from the trader’s standard terms. In such cases it must be clearly emphasized that he has given such consent.

Pre-ticked acceptance in orders, contracts and the like from which it appears that the customer gives consent to receive marketing material would usually not meet the requirements in the Danish Marketing Practices Act concerning informed consent.

Explicated consent implies that it appears clearly and unambiguously what consent is given to. Consent can be defined rather broadly. In the financial sector consent can be given with reference to receiving information on “new or improved deposit opportunities, new or improved pension schemes” etc. Likewise, it would be possible to obtain consent to send marketing material concerning children’s clothes, living room furniture, garden furniture, car insurances etc.

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(now section 6) of the Danish Act on Certain Consumer Contracts and the reply from the Danish Minister of Justice to the Legal Affairs Committee’s question 5.

<sup>24</sup> See case UFR 2001.175V in which a son-in-law requested that a banker paid a visit to his parents-in-law. The subsequent communication with the parents-in-law was contrary to section 6 of the Danish Act on Certain Consumer Contracts, and the contract entered into at the meeting was void.

Explication can be in form of a link to a website or a list from which it appears what consent is given to. The link must appear in the same media which is used to obtain consent. Thus, if consent is obtained via a physical document it is not sufficient to refer to a website where the consent can be explicated (Case No 10/01549).

It appears from legal practice that the courts undertake a specific assessment as to whether consent to direct marketing has been given and whether it is explicated to a sufficient extent.

As an example the Danish Maritime and Commercial Court's decision reproduced in U 2002.2277/S can be mentioned. A telephone company stated in the application form below the subscribers signature: "With my signature I give permission to [the telephone company] to analyze how I use my mobile phone in order for me to receive specific information and marketing material concerning telephone services from [the telephone company]. Below an acceptance box with the text "No I do not give my permission to [the telephone company]" which could be ticked off was placed. Based on a general assessment the Danish Maritime and Commercial Court found that the placement of the statement of consent and its layout compared to the rest of the application form did not meet the requirements to an informed and explicated consent pursuant to section 6 of the Danish Marketing Practices Act as the section was not accentuated and as it was not clear what consent was given to.

*It must appear what type of communication consent should apply to*

Because it is varying how aggressive different types of communication are perceived, which also appears from the judicial regulation of the different types of communication, it is the DCO's perception that it must appear what type of communication consent is given to. This implies that the trader in connection with obtainment of consent must inform the consumer whether he has given consent to receive marketing material by fax, email, SMS text message or letter. If the trader wishes to obtain consent in order to approach the consumer by telephone it must appear clearly and unambiguously that the consumer requests such telephone communications<sup>25</sup>. A case can be mentioned in which a clothing company had to pay a fine of DKK 100,000 because the company approached consumers by telephone and a recorded marketing voice was delivered, even though consent was only given to the company to "send" further information about Madonna's clothing line (Case No 08/01376).

*Consent to receive marketing materials from bonus and member's clubs*

If a consumer is a member of a member's club whose object is to obtain discounts on products or services for consumers purchased from other traders, it is the DCO's perception that the bonus club does not have to enumerate – when obtaining consent for a newsletter - what traders the consumer can expect to receive marketing material from. Likewise, it is not necessary to obtain new consent each time a new trader is included in the discount scheme.

*Can consent be surrendered*

Usually, consent will be granted to a specific trader i.e. the trader who has obtained the consent. If consent is given to a specific, named trader it cannot be surrendered to another trader for marketing purposes, unless the trader has taken over the business concerned, and only markets himself within the scope of the consent. Thus, a business can succeed the right to use consent from another

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<sup>25</sup> Cf. FT 1977-78, Schedule A, p. 774

business, if the business's assets and liabilities are taken over. However, in the DCO's opinion a business cannot use a customer consent record purchased from an estate in liquidation, if the business in addition has not taken over the bankrupt business's assets and liabilities.

However, the wording of section 6(3) of the Danish Marketing Practices Act does not exclude that consent can be general, and thus be given to a trader who passes on requests for direct commercial communications within specific areas to other traders, cf. Case No 2002/1282 S, where persons specifically gave consent to an "info bank", a bank providing data on consumers and consumer profiling tools, to pass on their names and addresses to businesses who wished to advertise their offers within specific areas of interest. It was the court's opinion that the layout of the application form including the acceptance box and signature in particular ensured that the consumer's consent was sufficiently informed and explicated.

