

The Danish Consumer Ombudsman's
guidance paper on section 6¹ of the
Danish Marketing Practices Act
**Unsolicited communications with
specific customers**

2013

¹ Consolidating Act no. 58 of 20 January 2012.

The Danish Consumer Ombudsman's guidance paper on section 6 of the Danish Marketing Practices Act

The Danish Consumer Ombudsman

Carl Jacobsens Vej 35

DK-2500 Valby

Tlf.: +45 41 71 51 51

E-mail: forbrugerombudsmanden@kfst.dk

Online ISBN 978-87-7029-665-6

Guidance prepared by the Danish Consumer Ombudsman

December 2013

Section 1	
Section 6 of the Danish Marketing Practices Act – An overview	4
1.1 Rules supplementing section 6 of the Danish Marketing Practices Act:	5
1.2 Overview showing how traders may use unsolicited marketing communications vis-à-vis consumers, traders and public authorities with a view to selling products or services:	6
Section 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	10
2.1 The rule only covers approaches from "traders"	10
2.2 What approaches are covered by section 6 of the Danish Marketing Practices Act	13
Section 3	
Section 6(1) of the Danish Marketing Practices Act – Ban on use of email, fax etc.	17
3.1 What communication techniques are covered by the ban?	17
3.2 Advertising on Facebook and other social media sites	17
3.3 Who is safeguarded by the ban on unsolicited communications?	17
3.4 Previous request to receive communications by means of email, fax etc.	18
Section 4	
Section 6(2) – Exemption from the ban on unsolicited marketing communications by electronic mail	19
Section 5	
Section 6(3) – Other communications to specific natural persons	22
5.1 "Communications to specific natural persons using other means of remote communication"	22
5.2 Who may decline direct communications pursuant to section 6(3) of the Danish Marketing Practices Act?	23
5.3 If a person has declined direct marketing communication by other means of remote communication	23
Section 6	
Section 6(4) of the Danish Marketing Practices Act – Consent to receive direct communications	25
Section 7	
Section 6(5) of the Danish Marketing Practices Act – Information on the option to decline communications	26
Section 8	
Section 6(6) of the Danish Marketing Practices Act – No payment for revoking consent or declining communication	27
Section 9	
Section 6(7) of the Danish Marketing Practices Act – Administrative rules	28
Section 10	
Consent to receive marketing material by email, fax, letter etc.	29
Section 11	
The DCO's enforcement of section 6 of the Danish Marketing Practices Act	35

Section 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 personally addressed letters, personally addressed marketing material² or other direct marketing methods to targeted recipients, unless a recipient has declined such communications by request. Door-to-door distributed marketing material without a named addressee as well as marketing material on the Internet is not covered by the provision. Approaches 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 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 personally addressed marketing material or telephone communications, where such communication is lawful.

The provision covers marketing 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 marketing communications. That applies both when giving his contact details to the trader and in the event of subsequent communication.

Other means of direct communication

Section 6(3) of the Danish Marketing Practices Act prohibits a trader from approaching a person e.g. by means of *letters or other personally addressed mail* if the person concerned has declined such communication. Where these are lawful, telephone communications are also

² This covers marketing material addressed to a specific name and address or possibly to a specific name only.

covered by the provision. Persons may decline marketing communications either by informing the trader or by signing up to a list prepared by 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 directly and personally addressed marketing communications to persons.

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 sends marketing material by letter or other personally addressed mail, as referred to in subsection (3), to 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 marketing communications from the trader, cf. section 6(5) of the Danish Marketing Practices Act. At the same time, the trader must offer the person concerned an option to decline such communications in an easy manner.

Revocation of consent etc.

Section 6(6) of the Danish Marketing Practices stipulates that a trader may not request payment for receiving or recording 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.

1.1 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. However, the ban does not apply if the consumer has requested in advance to be contacted by telephone or to receive a visit.

Exemptions

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. The exemption does not apply if the consumer has declined direct marketing communications, for example, by signing up to the Robinson List. No exemptions, however, apply to the ban on unsolicited door-to-door selling.

Insurances

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 marketing communications, cf. section 6 of the Danish Marketing Practices Act.

