

Guidelines on gender-related advertising

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The Danish Consumer Ombudsman

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Guidelines prepared by the Danish Consumer Ombudsman

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Background/Introduction

On the basis of negotiations with the Danish Consumer Council, the Danish Chamber of Commerce, the Confederation of Danish Industry, De Samvirkende Købmænd (the Danish professional association of cooperative merchants), Danish Brewers' Association, Danske Reklame- og Relationsbureauers Brancheforening (DRRB) (the Danish association of advertising and relations agencies), Dansk Annoncørforening (the Danish association of advertisers), Danske Mediers Forum (the Danish media forum), Dansk Kvindesamfund (the Danish women's society), women's council in denmark, Pornofrit Miljø (the Danish association for a porn-free environment), the Danish Family Planning Association, Seksualpolitisk Forum (the Danish forum of sexual politics), the National Council for Children, Alkoholpolitisk Landsråd (the Danish national council for alcohol politics), and with the following as observers: the Radio and Television Board, Alkoholreklamenævnet (the Danish alcohol advertising board), TV2 Danmark A/S, the Danish Competition and Consumer Authority, the Danish Ministry for Gender Equality and Ecclesiastical Affairs (the Gender Equality Section), the University of Copenhagen (the Faculty of Law) and Copenhagen Business School, the Danish Consumer Ombudsman has issued the following guidelines on gender-related advertising. See section 24(1) of the Danish Marketing Practices Act.

The purpose of these guidelines is to define good marketing practice (see section 1(1) of the Marketing Practices Act) in relation to gender-related advertising. Under section 1, traders must exercise good marketing practice with reference to consumers, other traders and public interests. The guidelines are intended to define clearer and more precise directions with a view to ensuring real and fair competition between traders and protecting consumers against illegal gender-related advertising.

In the circumstances, gender-related advertising is also regulated by special legislation. Businesses acting contrary to the special legislation will generally also be acting contrary to good marketing practice. See section 1 of the Marketing Practices Act.

The assessment of whether gender-related advertising is in accordance with good marketing practice depends on the balancing of considerations for consumers, public interests and traders. The consideration for public interests means that business advertising must comply with the prevailing social and cultural norms of decency.

In the comments on the guidelines, examples of elements taken from legal practice have been included, which the Consumer Ombudsman will take into account when assessing whether an advertisement complies with good marketing practice.

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Section 1

Legislative framework

Section 1(1) of the Marketing Practices Act:

"Traders subject to this Act shall exercise good marketing practice with reference to consumers, other traders and public interests."

Section 8(1) of the Marketing Practices Act:

"Marketing directed at children and young people shall be designed with specific reference to their natural credulity and lack of experience and critical sense, as a result of which they are readily influenced and easy to impress."

Section 2

Definitions

For the purposes of these guidelines:

- » "Advertisement" means any indication whether in the form of images, text or sound aiming to promote the sale of products or services.
- » "Gender-related advertisement" means an advertisement in which gender plays an important part or in which nudity or eroticism constitutes significant effects.

Section 3

Guidelines

3.1 General comments

Whether a gender-related advertisement complies with good marketing practice depends on an individual assessment.

Such assessment will be an overall assessment of the predominant elements of the advertisement, including the content and design of the advertisement. Furthermore, importance will be attached to the context of the advertisement, the effects used in the advertisement, the target group of the advertisement, the time and place of publication of the advertisement in addition to the availability of the advertisement.

The commercial freedom of speech provides considerable creative leeway in advertising, however subject to the basic provisions of the Marketing Practices Act. Good marketing practice implies that an advertisement must be designed with due consideration for public interests. It is the opinion of the Consumer Ombudsman that this consideration means, in conjunction with the Danish Gender Equality Act, that an advertisement may not discriminate against gender (4.1.) and that an advertisement must be decent and designed with a sense of social responsibility (4.2.).

The Consumer Ombudsman will include relevant practice from the Radio and Television Board in the assessment of the legality of gender-related advertisements.