#### *Purchase of advertising databases for marketing purposes*

If a trader purchases or takes over a customer consent record with the purpose of distributing marketing material by electronic mail – within the scope of the law - it is the trader's responsibility to ensure that the addressees have given their consent to receive such marketing material. Therefore, the trader should ask for a statement from the seller stating how consent has been obtained and make proper random checks to assess whether consent has been obtained legally. If marketing material is distributed by electronic mail to someone who has not given informed and explicated consent, it is for the court to decide whether the trader has acted negligently i.e. whether the trader has conducted the necessary assessment of whether consent has been obtained legally. If that is not the case the trader is punishable for violation of section 6 of the Danish Marketing Practices.

#### *Requirements in the Danish Act on Processing of Personal Data on processing information about private persons for marketing purposes*

As a rule a trader may *not* process information about private persons for marketing purposes, unless the person concerned has given his explicit consent. The same applies if the trader uses the information for marketing purposes on behalf of another trader. Consent should be obtained in accordance with the rules laid down in section 6 of the Danish Marketing Act. Please see section 6(2) of the Danish Act on Processing of Personal Data.

Where general information about customers is used, this data may be processed without consent<sup>26</sup>. General information on customers include name, address, sex, age, whether he customer is a car owner or a house owner etc. However, information about consumption habits or private affairs cannot be processed without the customer's consent.

Before a trader discloses general data concerning a consumer, he must check in the CPR whether the consumer has filed a statement to the effect that he does not want to be contacted for the purpose of marketing activities. Before data relating to a consumer who has not given such information to the CPR or who has not declined such communications from the trader are disclosed the company should give the consumer access to object in a simple manner within a period of two weeks. Please see section 36 of the Danish Act on Processing of Personal Data.

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<sup>26</sup> However, section 6(1)(vii) of the Danish Act on Processing of Personal Data must be observed.

The Danish Data Protection Agency monitors compliance with the processing of data to which the act applies. Information on decisions etc. and guidance paper on the rights of registered persons can be accessed at [www.datatilsynet.dk](http://www.datatilsynet.dk).

That information can be processed for marketing purposes pursuant to the Danish Act on Processing of Personal Data does not necessarily mean that information can be used for marketing purposes. For example consent is required in connection with distribution of marketing material by electronic mail. If a person has not objected to the processing of his email address it does not mean that he has given his consent.

#### *Expiration*

Consent expires when it is revoked. No specific formal requirements may be made to the revocation of the consent. However, the trader should give the consumer option to revoke consent in an easy manner. Please see part 8.

Consent should be revoked by informing the person who has obtained the consent unless it was clearly stated at the time consent was given that consent would be surrendered to a specific trader.

Consent to receive newsletters does not lapse only because the customer relations are terminated. In that case consent must also be revoked.

Furthermore, it is the DCO's perception that consent can be lapsed pursuant to the principle on passiveness if the trader has not made use of the consent for a longer period of time. A longer period of time is considered as one year.

#### *Reward for consent – participation in competitions*

In the DCO's opinion there is nothing wrong with rewarding a person with a gift certificate or the like for giving consent to receive marketing material<sup>27</sup>. However, it must be possible to revoke consent immediately after it has been given without withdrawal of the reward, cf. section 6 of the Danish Marketing Practices Act.

Furthermore, it is not unusual that a trader offers participation in a competition to consumers who give their consent to receive marketing material. In the previously mentioned case referred to in 2002/1285 SH, the Danish Maritime and Commercial Court decided on whether it was contrary to good marketing practice to reward persons who gave consent to receive marketing material to an "info bank". The layout of the material was made in such a way that it only concerned consent for marketing purposes. The layout consisted of two double pages where consumers could inform and explicate their interests for receiving marketing material for specific product lines. The accompanying letter stated that it was possible to win a trip worth DKK 25,000 if they entered within a specific time limit. The Danish Maritime and Commercial Court stated that the competition due to the layout and the modest amount of prize money was not contrary to good marketing practice.

Thus, rewards can be contrary to good marketing practice if the reward or the winning chances are large and if focus is turned away from the fact that consent is given.