Marketing communications to companies and other legal entities

As mentioned, the ban on unsolicited marketing communication by electronic mail also applies when the recipient is a company or other legal person. Generally, businesses may obtain protection against unsolicited advertising by registration to that effect with the Danish Central Business Register (CVR). If a business has advertising protection, information about the business will generally not be disclosed, unless the business receiving the information accepts in writing to respect the registration. Where basic data received from CVR is nonetheless used for marketing communications or is disclosed, the business is subject to penalty, cf. sections 19 and 22 of the Danish Act on the Central Business Register.³

Mail without a named addressee

Consumers and traders may decline receipt of unaddressed mail and mail on which an address, but no name has been provided, by registering for the opt-out schemes "No ads please" or "No ads or free newspapers please". The schemes are part of the DCO's guidelines on good marketing practice in connection with distribution of mail without a named addressee, available at www.forbrugerombudsmanden.dk. Such mail is not covered by section 6 of the Danish Marketing Practices Act. Traders who arrange for the distribution of such marketing material are thus not obliged to consult the Robinson List in order to check whether the consumer is registered, unless the recipient's name is provided on part of the marketing material.

1.2 Overview showing how traders may use unsolicited marketing communications vis-à-vis consumers, traders and public authorities with a view to selling products or services:

Methods of communication	To consumers	To traders	To public authorities
(1) Electronic mail, SMS text messages, fax, etc. Section 6(1) of the Danish Marketing Practices Act: Parts 2 and 3 of this guidance.	Banned.	Banned.	Banned.

³ Consolidating Act no. 653 of 15 June 2006 on the Central Business Register. For additional information, visit www.cvr.dk.

<p>Exemptions Section 6(2) of the Danish Marketing Practices Act Parts 4 and 10 of this guidance.</p>	<p>Subject to the satisfaction of a number of conditions, electronic advertising of own similar products and services may be sent to previous customers.</p> <p>Electronic advertising may also be sent if the recipient has expressly consented thereto.</p>	<p>Subject to the satisfaction of a number of conditions, electronic advertising of own similar products and services may be sent to previous customers.</p> <p>Electronic advertising may also be sent if the recipient has expressly consented thereto.</p>	<p>Subject to the satisfaction of a number of conditions, electronic advertising of own similar products and services may be sent to previous customers.</p> <p>Electronic advertising may also be sent if the recipient has expressly consented thereto.</p>
<p>(2) Other direct communication to a specific person or a specific telephone number, etc. The provision covers e.g. personally addressed letters.</p> <p>Section 6(3) of the Danish Marketing Practices Act Part 5 of this guidance.</p>	<p>Permitted.</p> <p>(With the exception of telephone communications, which are banned. See item (3))</p>	<p>Permitted.</p> <p>Legal entities may, however, have advertising protection through a registration with CVR. See part 1.</p>	<p>Permitted.</p> <p>(Public authorities are not covered by subsection (3))</p>
<p>Exemptions Section 6(3) of the Danish Marketing Practices Act Part 5 of this guidance.</p>	<p>Banned if the consumer has declined communications from traders, or if the person is registered on</p>	<p>Banned if a natural person trader (i.e. not a company) has declined unsolicited communica-</p>	

	the Robinson List.	tions by telephone and letter, etc. from the trader or has registered on the Robinson List.	
<p>(3) Telephone communications</p> <p>Section 6 of the Danish Act on Certain Consumer Contracts and section 6(3) of the Danish Marketing Practices Act.</p> <p>Part 1 of this guidance.</p>	Banned.	Permitted.	Permitted.
<p>Exemptions</p> <p>Section 6(2) of the Danish Act on Certain Consumer Contracts and section 6(3) of the Danish Marketing Practices Act.</p> <p>Part 1 of this guidance.</p>	<p>A few exemptions apply. Newspapers, magazines and insurances may, for example, be sold by telephone sales.</p> <p>However, the exemptions do not apply if the person is registered on the Robinson List or has declined communications from the trader.</p>	<p>Natural person traders (not companies) may decline telephone communications from other traders, cf. section 6(3) of the Danish Marketing Practices Act.</p> <p>If the trader runs his business from home, he may also be registered on the Robinson List.</p> <p>See also part 1 on advertising protection in CVR.</p>	
<p>(4) Door-to-door selling</p> <p>(Section 6 of the Danish Act on Certain Consumer Contracts and section 34 b of the</p>	Banned.	Permitted.	Permitted.

