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The Consumer Ombudsman's Guidelines on Commercial Practices towards Children and Youth

- Children and marketing
- Children and contractual terms

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1. Preamble

1.1 Background

These guidelines contain general information on the particular provisions of the Marketing Control Act concerning children and on the practice of the Consumer Ombudsman and the Market Council in cases concerning children and youth. The guidelines are not official regulations and do not give an exhaustive presentation.

Traders who are in doubt as to whether their marketing is in compliance with the Marketing Control Act's chapter on children may contact the Consumer Ombudsman for guidance. While the Consumer Ombudsman cannot approve marketing in advance, it can provide guidance concerning which requirements apply.

1.2 The Consumer Ombudsman and the Market Council

The Consumer Ombudsman and the Market Council enforce the Marketing Control Act with the consumers' interests in mind.

The Consumer Ombudsman conducts the day-to-day monitoring of traders' marketing, commercial practices and contractual terms in their relations with consumers in order to ensure that they are in line with the Marketing Control Act.

The Market Council is a court-like administrative agency which handles cases regarding marketing brought forward by the Consumer Ombudsman or others.

2. Legal basis

2.1 EU Directive on Unfair Commercial Practices

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices prohibits "unfair commercial practices"; see also Article 5.

By *commercial practices* is meant any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.¹

According to Article 5 of the Directive, a commercial practice will be seen as "unfair" if it is contrary to the requirements of professional diligence and it significantly alters or is likely to significantly alter the financial behaviour of the average consumer. A commercial practice is always considered to be unfair if it is misleading as defined in Articles 6 and 7, or aggressive as defined in Articles 8 and 9, and likely to influence the average consumer to make a financial decision that he/she would otherwise not have made.

¹ See definitions in MCA section 5, sub-paragraph (d) and the Directive on Unfair Commercial Practices, Article 2, sub-paragraph (d).

Appendix 1 of the Directive states forms of commercial practice which under any circumstances are seen as unfair and prohibited. This appendix is commonly known as the "Blacklist". Point 28 in the Blacklist establishes that the following will always be unfair and prohibited:

"Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them."

2.2 The Marketing Control Act

The new Marketing Control Act came into force on June 1st 2009. As regards contents, the new act is mainly a continuation of the former act, with those adjustments needed for compliance with the Directive.

The first chapter of the Act states provisions of a general nature, including section 2, which establishes that marketing must not be contrary to good marketing practice, and section 3, which establishes that all marketing shall be designed and presented in such a manner that it clearly comes across as marketing.

The Directive is carried out in sections 6-9 of the Act, which establishes that marketing shall not be unfair, e.g. by being incorrect, insufficiently instructive or aggressive.

2.3 New chapter on children

In Chapter 4 of the new Act, a separate chapter is included with specific provisions on the protection of children. The chapter consists of three provisions, namely: a general provision in section 19, a provision on unfair commercial practice towards children in section 20, and a provision on good marketing practice towards children in section 21.

The new provisions in sections 19 and 21 establish the principles on marketing towards children which currently follow from the practice of the Consumer Ombudsman and Market Council according to the former Act. The provision in section 20 is new and included in the Act as a result of the Directive on Unfair Commercial Practices.

The term *children* basically refers to minors under the age of 18. However, the term is used flexibly in interpretations of the Marketing Control Act. In the assessment of the fairness of a particular marketing approach, the age and development of the target group will also be considered. It will thus be of significance whether the marketing is aimed at youth or at small children. The younger the age group affected by the marketing, the stricter the assessment of unfairness.

2.4 Relation to previous practice

The practice of the Market Council and Consumer Ombudsman according to the former Act has been reviewed and assessed in relation to the new Marketing Control Act and the Directive on Unfair Commercial Practices.

References to practice under the previous Act apply to standpoints which the Consumer Ombudsman deems sustainable under the new Act as well.

3. Children and marketing

Research² has shown that it is more difficult for children to understand what marketing is and what its purpose is, as well as to recognise marketing and distinguish it from other content. Their impressionability and lack of experience make them vulnerable to various means and forms of marketing, and they therefore have a greater need for protection against the pressures and influences of marketing than adults do.

Since children are very active users of media and quick to utilise new technology, the development of media in recent years involves new challenges with respect to protecting children and youth to prevent the exploitation of their impressionability, credulity, trusting natures and lack of experience for commercial purposes.

First of all, the development of media has resulted in many new products and services of particular interest to children, such as mobile content services and Internet, TV and PC games. One challenge in this connection is that these products and services are marketed greatly towards children and youth. Another challenge is that with some of these services and products, children and youth are invited to enter agreements and make purchases, often beyond the limits of their legal competence in such matters.

Secondly, the development of media has also provided new marketing opportunities, which has made it possible to communicate commercial messages directly and individually to children in a whole new way. Marketing is easily integrated with other material, typically by blending with gaming or entertainment activities, and will thus often appear as something other than marketing,. The result is that the distinctions between advertising, information and entertainment become blurred, and the effects of marketing become entrenched in a way that is more difficult to identify and protect oneself against. Marketing also occurs increasingly across national borders, for instance through mobile phones, the Internet and television.