The use of effects such as humour, satire, caricature, irony and stereotypes in an advertisement must be included in an overall assessment of whether an advertisement complies with good marketing practice. In some cases, the use of such effects is a sign that the image, action or statement in the advertisement should not be taken seriously. However, such effects can also have the opposite result, e.g. if the advertisement makes fun of one of the two genders in a way making it suitable for offending, ridiculing or affronting the gender.

The current state of fashion and media contributes to providing considerable leeway for using nudity and eroticism in gender-related advertising.

An advertisement in which naked or scantily dressed persons and/or erotic effects are included is not illegal as a starting point, even if nudity or eroticism is not naturally related to the products or services being advertised. An example of that could be if the content of the advertisement is not particularly sensational in the light of the general state of fashion and media.

If a gender-related advertisement is directed at children and young people, more stringent requirements apply to the design of the advertisement (see section 8(1) of the Marketing Practices Act, see section 1 thereof) because, in the opinion of the legislature, children and young people lack experience and critical sense and are readily influenced and easy to impress. This applies whether or not the medium used, including websites, is directed at children and young people. The provision is a standard of care or frame of reference impressing on businesses that they must take special considerations into account when devising marketing communications directed at children and young people.

Gender-related advertising not directed at children and young people, but shown publicly in places naturally frequented by children in particular, e.g. in close proximity to schools, day-care centres or playgrounds, should consider this. See section 1 of the Marketing Practices Act. Consequently, it should not contain any images or statements that could cause psychological or moral harm to children, and it should not be suitable for affronting children's natural modesty.

In shops where children go with their parents and perhaps sometimes alone, no magazines, newspapers, films, etc. may be displayed the front pages of which are pornographic in a way which will be immediately seen by children. It is up to each shop to find an appropriate way of displaying porn magazines and porn films so that they are less visible to children.

Advertisements for films, plays, art exhibitions and the like are typically given more leeway when showing pictures from the specific artwork or exhibition.

3.2 A gender-related advertisement must be designed in accordance with good marketing practice (see section 1 of the Marketing Practices Act) to the effect that it does not contain or is suited to promote sex discrimination

An advertisement is deemed to discriminate against gender where

- a. The gender is represented in a derogatory or contemptuous manner;**
- b. Nudity or eroticism is included in a manner appearing to be derogatory or contemptuous to the relevant gender;**
- c. The advertisement gives the impression that the role of one gender is socially, financially or culturally subordinate to the other gender;**
- d. The advertisement gives the impression that one gender is less competent, less intelligent or less suited to perform tasks which both genders can perform equally well physiologically; or**
- e. The advertisement gives the impression in a derogatory or contemptuous manner that one gender has special negative personality traits or characteristics.**

Comments:

Paras a. - e. are not exhaustive, but list examples of advertising which must generally be deemed to discriminate against gender according to these guidelines.

If nudity or eroticism is included in the advertisement as an effect, it must not be included in an offensive, derogatory or contemptuous manner. This may be the case, e.g. if a person in an advertisement is reduced to being a sex object.

An advertisement using men's or women's fantasy about or possibility of sex in a work-related context as an effect may be degrading and affronting for the relevant gender in the circumstances. It is in the public interest to combat sexual harassment in the workplace, and such advertisement may have a negative impact on such efforts.

An advertisement may not be based on the assumption that by making themselves sexually available women or men can do better or be successful on the labour market or in any other social context.

Representation of gender roles or the relationship between the genders is generally lawful.

An advertisement concerning a product only relating to one gender, or an advertisement in which one or more idealised persons and beauty ideals are included, does not per se discriminate against gender.

An advertisement for underwear or tights for example may show a beautiful, seductive body or a sexually attractive person without becoming gender-discriminating.

Depicting a gender in a typical or characteristic manner in an advertisement is permitted. An advertisement may e.g. show children in clothes in a colour typical of that gender.