Danish Insurance Contracts Act.) Part 1 of this guidance.			
Exemptions	No exemptions.	No exemptions.	No exemptions.
(5) Mail without a named addressee The DCO's guidelines on good marketing practice in relation to distribution of mail without a named addressee. www.forbrugerombudsmanden.dk	The labels "No ads please" and "No ads or free newspapers please" on mailboxes must be respected.	The labels "No ads please" and "No ads or free newspapers please" on mailboxes must be respected.	The labels "No ads please" and "No ads or free newspapers please" on mailboxes must be respected.

Section 2

Section 6 of the Danish Marketing Practices Act – A review of the provision based on legislative material, legal practice and the DCO's practice⁴

2.1 The rule only covers approaches from "traders"⁵

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 generating profit. Likewise, it is of no importance whether the activity concerns fulltime-work or a side-line. The business activity should be of continuous character and be exercised to a certain extent.

Associations whose objects are charitable, political or religious and public utility societies are usually⁶ not considered to be 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. However, 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 interests of members – e.g. cooperative societies or homeowner's associations – are not covered by the rules to the extent that they safeguard interests 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.

⁴ The published practice is available in Danish at www.forbrugerombudsmanden.dk in the section "Sager og praksis" – "Markedsføringsloven" – "Spam mv./uanmodet henvendelse" and in the section "Nyheder". It is possible to search for cases by case numbers at the website.

⁵ See the explanatory notes to section 2 of the Danish Marketing Practices Act on what is deemed to be economic activity, cf. Bill L13 Folketingstidende (official report of parliamentary proceedings) 2005-2006.

⁶ 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 High 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", 5th edition, 2007, part 2, page 19. (Only available in Danish)

Sports associations, social clubs and other non-profit associations generally fall outside the concept of traders.

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 newsletters to members containing information on new legislation, replies, contributions to political discussions etc. which is of relevance to the membership is not covered by the provision concerning communications with a view to selling 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 may according to a case-by-case assessment be deemed to fall under the scope of the Danish Marketing Practices Act. In its judgment of 9 December 2013 (case no. 25/2012), the Supreme Court found: "Thus, the legislative material does not provide any specific information on whether the activities of a trade union fall under the scope of the Danish Marketing Practices Act. Whether or not a trade union is covered by the Act will thus be subject to an assessment of the specific activities carried on by the trade union.

Traditional core activities carried on by a trade union – making collective agreements on salaries and employment conditions for its members within a specific professional field – cannot be deemed to be activities with a commercial purpose and are thus not covered by the Danish Marketing Practices Act. The same applies to the traditional core activities of unemployment insurance funds.

However, trade unions increasingly operate in a commercial market characterised by competition between the unions and activities to win members, resulting in marketing activities. Some trade unions do not negotiate or enter into collective agreements, or do so only to a limited extent, but safeguard their members' interests by providing services in the form of individual legal and professional assistance. Trade unions also to a large extent safeguard their members' interests by selling insurances and offering discount schemes etc. Such activities are generally deemed to be commercial activities covered by the Danish Marketing Practices Act."

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

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 <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 the decision 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 High 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 message 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 marketing 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. If text has been inserted in the message, the consumer must be able to see the text that he is forwarding, if the function is used. The consumer must be able to delete or edit the text. However, if the trader rewards the consumer, or provides the consumer with an incentive to use the function, 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 marketing 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). In another case, a bank rewarded its customers with DKK 150 if the customer forwarded a link to the bank's website to friends and acquaintances, and if this resulted in the email recipient opening an account with the bank and logging on to the site. The bank accepted a fine for violating section 6(1) of the Danish Marketing Practices Act. (case no. 12/02431)

Friend-to-friend solicitation

"Friend-to-friend solicitation" is characterised by rewarding a member (or a customer) for soliciting new members (customers) (see, for example, case no. 08/08678). Friend-to-friend solicitation is similar to "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 practice⁷, 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 a trader may only lawfully use friend-to-friend soliciting if he directs a lawful way of approaching new customers, or if the customer is only rewarded for providing 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" - it 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. In case no. 12/08744, the DCO further stated that it falls under the scope of commercial freedom of speech to encourage customers to tell friends and acquaintances of the trader's product, if no special incentive to do so is provided.