² See, for instance: Bjørnebekk 1992, Dorr 1986, Feilitzen 1989, Schultz Jørgensen et al. 1992, Bjurström 1993, Borch 1996, Tufte 1999, Sverdrup and Lunde 1995 and Von der Lippe 1996.

4. Marketing Control Act section 19: "General provision"

4.1 About the provision

The Marketing Control Act, section 19 reads:

"Section 19 General provision

When a commercial practice is directed at children, or may be seen or heard by children, particular care shall be exercised with regard to the impressionability, lack of experience and natural credulity of children.

In the assessment of whether a commercial practice contravenes provisions in or introduced pursuant to this Act, account shall be taken of age, development and other factors that make children particularly vulnerable."

This is the "children's general clause", the general provision on children and marketing.

Under the provision, consideration must be given to the vulnerability of children not only in cases in which children are the target group for the marketing, but in *all* marketing. This is because children are also exposed to marketing not specifically aimed at them, where precisely the fact that the marketing is not intended for children makes its contents unsuitable and unfair for this age group.

The principles of a stricter interpretation of the Marketing Control Act, and of exercising caution, when marketing towards children, are not new, but also applied under the former Marketing Control Act.

4.2 Hidden marketing

All marketing shall be designed and presented in such a way that it clearly appears as marketing; see also MCA section 3. This is particularly important in relation to children and youth, for whom it is more difficult to distinguish marketing from other communication. This implies that where marketing is directed towards children, it must be designed in such a way that it is obvious to this age group that it is in fact marketing; see also MCA section 19.

4.2.1 Previous practice

In the assessment of previous cases of hidden marketing, the Consumer Ombudsman has emphasised such factors as whether the marketing is mixed together with various elements of gaming, fun and entertainment. In this context, it is also significant whether the medium used allows for interactivity, since this would reinforce the child's experience of fun and entertainment. In these cases, the entertainment elements capture and hold the children's attention, and the children are engaged directly through their own participation. This reinforces the marketing effect and makes it more invasive, while at the same time making it more difficult to distinguish and identify, and the requirement of special caution is further strengthened in this respect.

The Consumer Ombudsman has also considered various forms of sponsorship, company visits and brand-building aimed at nursery schools or school classes. This type of marketing towards children is not unfair per se, but requires the trader to exercise special caution in designing the programmes or events, and to be open and honest about the motives of brand-building, product profiling, customer recruitment, etc. This is because children do not have the experience necessary to see these underlying motives.

5. **The Marketing Control Act section 20: “Unfair commercial practices affecting children”**

The Marketing Control Act section 20 reads:

“Section 20 Unfair commercial practices affecting children

In the assessment of whether a commercial practice is unfair pursuant to section 6, emphasis shall be given to whether the commercial practice is directed especially at children. Even if the commercial practice is not directed especially at children, emphasis shall be given to whether the practice, by virtue of its nature or the product, is likely to influence children, and to whether the trader can be expected to foresee the particular vulnerability of children to the practice.

It shall be prohibited to include in advertising direct exhortations to children to purchase advertised products or to persuade their parents or other adults to buy the advertised products for them.”

5.1 **Unfair commercial practices**

Marketing which is contrary to good commercial practice is unfair and prohibited, if the practice is likely to significantly alter the financial behaviour of the consumers so that they make decisions which they would otherwise not have made; see also MCA section 6, first paragraph and second paragraph.

The obligation of fair commercial practice towards the consumers contains an objective standard which businesses should reasonably be expected to meet.

Marketing shall always be considered unfair and thereby prohibited according to section 6 if it is misleading according to MCA section 7 or 8 or aggressive according to MCA section 9, and likely to influence consumers to make financial decisions which they would otherwise not have made.

The extent to which the marketing is misleading depends on whether it contains incorrect information and is thus untruthful, or if it is likely in any other way to mislead consumers in connection with any of the factors listed in MCA section 7, first paragraph, sub-paragraphs (a) to (h). Marketing will furthermore be considered misleading if it omits or hides significant information, or presents this in an unclear, unintelligible, ambiguous or untimely manner; see also MCA section 8.

Marketing is aggressive if through harassment, coercion, physical force or undue influence it is considered likely to significantly limit the consumers’

freedom of choice or behaviour in connection with a product; see also MCA section 9, first paragraph. By “undue influence” is meant that in which the trader holds a position of power in relation to a consumer and uses this to exert pressure. Undue influence would be a milder form of influence than harassment or coercion. What is unfair in such situations is that the consumer is significantly restricted in terms of his/her opportunity to reach an informed decision. MCA section 9, second paragraph lists factors that must be considered in the assessment of whether marketing is aggressive.

