

TV advertisements

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TV advertisements

The Danish Consumer Ombudsman

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This Guidance enters into force on 15 January 2015.

Introduction

This guidance describes what information a TV advertisement must provide under the Danish Marketing Practices Act and the Danish Act on Certain Consumer Contracts, and when the consumer may be referred to a website or teletext for further information. It also specifies that any text in TV advertisements must be of a certain size, duration and with a background colour to ensure that consumers have time to read it.

The Danish Consumer Ombudsman's guidance paper on information requirements in TV advertisements, see sections 3, 12 a and 14 a of the Marketing Practices Act.

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Background

In recent years, there has been a growing trend towards more and more information about the marketed product being provided in writing at the bottom of the screen rather than in the central message of the advertisement. Moreover, the text is often written in such small print and shown so briefly, and often against a moving background, that it can be difficult to read.

The TV station TV 2 and Dansk Annoncørforening (the Danish association of advertisers) approached the Consumer Ombudsman on the basis of decisions by the Radio and Television Board stating that, in the opinion of the Board, some TV advertisements constituted a violation of section 3 of the Marketing Practices Act. TV 2 and Dansk Annoncørforening proposed that requirements be set up as to the minimum text size and duration for such texts. TV 2's text guidelines of 1 December 2014 are set out in Annex 1. It was further proposed that viewers may be referred to a website or teletext for more information.

Purpose

The general purpose of this guidance is to describe what information a TV advertisement must provide under the Marketing Practices Act and the Act on Certain Consumer Contracts, and when the consumer may be referred to a website or teletext for further information. The purpose is furthermore to provide organisations and other advisers with more general guidance on what information an advertisement should comprise and how such information should be presented in order that the advertisement is not misleading and in order to otherwise comply with the information requirements of the Marketing Practices Act and the Act on Certain Consumer Contracts.

The purpose of the guidance is not, however, to explain the rules of the Marketing Practices Act or the rules of law in general. Traders must ensure that such rules are also complied with, including the rules set out in section 8 of the Marketing Practices Act and Danish radio and television legislation(i).

Legislative framework

The central statutory provisions in determining whether a TV advertisement meets the statutory requirements are sections 3, 12 a and 14 a of the Marketing Practices Act. These provisions are reproduced in Annex 2. Sections 3 and 12 a implement articles 6 and 7 of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices, in the following referred to as "the Marketing Directive". Articles 6 and 7 are also reproduced in Annex 2. Sections 3 and 12 a should be interpreted in accordance with the Marketing Directive.

Section 14 a of Marketing Practices Act sets out the information required in marketing concerning credit agreements.



The Act on Certain Consumer Contracts⁽ⁱⁱ⁾ sets out rules as to the information required prior to conclusion of distance contracts in relation to a medium imposing limitations of space or time.

Brief presentation of the rules

Section 3 of the Marketing Practices Act stipulates that advertisements may not use *misleading or incorrect statements*. Advertisements may be regarded as misleading even if the content is factually correct, if it is given in a way which, through its general presentation, misleads or is likely to mislead consumers.

Also, advertisements may not *omit material information*. Material information is information that average consumers need in order to make an informed decision as to whether, how and on what terms he or she wishes to purchase a product. In the case of an actual invitation to purchase – that is an advertisement containing information about the characteristics and price of a product, thereby enabling the consumer to make a purchase – the information set out in section 12 a(1) is considered material information which may not generally be omitted from an advertisement. However, see below for information which may be provided by other means in relation to media imposing limitations of space and time.

Misleading omission is not restricted to situations where the material information is not included in the advertisement at all. It is also regarded as a misleading omission when material information is hidden or provided in an unclear, unintelligible, ambiguous or untimely manner.

It may be a violation of section 3 of the Marketing Practices Act if the advertisement itself contains misleading or false information or if material information is omitted, and this is likely to cause the consumer to take a so-called transactional decision. A transactional decision may be a decision to visit the trader's website to find out more or a decision to contact the trader by telephone. It is thus irrelevant whether the information is subsequently corrected or is given subsequently, for example on the trader's website or during the telephone call to the trader.