2.2 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, marketing 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 decision 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 messages intended to build the reputation of the trader ("branding") are also covered by the ban as the branding is conducted with a view to selling products. In its judgment of 12 April 2013 (the Post Danmark case) the Supreme Court seemingly agrees.

Electronic Christmas cards

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). However, in some cases, 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, would previously have sent a physical Christmas card to the customer, but now has proceeded to elec-

⁷ See U2002.2227 SH, mentioned above in the "Use of non-traders in advertising".

tronic cards in line with technological developments. However, that presupposes that the Christmas card does not contain any advertising. Electronic Christmas cards may also be sent in circumstances which satisfy the conditions set out in section 6(2).

Participation in competitions

Unsolicited approaches offering participation in a competition is according to the DCO's perception contrary to section 6 of the Danish Marketing Practices Act as competitions are usually 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 newsletters and part 8 on opt-out consent.

Distribution of service emails when an order process has been interrupted

Consumers buying products or services via an online shop must be able to interrupt an order process at any time if he decides not to buy anything. In case no. 12/08813, the DCO stated that it is contrary to section 6(1) of the Danish Marketing Practices Act if a trader sends a "service email" to a consumer who has interrupted an order process, informing the consumer that the order has been interrupted and how to resume the order process.

Emails stating that the consumer has not made any purchases for a long time

Traders may not send any unsolicited emails to individuals who have not made any purchases with the trader for a short or long period of time in order to encourage the customer to return to the shop, unless the conditions set out in section 6(2) are satisfied. For additional information about the exemption, see part 4 below.

Current 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 performance of a contract as well as approaches deriving from non-performance and practical service announcements such as change of address and renew-

al/change of contract/policy are not covered by section 6 of the Danish Marketing Practices Act.⁸

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). Such emails may also not encourage the recipient to consent to marketing. 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. Furthermore, it cannot be deemed to be an approach with a view to the sale of products if the "auto signature" includes the trader's web address.

Market surveys

Actual market surveys are not covered by section 6 of the Danish Marketing Practices Act if they are not sent with a view to selling products or services but to disclosing specific market conditions. If the object of the survey is (also) to "brand" a trader or advertise the trader's products the approach would be covered by section 6 of the Danish Marketing Practices Act.⁹ 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 selling products etc. provided that the survey did not include any invitation to make a purchase or praising words about the estate agent (case no. 09/00787). On the other hand, satisfaction surveys which were not completely neutral but also contained a positive mention of – or had unnecessary focus on – a certain business or its products have been deemed by the DCO to be contrary to section 6 of the Danish Marketing Practices Act (Cases 10/09158, 10/09924 and 13/06976).

Although unsolicited communications from e.g. research agencies to consumers by email or telephone are not covered by section 6 of the Danish Marketing Practices Act and section 6 of the Danish Act on Certain Consumer Contracts, they are covered by section 1 of the Act if their purpose is not to sell products or services. Accordingly, under specific circumstances, it may be contrary to good marketing practice to approach persons who have indicated that they do not want such communications. (Case no. 12/02881)

⁸ See FT 1999-2000, Bill L213, general explanatory notes, 3.2, and reply from the Minister of Justice to the Legal Affairs Committee's question 5. (Only available in Danish).

⁹ For more information on the issue see the explanatory notes to section 2 of the Danish Act on Certain Consumer Contracts [now section 6] on ban on unsolicited telephone communication for marketing purposes, cf. FT 1977/78, schedule A, page 744-745. (Only available in Danish)

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.¹⁰ That also applies to electronic newspapers. Section 6 of the Danish Marketing Practices Act applies only in case the main object of the approach is the message of the advertisement.¹¹

Blogging

A trader who blogs is generally 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.