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<sup>27</sup> Also see case UFR 1998.83H where the Supreme Court based on a case-by-case assessment of the facts of the case found that offering presents valued between DKK 300 and DKK 500 to consumers who requested a visit from a HNG sales consultant was not contrary to good marketing practice.

It has become common to offer competitions where the competition itself is the principal service and where it appears less clearly that the condition of participation is consent to receive marketing material. As an example a Christmas competition can be mentioned where it did not appear clearly that by participating the participant gave his consent to receive marketing material. On the front page where information on the competition appeared an acceptance box which was to be ticked off was placed. From the text related to the acceptance box it appeared that the participant had read the general stipulations. From the general stipulations it appeared that the participant gave consent to receive a newsletter from the traders who sponsored the competition. The consent was neither informed nor explicated, and therefore it could not be used for marketing purposes.

Even though consent is informed and explicated it is doubtful whether such a free service can be based on the condition that consent to receive marketing material is given. In all circumstances, when combining obtainment of consent with rewards, it must be required by the trader emphasizes that he emphasises the fact that by participating in a competition the consumer gives his consent to receive marketing material<sup>28</sup>. Consent can be revoked immediately after participation in the competition.

#### *Consent to receive marketing material via Bluetooth*

Notwithstanding which technology is used to obtain consent, the requirements stating that consent must be informed and explicated must be met. The DCO has stated that a concert hall could obtain consent via Bluetooth when a consumer located in a specifically defined area (a building) activated his Bluetooth – and thereby actively acknowledged that he wished to be contacted. However, it is a precondition that it is clearly displayed that consumers who activate their Bluetooth will be contacted and that it is explicated what the commercial communications will concern. Last but not least the trader must ensure that the consumer is not contacted if his Bluetooth is active before he enters the area concerned (Case No 09/05736).

In another case) presented to the DCO (Case No 10/00727) a shopping center wanted to distribute electronic marketing material via Bluetooth to customers inside the center. The trader wanted to state this clearly by means of a display in the entrance to the shopping center, in advertising flyers etc. The DCO stated that consent would not be sufficiently informed as it could not be made sure that a customer who was already inside the shopping center in order to shop and was lost in thought or was engaged in a conversation with someone else would notice the display.

In Norway the Norwegian Consumer Ombudsman accepts that consent to receive marketing material via Bluetooth in shopping centers can be obtained by going to “a base station” in the shopping center and acknowledging that you wish to receive marketing material via Bluetooth by holding the mobile phone in front of “the base station”. It is the DCO perception that consent also can be obtained in such a way in Denmark provided that the consumer at the time of registration at the latest is informed of what he has given consent to (requirement concerning explication).

#### *Agreeing to receive marketing material as a precondition for entering a contract*

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<sup>28</sup> For example, see the Danish Consumer Complaints Board’s decision in Case No 2004-432/7-4, in a case where participating in a competition, a married couple gave consent to receive telephone communications from the trader. The Complaints Board found that the consent did not meet the requirement in the Danish Act on Certain Consumer Contracts concerning informed and explicated consent.

In the DCO's opinion agreeing to receive marketing materials must not be set as a precondition for entering a contract. Reference is made to point 2.3.2.2 in the Nordic Ombudsmen's Position on Internet Commerce and Marketing.

It is noted that the recipient can revoke consent at any time. Therefore, such a precondition is not practicable.

#### *Minor's consent*

Parents of children and young people can request commercial communications by electronic mail on their behalf. When parents have given consent to receive marketing material by electronic mail and the like, and when such communications subsequently are sent to children or young people, the DCO's guideline "Children, Young People and Marketing Practices"<sup>29</sup> should be complied with.

#### **11: The DCO's enforcement of section 6 of the Danish Marketing Practices Act**

The DCO uses a fine calculation model when calculating fines in connection with violation of section 6(1) of the Danish Marketing Practices Act. The fine calculation model is approved by the Danish Parliament by Act No 1389 of 21 December 2005 on marketing<sup>30</sup> and has subsequently been applied by the courts.

According to the fine calculation model a fine of DKK 10,000 (€ 1,500) is given for violation of section 6 of the Danish Marketing Practices Act for distribution of up to 100 emails, SMS text messages, faxes etc. If more than 100 emails, SMS text messages, faxes etc. are distributed a fine of DKK 100 is given for each instance of violation. (E.g. DKK 14,000 for 14,000 unsolicited emails). However, the fine will always be based on a specific assessment of the particulars of case. The fine level may be deviated from depending on whether mitigating or aggravating circumstances exist.