In advertising concerning credit agreements stating an interest rate or any figures relating to the cost of the credit to the consumer, the advertisement must include certain specified standard information in accordance with section 14 a of the Marketing Practices Act ⁽ⁱⁱⁱ⁾. The provision requires that the information be provided in a clear, concise and prominent way.

Media imposing limitations of space and time

In determining whether material information has been omitted, it should be taken into account whether the medium used to communicate the advertisement imposes limitations of space and time, and whether the trader has taken measures to make the information available to consumers by other means. ^(iv)

Even in relation to media imposing limitations of space and time and even if the information has been made available by other means, the information in the advertisement may not be incorrect or misleading, and the overall impression given by the advertisement must be fair and balanced. Moreover, it is misleading if certain essential information is omitted, even in such media^(v). Examples of information that may not be omitted are non-immaterial limitations, reservations or conditions.

The information required to be given in marketing concerning credit agreements, see section 14 a of the Marketing Practices Act, may not be omitted.^(vi)

Act on Certain Consumer Contracts

Under the Act on Certain Consumer Contracts, which applies to conclusion of distance contracts, traders are required to provide a wide range of information prior to the conclusion of a contract. In the case of media imposing limitations of space or time, the information requirement is limited. Section 11(2) of the Act sets out the minimum information required.

The information requirement under the Act on Certain Consumer Contracts generally also applies to offers in TV advertisements if the purchase contracts are distance contracts. If, after having seen the TV advertisement, the consumer has to go to the trader's website to order the product or service, the Act on Certain Consumer Contracts information provides that the required information may be provided on the website. If the consumer can order a product or service on the basis of the information in the TV advertisement by, for example, sending a text message with an additional charge, the required information must be provided in the TV advertisement. In the case of a TV advertisement for a product or service to be purchased in a physical shop, the required information does not have to be provided in the TV advertisement under the Act on Certain Consumer Contracts.

What constitutes an invitation to purchase?

In the case of an invitation to purchase, a range of information is generally required, as set out in section 12 a of the Marketing Practices Act. However, if this information is apparent from the context, this does not apply.

An invitation to purchase exists when a specific product is marketed stating a price, thereby enabling the consumer to make a purchase. On the other hand, if an advertisement solely builds the reputation of the trader or generally promotes the trader's products ("branding"), without offering specific products as mentioned above, it does not constitute an invitation to purchase, and the information requirement under section 12 a does not apply.

Even if it does not constitute an invitation to purchase, an advertisement may not contain incorrect or misleading information or omit information to the effect that the central message is incorrect or misleading. Accordingly, even if it does not constitute an invitation to purchase, the message must be fair and balanced, see section 3 of the Marketing Practices Act.

The Consumer Ombudsman's view

If a trader complies with the following recommendations, the trader can generally assume that a TV advertisement complies with the provisions of the Marketing Practices Act.

The Consumer Ombudsman takes the general view that the presentation of information in a TV advertisement should take into account the fact that the consumer's attention is normally caught by the visuals and the plot of the advertisement, etc. and that this reduces their focus on the text, which may contain material information. If the material information is presented in a text at the bottom of the screen, this therefore raises the issue of misleading omissions, as the information is presented in a hidden, unclear, unintelligible, ambiguous or untimely manner.

1. A TV advertisement containing an invitation to purchase must include all material information that average consumers need in order to make an informed decision to purchase. Furthermore, the information requirements under section 12 a of the Marketing Practices Act must as a general rule be complied with. See, however, paragraph 4 below on advertising in media imposing limitations of space and time.



A trader can choose to arrange a TV advertisement in such a way that it does not constitute an invitation to purchase, but merely “branding” of the trader’s products. Examples of statements that cannot be considered an invitation to purchase: “NN telephone company offers ultra-high-speed internet”, or “NN department store offers the trendiest autumn collection”, without mentioning specific products or prices. In that case, there is no requirement for the information under section 12 a of the Marketing Practices Act. However, such advertisements may not give incorrect information or omit information to the effect that the central message becomes incorrect or misleading, see paragraph 2 below.

2. A TV advertisement may not give incorrect information. Moreover, the visuals and the soundtrack as well as any specially highlighted text, for example in a “splash” (the central message of the advertisement), should in a loyal and balanced manner give consumers a fair impression of both advantages and disadvantages, conditions and limitations of the offer.