Press releases

If a trader forwards a press release to the media with a view to obtaining 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 *purchasing* 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 where a trader e.g. offers to arrange sales of a person's property will be covered by the concept of selling. Communications by electronic mail to a consumer with a view to purchasing 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 purchasing products or services would be in violation of section 6 of the Danish Act on Certain Consumer Contracts.

The DCO has received many enquiries from traders who have asked if they may lawfully contact e.g. craftsmen by email, asking the craftsmen to provide quotes to consumers for their services. It is the DCO's perception that this is lawful if the trader does not request any remuneration or similar per referral.

¹⁰ Reply from the Danish Minister of Justice to the Legal Affairs Committee's question 2 (FT 1999-2000 Bill L213). (Only available in Danish)

¹¹ Reply from the Danish Minister of Justice to the Legal Affairs Committee's question 14 (FT 1999-2000 Bill L213). (Only available in Danish)

Section 3

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

(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.

3.1 What communication techniques are covered by the ban?

There is a ban on distribution of unsolicited marketing 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.¹² 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.

3.2 Advertising on Facebook and other social media sites

In the "Position of the Nordic Ombudsmen on Social Media Marketing", the Nordic consumer ombudsmen have provided an assessment of when messages on social media, including Facebook, may be deemed to be electronic mail, cf. section 6(1) of the Danish Marketing Practices Act, and when they must be deemed to be other direct communications covered by section 6(3) of the Danish Marketing Practices Act. See section 3 and appendix 1 of the Position.

3.3 Who is safeguarded by the ban on unsolicited communications?

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.

¹² See the definition in Directive 2002/58/EC, article 2(h).

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 High 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".¹³

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

The ban does not apply if the recipient has requested that the trader sends marketing communications by means of email etc. The same applies if the trader has obtained the recipient's consent to distribute marketing communications in such a way. For further information on how to obtain consent and what requirements should be met in order to obtain consent, 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.

¹³ The Supreme Court did not decide on this matter, as the decision was appealed claiming mitigation only.

Section 4

Section 6(2) – Exemption from the ban on unsolicited marketing communications 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 subsequent communications.

The exemption from section 6(1) of the Danish Marketing Practices Act enables traders to send marketing communications by electronic mail (email, SMS text messages, MMS messages etc.)¹⁴ to a former customer, even though the customer has not given his consent¹⁵.

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 marketing communications regarding other 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 marketing communications from the trader in that connection, she has accepted that the trader sends marketing 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 marketing communication in every subsequent email.

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

- » The recipient of marketing communications *must previously have purchased* a product or service from the trader. Addresses stated in connection with receipt of a free gift, free consultancy, an offer or particulars, participation in competitions or the like cannot form the basis for marketing 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 marketing communications

¹⁴ Cf. Act no. 450 of 10 June 2003 to amend the Act on Competition and Consumer 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.

¹⁵ For further information on the requirements concerning consent to receive marketing material, see part 10.

-
- any longer. In that case the customer should make use of the option to decline any subsequent marketing communication.
- » The recipient of marketing 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.
 - » The recipient of marketing communication must in connection with the purchase clearly and unambiguously have been informed that the electronic address could possibly be used for marketing purposes.
 - » When giving his contact information, the recipient of marketing 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 marketing communication by electronic mail right away. As opposed to circumstances in which specific consent to receive marketing material is obtained, as described in part 10, the trader may use a pre-ticked box which the customer can untick. However, this is subject to the satisfaction of the requirement set out in item 3 above and to the consumer being clearly and unambiguously informed about his right to decline marketing material by un-ticking the box.
 - » If the customer does not decline marketing communication when stating an address he or she should be informed of the option of declining subsequent communication *every time he or she receives marketing communication by electronic mail*. The customer should get the option of declining marketing communication free of charge and in an easy manner. If marketing 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 marketing 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.
 - » The exemption only opens up for the possibility of distributing marketing communication by electronic mail – not by facsimile machines, automated calling systems, telephone calls, letters etc.
 - » 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 marketing communication. Furthermore, the trader, which the customer has purchased products from, may not advertise the subsidiary's products.
 - » 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 according to the DCO's perception would be or would not be allowed:

If the customer has purchased a pair of pants, the trader may advertise other clothing.¹⁶

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.