3.3 A gender-related advertisement must be decent and designed with a sense of social responsibility

Comments:

This item concerns gender-related advertisements in which nudity or scantily dressed persons or erotic effects are used as significant effects. An advertisement in which one or more of these elements are included will generally be indecent if the advertisement is unquestionably suited to cause offence.

An advertisement in the public domain which is offensive (crude sexual pictures) and accordingly in violation of section 9¹ of the Danish Executive Order on Public Order would also constitute a violation of section 1 of the Marketing Practices Act.

¹ Under section 9(1) of the Executive Order on Public Order, posters may not be put up or delivered and publications or pictures may not be exhibited, sold or distributed when suited to disturb the peace or cause offence. Failure to comply with the provision is fined.

Section 9 of the Executive Order on Public Order constitutes criminal law protection against violations qualified as more serious in the public domain. In this connection, reference is made to the report of 17 December 2002 issued by the Director of Public Prosecutions to the Danish Ministry of Justice on criminal law protection against being confronted with pornographic pictures in the public domain. According to the report, the provision assumes that crude sexual pictures are at issue. The concept "offensive" (section 9(1) of the Executive Order on Public Order) is a legal standard the meaning of which will change over time as people's perception of sexual issues change. Section 9 of the Executive Order on Public Order corresponds to the previous section 12 of the standard police regulations referred to in the report by the Director of Public Prosecutions.

In a judgment (case no. SS 711/2010), the Court of Holstebro found for the owner of a shop charged with violating section 9 of the Executive Order on Public Order by having put up two posters outside the shop showing partially naked women with a dildo. The Court found that objectively one of the posters was suited for causing offence – depending on the context in which it was used. However, the Court did not find that the poster could be deemed to be offensive in the context in which the owner of the shop had used it. The Court emphasised, among other things, that no information was available in the relevant case about anything in close proximity to the shop prompting special consideration to be given to the persons frequenting the place. The judgment seems to be in line with the Director of Public Prosecutions' perception of the concept of "offensive".

In other circumstances, the advertisement might be deemed to be indecent or without any sense of social responsibility based on an individual assessment and consequently in violation of good marketing practice.

Current social norms mean that considerable leeway will be given in relation to nudity and eroticism in advertisements. For example, an advertisement showing a naked or scantily dressed person or an advertisement showing two persons lovingly embracing each other will not generally be offensive if the advertisement does not contain pornographic elements. The statements and choice of words in the advertisement could be decisive for whether the advertisement would be deemed to be indecent.

That a gender-related advertisement must be designed with a sense of social responsibility means that it must take human dignity into consideration, that it must not play on fear without any legitimate reason or exploit misfortune or suffering, and that it may not give the impression of inciting or supporting violent, illegal or reprehensible behaviour.

An advertisement for alcohol linking the consumption of alcohol to nudity or scantily dressed people or connecting the consumption of alcohol with sexual excitement or sexual performance may reflect a lack of social responsibility in the circumstances.

An advertisement the images or text of which are suited to cause discomfort or fear because the advertisement shows a completely or partially naked woman or man with a physical handicap following from an operation or accident without any legitimate reason could be deemed to be designed with a lack of social responsibility in the circumstances.

As regards consideration for children in the public domain, reference is made to the general comments in item 4 of these guidelines.

Section 4

Commencement

These guidelines will enter into force on 1 April 2012. At the same time, the guidelines on gender-discriminating advertising of February 1993 are repealed.

The guidelines will be reviewed as and when deemed necessary by the Consumer Ombudsman, however not later than five years after their first release.

4.1 Annex to the guidelines on gender-related advertising

In 1993, the Consumer Ombudsman issued Guidelines on gender-discriminating advertising. They superseded the guidelines stated in "Rapport afgivet af en af Forbrugerombudsmanden nedsat arbejdsgruppe" (Report issued by a working group set up by the Consumer Ombudsman) of January 1979 on gender-discriminating advertising.

The period since 1993 has seen social and regulatory developments that may have an impact on what is considered good marketing practice in the use of gender in advertising. See section 1 of the Marketing Practices Act. These guidelines cover gender-related advertising, see item 3 of the guidelines, and supersede the guidelines on gender-discriminating advertising of 1993 issued by the Consumer Ombudsman.