The central message of the advertisement must take into account any material reservations or limitations, so that the statement of the advertisement does not become excessive or incorrect in relation to the limitations. For example, it is not loyal and balanced for the central message to show a car with extra equipment while less visibly in a text at the bottom of the screen, stating that the advertised price does not include extra equipment. This would normally be in violation of the prohibition against using misleading statements.

Any text should thus be used only to elaborate or clarify the content of an offer. The text may not be contrary to the information provided in the soundtrack/speak or other content of the advertisement.

What information should be included in the main contents of the advertisement is subject to an individual assessment. It may, for example, be information about extra costs charged in addition to the amount stated in the advertisement’s central message. Or it may be limitations as to who can use the offer – for example new customers or customers who live in a specific area – any period of commitment or the total price during the period of commitment, if the sale of a product is, for example, subject to the conclusion of a subscription agreement.

In marketing concerning credit agreements, the information mentioned in section 14 a must be stated in the main contents of the advertisement, as the provision requires the information to be featured in a prominent way.

3. If a trader chooses to provide information in a TV advertisement in text form, the following requirements should be met:

- (a) The text should not comprise corrections of information provided in the advertisement’s visuals or speak.
- (b) Superfluous information should be avoided, as it would contribute to making the text confusing and difficult to read and understand.
- (c) The text should be written in large enough print, be shown for a sufficient amount of time and be displayed against a contrasting background colour so that the text is legible and the average consumer has time to understand it in the time available. If TV2’s text information guidelines (Annex 1) are complied with, the Consumer Ombudsman will consider the requirements in (c) above to have been met.

4. When a medium, such as TV, imposes limitations of time and space, certain information of less importance to the consumer’s assessment of the offer may be omitted if made available by other means.

Information that may be omitted in such circumstances may be information about the trader’s address, arrangements for payment, delivery or performance of the

contract and the method of handling complaints. Furthermore, as an example from the telecommunications area, traders are not normally required in TV advertisements to provide information on the transaction fees charged if payment can be made without fees by use of a standard payment method. The TV advertisement also does not normally have to provide information on the price of voice or data usage in excess of what is included in a package, nor does it have to state that the price applies only to use in Denmark. If material information is given in the advertisement's central message, it is not a requirement that it is repeated in the text at the bottom of the screen.

In marketing concerning credit agreements, the information set out in section 14 a may not be omitted.

If a distance contract is concluded on the basis of the information in the TV advertisement – for example by sending a text message with an additional charge, the information requirements in section 11(2) of the Act on Certain Consumer Contracts, cf. section 8, must be complied with.

Information that, as mentioned above, is of significance to the central message being correct and balanced, see paragraph 2, may not be omitted.

For traders to be on the safe side, the Computer Ombudsman recommends that they briefly mention the information found on a website or in teletext, for example, (vii), in connection with the referral to such site. For example: "Read more about freight charges and transaction fees on teletext p. xx or at www.xx.dk".

Advance indication

If, after having sought legal advice, an advertiser is unsure if the specific information in the advertisement complies with the requirements of the Marketing Practices Act, the advertiser may request an advance indication from the Consumer Ombudsman. Such request should be accompanied by a motivation specifying why the advertiser believes the advertisement to comply with legislation.

Evaluation

The Consumer Ombudsman will consider if the current guidelines and TV2's guidelines on text information in TV advertisements have the desired effect. If advertisements do not become any less confusing to consumers, the Consumer Ombudsman reserves the right to revise the guidelines.

Commencement

This Guidance enters into force on 15 January 2015. TV2's text information guidelines take effect on 1 March 2015. Until that date, the Consumer Ombudsman recommends that traders comply with the general requirements in paragraph 3 c.

Annexes:

Annex 1:

TV2's guidelines on text information in TV advertisements

"Obligatory texts"

The purpose of the guidelines is to define the requirements to so-called "obligatory texts". The term "obligatory texts" refers to text in TV advertisements containing price or product information that consumers require in order to be able to understand a specific offer.