Newsletters

The DCO has previously stated that the exemption under section 6(2) of the Danish Marketing Practices Act can hardly be used as a basis for sending out newsletters because newsletters will often include advertising for a wide range of products, and not just products similar to those the consumer previously bought.

Significance of registration on the Robinson List

The exemption from the general ban on unsolicited distribution of marketing 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.

¹⁶ The example comes from the legislative material which also states that if the customer has bought a suitcase the trader may not advertise shoes.

Section 5

Section 6(3) – Other communications to specific natural persons

(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 with consumers are also subject to the regulations governing unsolicited communications in the Act on Certain Consumer Agreements.

5.1 "Communications to specific natural persons using other means of remote communication"

Subsection (3) concerns communication directed at a specific natural person using other means of remote communication than electronic mail, fax and automatic calling systems. Typically, these will consist of offers etc. sent by letter, but other communications which may be deemed to be directed at a specific natural person will also be covered. These may include communications sent to a specific phone number or the like.

However, mail which is not addressed to any specific person, advertising flyers, TV ads and the like distributed to an indeterminate number of possible purchasers are not covered by the provision.¹⁷ 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.¹⁸

Telephone communications to natural person traders are also covered by the provision. Telephone communications to consumers are covered if in exceptional cases, under the Danish Act on Certain Consumer Contracts, it is lawful to make unsolicited approaches to consumers by telephone.

Envelope content, i.e. enclosed advertisements in an envelope containing a statement of account, is also covered by the provision.

¹⁷ See FT 1999-2000, Bill L213, general explanatory notes, 3.2.2 and special explanatory notes to section 2. (Only available in Danish)

¹⁸ Reply from the Danish Minister of Justice to the Legal Affairs Committee's question 2 (FT 1999-2000, Bill L213). (Only available in Danish)

In its decision, UFR.2013.2051H, the Supreme Court established that a marketing wrapper – with an address but not a name – distributed by Post Danmark to all mail recipients in Denmark, other than those who had registered for the opt-out scheme "No ads please", did not constitute communication to a specific natural person covered by section 6(3) of the Danish Marketing Practices Act. Thus, mail addressed to a specific, named person is covered by subsection (3), whereas mail addressed only to an address is not covered by the provision. As a result, the guidelines on distribution of unaddressed mail have been changed to also include mail with only an address. The new guidelines of 1 October 2013 on good marketing practice in relation to distribution of mail without a named addressee enter into force on 1 January 2014.

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 good marketing practice in relation to distribution of mail without a named addressee.

5.2 Who may decline direct communications pursuant to section 6(3) of the Danish Marketing Practices Act?

The provision in section 6(3) only safeguards natural persons, i.e. consumers and natural person traders. Natural person traders are understood as natural persons in their capacity as self-employed traders. However, legal persons such as private and public limited companies and public authorities are not protected by the provision.¹⁹

5.3 If a person has declined direct marketing communication by other means of remote communication

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

However, natural persons can decline direct communications from the trader. This can be done either by informing the trader or signing up to the CPR list²⁰. 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 personally addressed marketing material to a person who has declined such communications from the trader or to a person registered to the Robinson List may be liable to a fine.

¹⁹ Furthermore, legal entities can legally obtain advertising protection pursuant to section 19 of Consolidating Act no. 653 of 15 June 2006 on the Central Business Register (CVR). For further information, see www.cvr.dk.

²⁰ 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 marketing 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 realises that the person has declined marketing communications must comply with this.

The list can be downloaded free of charge at the website 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.²¹ 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 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.

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.

²¹ The DCO has stated that communication by a mobile phone which is not always located at a place to which there is 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)

Section 6

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

(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 marketing communications. For further information on the requirements to obtaining consent, see part 10.

Section 7

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

(5) The first time a trader communicates 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 offer the person concerned an option to decline such communications in an easy manner.

According to the explanatory notes to the Danish Marketing Practices Act, the above information on the right to decline marketing communications should be emphasised 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 marketing 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.