Good marketing practice is a legal standard evolving over time in line with trends in society. One of the consequences of this is that advertising previously contrary to good marketing practice is not necessarily contrary to it today – and vice versa.

The European Convention on Human Rights² is part of Danish law. It follows from article 10(1) of the Convention that everyone has the right to freedom of expression. Legal practice from the European Court of Human Rights shows that the freedom of expression also applies to traders (commercial freedom of expression).

It follows from Article 10(2) of the Convention that the freedom of expression may be restricted if prescribed by law having regard to specific social considerations. Thus, special statutory authority must exist for intervening in marketing activities. The Marketing Practices Act is an example of such legislation.

Today, marketing law has been harmonised in the European Union to a high degree by the adoption of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005

² The European Convention on Human Rights was implemented in Danish law by Act no. 285 of 29 April 1992 on the European Convention on Human Rights. See Consolidating Act no. 750 of 19 October 1998 as amended.

concerning unfair business-to-consumer commercial practices in the internal market (in the following the "Marketing Directive"), which was implemented in Danish law by Act no. 1547 of 20 December 2006, which came into force on 1 December 2007.

However, the issues dealt with in the guidelines fall outside the scope of the Marketing Directive. See recital 7 of the Directive. This recital states that the Directive does not concern "taste and decency", and that member states should be able to ban certain commercial practices in their territory for such reasons even where such practices do not limit consumers' freedom of choice.

The Lisbon Treaty came into force on 1 December 2009. Article 6 of the Treaty refers to the Charter of Fundamental Rights of the European Union³. The Charter is legally binding on the institutions and member states of the European Union in connection with the implementation of EU law. Article 21 of the Charter prohibits discrimination on the grounds of sex.

The Gender Equality Act⁴ the purpose of which is to promote equality between women and men was enacted by Folketinget (the Danish parliament) in 2000. The Act, which has since been amended, contains a prohibition against discrimination on the grounds of gender (sex discrimination). Under section 2(1) of the Act, no one shall expose any person to direct or indirect discrimination on the grounds of gender.

The enactment by the Folketing of the Gender Equality Act reflects a significant social interest in ensuring that no discrimination occurs on the grounds of gender.

Under section 4 of the Act, public authorities must work to promote gender equality in their respective fields and incorporate gender equality in all planning and management. As part of his general supervisory activities under the Marketing Practices Act, the Consumer Ombudsman will ensure that advertising does not discriminate against gender, and these guidelines are also part of the general efforts to support gender equality.

In addition to the Gender Equality Act, other statutory provisions exist which also regulate gender-related advertising, and which also have an impact on the interpretation and application of section 1 of the Marketing Practices Act.

Section 9 of the Executive Order on Public Order⁵ may, in the circumstances, lay down restrictions in relation to advertising.

Sections 232 and 234 of the Danish Criminal Code constitute protection against being confronted with e.g. crude pornographic pictures.

The Executive Order on Advertising on the Radio, Television and in On-Demand Audio-Visual Media Services⁶ provides that an advertisement must be decorous, honest and designed with a

³ The Charter of Fundamental Rights of the European Union was published in the Official Journal of the European Union on 14 December 2007, C 303, page 1.

⁴ See Consolidating Act no. 1095 of 19 September 2007 on Equality between Women and Men, as amended.

⁵ Executive Order no. 511 of 20 June 2005 on the Securing by the Police of Public Order and Protection of Individuals' and Public Safety etc. and Police Access to Initiate Temporary Measures (the Executive Order on Public Order) as amended.

sense of social responsibility (section 8(1)), and it further provides that advertisements may not include or promote any discrimination on the grounds of e.g. gender (section 10(2)).

⁶ Executive Order no. 338 of 16 April 2011 on Advertising and Sponsoring etc. of Radio and Television Programmes and On-Demand Audio-Visual Media Services and Establishment of Partnerships.