"Duration" – how long the text must be shown on the TV screen



A text in a TV advertisement must be shown for at least 2 seconds. To this should be added 0.2 second per word. For example, a six-word text should be displayed on screen for at least 3.2 seconds.

Number of words	10	15	20	25	30	35	40
Number of seconds:	4	5	6	7	8	9	10

Viewers will generally not be able to distinguish between the text containing important information and other text in the advertisement. Therefore, all text – both at the bottom of the screen and all other text on the screen – must be included in the calculation of the minimum duration. This applies even if parts of the information in the obligatory text also appear from the advertisement's sound-track/speak.

Generally, the text must be displayed against a steady, opaque, uni-coloured background with good contrast and legibility. Any text at the bottom of the screen must also be displayed continuously for the minimum duration, that is the time it is displayed may not be split up into several sections. For example, a text which must be shown for 20 seconds may not be displayed for ten seconds at the beginning of the advertisement and for a further ten seconds later in advertisement.

Duration in case of a moving background

If the background is moving, multi-coloured or if there are other texts or illustrations that may divert the consumer's attention, the text must comply with the following, stricter minimum duration requirements:

The text must be shown for at least 3 seconds. To this should be added 0.2 second per word. For example, a six-word text should be displayed on screen for at least 4.2 seconds.

Number of words	10	15	20	25	30	35	40
Number of seconds:	5	6	7	8	9	10	11

Minimum text size in TV advertisements

The minimum text size requirement is that the height of each text line must be 1/30th of the height of the screen – corresponding to 36 pixels from line bottom to line bottom at full HD 1920 x 1080.

Minimum text size in case of a moving background:

If the background is moving, multi-coloured or if there are other texts or illustrations that may catch the consumer's attention, the text must comply with the following stricter minimum size requirements:

The minimum text size requirement is that the height of each text line must be 1/25th of the height of the screen – corresponding to 43.2 pixels from line bottom to line bottom at full HD 1920 x 1080.

Pre-approval

As previously mentioned, the area of TV advertisements is complicated from a legislative perspective. Small nuances may decide whether an advertisement is inside the letter of the law, and we therefore recommend that traders use the opportunity to have a draft advertisement pre-approved.

We are naturally also happy to answer any questions that may arise in the course of production of advertisements, and we are available to hold external talks on theory and practice in this area.

Annex 2:

Marketing Practices Act

Section 3(1) of the Marketing Practices Act reads:

Traders may not use misleading or incorrect statements or omit material information if this is likely to materially distort consumers' or other traders' economic behaviour in the market.

Section 12a of the Marketing Practices Act reads:

12 a.-(1) In the case of an invitation to purchase directed at the consumer, the trader shall provide the following information, if not already apparent from the context:

- 1. the main characteristics of the product or service,*
- 2. the address and the identity of the trader,*
- 3. the arrangements for payment, delivery and performance of the contract, to the extent these arrangements depart from normal industry practice,*
- 4. the trader's method of handling complaints, to the extent it departs from normal industry practice,*
- 5. the right of withdrawal, cancellation or return, if the consumer has such a right, and*
- 6. the price inclusive of taxes.*

(2) Where the nature of the product or service means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated shall be provided. Where appropriate, all additional freight, delivery or postal charges shall be provided or, where these charges cannot reasonably be calculated in advance, it shall be made clear that such additional charges may be payable.

(3) By "invitation to purchase" is meant a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase.

Section 14 a of the Marketing Practices Act reads:

14 a.-(1) Any advertising concerning credit agreements which indicates an interest rate or any figures relating to the cost of the credit to the consumer shall include standard information in accordance with subsection (2).

(2) The standard information referred to in subsection (1) shall specify in a clear, concise and prominent way by means of a representative example:

- 1. The borrowing rate, fixed or variable or both, together with particulars of any charges included in the total cost of the credit to the consumer.*
- 2. The total amount of credit.*
- 3. The annual percentage rate of charge, calculated in accordance with the Credit Agreements Act.*
- 4. The duration of the credit agreement.*
- 5. In the case of a credit in the form of deferred payment for a specific product or service, the cash price and the amount of any advance payment.*
- 6. The total amount payable by the consumer and the amount of instalments.*

(3) Where the conclusion of a contract regarding an ancillary service relating to the credit agreement, in particular insurance, is compulsory in order to obtain the credit



or to obtain it on the terms and conditions marketed, and the cost of that service cannot be determined in advance, the obligation to enter into that contract shall also be stated in a clear, concise and prominent way, together with the annual percentage rate of charge.