Section 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 recording 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, recording 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 marketing communications pursuant to section 6(3) of the Danish Marketing Practices Act. The same also applies to marketing communications pursuant to subsection (2) of the Danish Marketing Practices Act. See part 4, item 5. In a specific case the DCO has stated that a trader cannot cancel a guarantee which was given as a reward for consent to receive 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).

Section 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.

Section 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 marketing communications but also in cases where the trader has obtained the recipient's consent.²²

Basis in EU law

The rules of section 6 of the Danish Marketing Practices Act implement a ban under EU law on unsolicited communication using electronic mail with a view to direct marketing. The EU rules are intended to protect subscribers from intrusion of their *privacy* by unsolicited communications for direct marketing purposes, cf. Directive 2002/58/EC²³, whereas clause 40. It is furthermore established that such communication requires that the "*prior explicit consent of the recipients*" is obtained. As regards the requirements for consent, article 2(h) refers to Directive 95/46/EC, which states that consent is any *freely given specific and informed indication of his wishes*.

The requirements for consent set out in the Danish Marketing Practices Act must be interpreted in consistence with the requirements of the said Directives.

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 marketing communications by email, fax or the like. If a person is registered on the Robinson List, the trader is prohibited from sending marketing communications by personally addressed letter.²⁴ This also applies to current customer relations. In connection with current customer relations, the DCO has stated that the trader is not allowed to inform his customer

²² See FT 1999-2000, Bill L213, explanatory notes to section 2 of the Bill (section 6 of the Danish Marketing Practices Act)

²³ Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector.

²⁴ See also 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 [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 6.

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.²⁵

Documentation

The trader has the burden of proof in case a recipient claims that he has not given consent to receive marketing 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 emphasised 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. If the trader intends to ensure that the customer is aware that he is consenting to receive marketing communication, he may do so by asking the customer to actively indicate this, e.g. by ticking a box stating that the customer consents to marketing communication.

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

²⁵ See, for example, the decision 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.

material concerning children's clothes, living room furniture, garden furniture, car insurances etc.

Explication can be in form of a link to a website or a list from which it is clarified 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 High Court's decision reproduced in U 2002.2277/S can be mentioned. A telephone company stated in the application form below the subscriber's signature: "With my signature I give permission to [the telephone company] to analyse 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 High 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.²⁶ 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).

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 business, if the business's assets and liabilities are taken over. However, it is the DCO's perception that 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.

²⁶ Cf. FT 1977-78, Schedule A, p. 744

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 marketing communications within specific areas to other traders, cf. decision U 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. 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.²⁷ 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. See section 36 of the Danish Act on Processing of Personal Data.

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.

²⁷ However, section 6(1)(vii) of the Danish Act on Processing of Personal Data must be observed.

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. It is the DCO's perception that revocation takes effect from the time it reaches the trader.

However, the trader should give the consumer an option to revoke consent in an easy manner each time the consent is applied. 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 probably does not lapse only because the customer relations are terminated. In that case consent must presumably also be revoked. Whether or not the consent has been revoked must depend on an interpretation of the termination.

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

It is the DCO's perception that there is nothing wrong with rewarding a person with a gift certificate or the like for giving consent to receive marketing material.²⁸ 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 High 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 before a specific date. The Danish Maritime and Commercial High Court stated that the competition due to the layout and the modest amount of prize money was not contrary to good marketing practice.

²⁸ See also 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 home visit from a HNG sales consultant was not contrary to good marketing practice.

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

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.

If a competition is used for obtaining consent to marketing communications, such combination of purposes must be subject to particularly strict requirements to the effect that the trader must emphasise the fact that by participating in a competition the consumer also gives his consent to receive marketing material.²⁹ Consent can be revoked immediately after participation in the competition.

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

It is the DCO's perception that conclusion of an agreement for the purchase of a product or service should be subject to the consumer consenting to the trader subsequently contacting the consumer for marketing purposes, among other things because it raises questions about whether the consent was freely and expressly given. Reference is made to item 2.3.2.2 of 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 marketing 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"³⁰ should be complied with in their entirety.

²⁹ See, for example, 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.

³⁰ The guidance is available at <http://www.forbrugerombudsmanden.dk/Love-og-regulering/Retningslinjer-og-vejledninger/Markedsfoeringsloven>.