Violation of section 6(3) of the Danish Marketing Practices Act will result in a fine of DKK 5,000 (€ 750) per letter sent to a person who has declined such commercial communications by signing up to the Robinson List. However, it must be noted that practice is sparse, and that it only concerns cases where one or two letters have been sent.

#### *Complaints procedure*

The DCO has created two spam mailboxes to which we kindly ask you to forward your complaint. Please forward complaints concerning spam from Danish spammers to [dansk@spamklage.dk](mailto:dansk@spamklage.dk) and complaints concerning foreign spam to [int@spamklage.dk](mailto:int@spamklage.dk). This procedure also applies to unsolicited commercial communication received by facsimile machines (fax).

When having sent your complaint to one of the above email addresses, you will receive an auto reply in Danish with a link to a questionnaire. We kindly ask you to fill in the questionnaire, which contains questions - in Danish - about the spam you have forwarded. If you do not understand the questions, you can forward the complaint to [consumerombudsman@kfst.dk](mailto:consumerombudsman@kfst.dk)

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<sup>29</sup> The guidance paper is available at <http://www.consumerombudsman.dk/Regulatory-framework/Danish-Marketing-Practices-Act>

<sup>30</sup> According to the report from the Committee on Business and Commerce of 8 December 2005 concerning Bill on Marketing the calculation model applies notwithstanding the Supreme Court's judgment of 22 September 2005 (Case No U2005.3446).



As for addressed letters and unsolicited communications by telephone, please send your complaint to [consumerombudsman@kfst.dk](mailto:consumerombudsman@kfst.dk) or to:

Forbrugerombudsmanden/  
The Danish Consumer Ombudsman  
Amagerfælledvej 56  
2300 København S

For more details about the filing process please visit the DCO's English website [www.consumerombudsman.dk](http://www.consumerombudsman.dk).

Currently, the DCO receives many complaints via the spam mailboxes. The majority of the complaints concerns cross border spam. Unfortunately, so far the DCO has only been able to do very little in relation to foreign unsolicited e-marketing messages. However, as the fight against spam becomes increasingly more effective through international enforcement co-operation, the DCO will be better equipped to track down foreign spammers. The DCO is actively involved in several international cross border spam enforcement and investigation networks, including London Action Plan, OECD, the EU and ICPEN<sup>31</sup>.

#### *Cross border advertising*

Danish businesses marketing themselves in Denmark should observe section 6 of the Danish Marketing Practices Act on unsolicited commercial communication to targeted recipients. The same applies for foreign businesses marketing themselves in Denmark<sup>32</sup>. Danish businesses marketing themselves in other EU countries should observe legislation on unsolicited commercial communication in the country concerned.

The DCO does not know of the rules in other EU countries but we can inform you that the rules are based on EU directives<sup>33</sup> that safeguard natural persons (both consumers and traders). According to these directives it is prohibited to send commercial communication by using an automated calling system or fax to natural persons. Furthermore, it is prohibited to send unsolicited commercial communication by means of email. However, email is subject to an exemption set out in section 6(2) of the Danish Marketing Practices Act. As regards other means of long distance communication it is up to each member state to decide whether unsolicited communication should be banned or whether such approach should be allowed unless the person has declined such communication.

#### *Advance indications*

In case any doubt occurs as to whether a contemplated marketing activity is in compliance with section 6 of the Danish Marketing Practices Act, traders may request that the DCO issues an

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<sup>31</sup> The International Consumer Protection and Enforcement Network (ICPEN) is an organization composed of consumer protection authorities from 38 countries including the Nordic countries, USA, Canada, Australia and most European countries.

<sup>32</sup> The Danish E-commerce Act does not apply to unsolicited commercial communication by means of electronic mail.

<sup>33</sup> Directive 97/7/EC of 20 May 1997 on distance contracts, Directive 97/66/EC of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, Directive 2002/65/EC of 23 September 2002 concerning the distance marketing of consumer financial services and Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.



advance indication on the legality of the marketing activity free of charge. For more information about advance indications, please visit [www.forbrugerombudsmanden.dk](http://www.forbrugerombudsmanden.dk) (information only available in Danish).