(4) A credit intermediary must indicate in advertising and documentation intended for consumers the extent of his powers, in particular whether he works exclusively with one or more creditors or as an independent broker.

Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices, article 6 and article 7

Sections 3 and 12a of the Marketing Practices Act implements articles 6 and 7 of Directive 2005/29/EC concerning unfair commercial practices. The provisions of the latter read as follows:

Article 6

Misleading actions

1. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

- (a) the existence or nature of the product;
- (b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;
- (c) the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product;
- (d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;
- (e) the need for a service, part, replacement or repair;
- (f) the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or his awards and distinctions;
- (g) the consumer's rights, including the right to replacement or reimbursement under Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (8), or the risks he may face.

2. A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:

- (a) any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor;
- (b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:
 - (i) the commitment is not aspirational but is firm and is capable of being verified, and
 - (ii) the trader indicates in a commercial practice that he is bound by the code.

Article 7

Misleading omissions

1. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

2. It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

3. Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.

4. In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context:

- (a) the main characteristics of the product, to an extent appropriate to the medium and the product;
- (b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;
- (c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;
- (d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;
- (e) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.

5. Information requirements established by Community law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material.

Act on Certain Consumer Contracts

11.-(1) In the case of distance contracts, the information specified in section 8(1) must be given or made available to the consumer using means appropriate to the distance communication used. If the information is provided on a durable medium, it must be legible.

(2) If a contract is concluded through a means of distance communication which allows only limited space or time to display the information, the trader must at least provide information on the trader's identity and the information specified in section 8(1)(i),(v), (vi), (ix) and (xvii) prior to the conclusion of the contract. The other information specified in section 8(1) must be provided to the consumer in an appropriate manner in accordance with subsection (1).



8.-(1) Prior to the conclusion of an off-premises contract or a distance contract for goods or non-financial services, the trader must provide the consumer with the following information in a clear and comprehensible manner

(i) the main characteristics of the goods or services, to an extent appropriate to the means of communication and to the goods or services;

(v) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated and, where applicable, all additional freight, delivery or postage charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;

(vi) in the case of contracts of indeterminate duration or contracts containing a subscription, the total costs per billing period, including, where such contracts are charged at a fixed rate, the total monthly costs, or, where the total costs cannot be calculated in advance, information on the manner in which the price is to be calculated;

(ix) information on whether a right to cancel exists and, where applicable, the conditions, deadline and procedures for exercising that right, see section 20, and the model cancellation form set out in Schedule 3 of this Act;

(xvii) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;

Notes

(i) An example is the Executive Order on Advertising, see Executive Order no. 801 of 21 June 2013, which prescribes special requirements for advertisements directed at children.

(ii) Act no. 1457 of 17 December 2013.

(iii) The Consumer Ombudsman has stated that his interpretation of section 14 a is that the information requirement is not applicable in the case of consumer credit granted entirely free of interest and charges.

(iv) Article 7(3) of the Marketing Directive, which is referred to in Bill no. L2 tabled on 4 October 2006 and which formed the basis of the adoption of Act no. 1547 of 20 December 2006, which implements the Directive in Danish law.

(v) See the explanatory notes on section 3(1) of Bill no. L2 tabled on 4 October 2006.

(vi) Section 14 a implements article 4 of Directive 2008/102/EC of the European Parliament and of the Council on credit agreements for consumers. It appears from the legislative material to section 14 a, cf. Act no. 535 of 26 May 2010, 2.3 and the explanatory notes to section 2(iii), that the Consumer Credit Directive complements the Marketing Directive and that any advertisement must comply with the information requirement. See also page 12 of the Commission's non-binding guidance document on the interpretation of the Consumer Credit Directive of 8 May 2012.

(vii) The Consumer Ombudsman recommends that the information be provided both on a website and on teletext, as some people do not have Internet access, while it may be difficult to access teletext via tablets, smartphones and the like.