Section 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 marketing³¹ 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 140 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. For example, it may be an aggravating circumstance if the trader has previously been sentenced for violation of section 6 of the Danish Marketing Practices Act. Generally, a certain "discount" would also be granted in the case of an insignificant number of unsolicited electronic mail. For example, a business accepted a fine of DKK 800,000 for having sent 200,000 unsolicited SMS text messages.

Fines for violation of section 6(3) of the Danish Marketing Practices Act are generally fixed as double the amount of the marketing expense. Accordingly, a business accepted a fine of DKK 200,000 for having sent 16,780 letters to persons registered on the Robinson List, while another business accepted a fine of DKK 15,000 for sending 1,180 letters to persons registered on the Robinson List. It is the DCO's perception that the minimum fine for distributing only a few letters to persons registered on the Robinson List should be between DKK 5,000 and DKK 10,000.

Complaints procedure

The DCO has created two spam mailboxes to which complaints about unsolicited emails may be sent electronically. Complaints concerning Danish marketing communication sent by email, SMS text message or MMS message should be sent to (dansk@spamklage.dk), and complaints concerning foreign marketing communication sent by email should be sent to (int@spamklage.dk).

Complaints concerning unsolicited marketing communications via other channels (fax, addressed letters or by telephone) should be sent to Forbrugerombudsmanden@kfst.dk or For-

³¹ According to the report from the Committee on Business and Commerce of 8 December 2005 concerning Bill on Marketing (L13/2005), the calculation model applies notwithstanding the Supreme Court's judgment of 22 September 2005 (Case No U2005.3446). The calculation model is also discussed in the explanatory notes to Act no. 378 of 17 April 2013 to amend the Danish Marketing Practices Act.

brugerombudsmanden, Carl Jacobsens Vej 35, DK-2500 Valby. For more details about the complaints procedure, see the DCO's website www.forbrugerombudsmanden.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.³²

Cross border advertising

Danish businesses marketing themselves in other EU countries should observe regulations on unsolicited marketing communication by electronic mail in the country concerned. Foreign businesses marketing themselves in Denmark must comply with the regulations set out in section 6 of the Danish Marketing Practices Act.³³

The DCO is not familiar with the rules in other EU countries but we can inform you that the rules are based on EU Directives³⁴ that safeguard natural persons (both consumers and traders). According to these Directives it is prohibited to send marketing communication by automated calling system, electronic mail or fax to natural persons in any EU country.

Email is subject to an exemption set out in section 6(2) of the Danish Marketing Practices Act.

In brief, Danish traders complying with section 6(1) and (2) of the Danish Marketing Practices Act should be able to assume that they also comply with the rules of other EU countries.

In one area, however, there may be a difference: In Denmark, everyone (i.e. consumers, traders and public authorities alike) are protected by the ban on unsolicited use of electronic mail for marketing purposes. Other EU countries may stipulate that only individuals (i.e. consumers and natural person traders) are protected.

Also, it cannot be ruled out that there may be minor differences in how the individual EU member states interpret the rules.

With respect to *other means of remote communication*, e.g. addressed letters, the individual member states may decide to ban any unsolicited communication or permit such communication provided that the person has not expressly requested not to receive such communication.

³² The International Consumer Protection and Enforcement Network (ICPEN) is an organisation composed of consumer protection authorities from 38 countries including the Nordic countries, USA, Canada, Australia and most European countries.

³³ The principle of country of origin under the Danish E-commerce Act does not apply to unsolicited marketing communication by means of electronic mail.

³⁴ 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.

As regards such other direct communication, Danish traders must comply with the rules of the country targeted by their marketing³⁵.

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 advance indication on the legality of the marketing activity. Requests may be sent to the DCO at the address: Forbrugerombudsmanden, Carl Jacobsens Vej 35, DK-2500 Valby, or email, forbrugerombudsmanden@kfst.dk. The website of the DCO contains a form for requesting advance indications. (12/09434)

³⁵ Physical mail is not covered by the Danish E-commerce Act. Consequently, no principle of country of origin applies, but rather the general principle that the marketing must comply with the rules of the country targeted by the marketing (*virkningsprincippet*).