The Marketing Control Act is designed to be flexible, and gives the Consumer Ombudsman and the Market Council the authority to intervene against unfair actions with the consumer’s interests in mind. This also applies in cases where consideration for the consumers is ensured through special legislation. Marketing which is contrary to provisions within the special legislation may on this basis, through the so-called *lovstridsprinsippet* (contrary-to-law principle), also be considered unfair and contrary to good commercial practice.

5.2 Unfair commercial practices affecting children

In the assessment of what is considered unfair commercial practice contrary to with MCA section 6, hereinunder misleading according to MCA sections 7 and 8, aggressive according to MCA section 9, or contrary to *lovstridsprinsippet*, emphasis shall be placed on whether the marketing is particularly aimed at children; see also MCA section 20, first paragraph. This means that consideration shall be given to the impressionability, lack of experience and natural credulity of children, as well as their age, development and other factors which make children particularly vulnerable; see also MCA section 19. Furthermore, even in cases where the marketing is *not* particularly aimed at children, emphasis shall be placed on whether the marketing, because of its nature or because of the product, is likely to influence children and whether the trader can be expected to foresee the particular vulnerability of children to its practice.

This means that the marketing will be subjected to a stricter assessment and that there will be a lower threshold for the rules to be considered violated. For instance, due to their natural credulity, children may take the marketing more literally than adults would, and can thus be more easily misled by marketing that is incorrect according to MCA section 7 or unclear or ambiguous according to MCA section 8. Children are also more easily influenced, and the threshold for what is considered undue influence contrary to the restriction against aggressive marketing in MCA section 9 will be much lower in relation to children than adults.

5.3 Direct exhortations to buy

According to MCA section 20, second paragraph, it is illegal to include in advertising a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them. This provision is equivalent to Point 28 of the Blacklist, which is categorised as a form of aggressive marketing which under any circumstance is considered unfair and prohibited.

Whether any given marketing approach contains a direct exhortation to children to buy or to persuade their parents or other adults to buy the advertised products must be assessed specifically. The assessment shall be made from the child's perspective in the sense that consideration is given to age, development and other factors which make the child particularly vulnerable; see also MCA section 19.

The limits for how "direct" or strong the exhortation has to be for the provision to be considered violated must be drawn in practice.

It is clear that the provision affects e.g. invitations of the type "come and buy" which are directly aimed at children. This follows from the legislative history of the provision.

Furthermore, the design of the marketing, including the words and formulations used, the nature of the medium and the availability of the offer, will be of significance in the assessment of what is to be considered a direct exhortation contrary to the restriction in section 20, second paragraph. For instance, an exhortation to buy may come across stronger in a TV advertisement than in a newspaper ad. The more direct the marketing medium is in nature, the less direct the invitation needs to be in order to be contrary to MCA section 20, second paragraph. The Consumer Ombudsman reasons that marketing sent directly – one-on-one – to a child on his/her mobile phone, e-mail address or through directly addressed mail will usually be considered a direct exhortation to children because of the direct contact with the child.

The accessibility of the offer will also be significant in the assessment of what is to be considered a direct exhortation. In cases where the advertised product may be ordered directly, for instance via the Internet or mobile phone, even more vaguely formulated invitations to buy may be considered a direct exhortation contrary to MCA section 20, second paragraph.

5.4 Previous practice

The prohibition on unfair commercial practices towards children according to MCA section 20, including the prohibition on direct exhortations to children, is new and was included in the law as a result of the Directive on Unfair Commercial Practices.

However, under the former Marketing Control Act, equivalent conditions were also considered to be unfair marketing.

In previous cases regarding misleading marketing to children, the Consumer Ombudsman has taken into account such factors as whether the marketing gives a false impression of the product's actual size, value, condition, durability and performance, or incorrect information concerning health and safety aspects of the product.

The Consumer Ombudsman has also assessed cases concerning marketing that has been deemed likely to create an unfair pressure for children to purchase. In this assessment, emphasis has been placed on e.g. the use of direct exhortations to buy and encouraging children to pester their parents. Invitations such as: "next time you purchase", "available at your local toy shop", "bring your mum and dad to..." etc. have been assessed as potentially unfair and contrary to the Marketing Control Act. Whether the marketing additionally uses various tactics to strengthen the effect of the invitation, such as incentives and taking advantage of various emotions, has also been taken into account.

In relation to children, *Lovstridsprinsippet* has proven to be particularly relevant in cases where marketing or contractual terms are contrary to the rules on the contractual competence of minors according to the Guardianship Act.³

6. The Marketing Control Act section 21: "Special provisions relating to good marketing practice towards children"

6.1 About the provision

The Marketing Control Act section 21 reads:

"Section 21 Special provisions relating to good marketing practice towards children

In an assessment pursuant to section 2 of marketing directed at children, emphasis shall be given to, among other things, whether the marketing:

- a) encourages breaches of the law, dangerous behaviour or breaches of ordinary safety norms,*
- b) plays on social insecurity, a bad conscience or poor self-confidence,*
- c) employs frightening means or is likely to cause fear or anxiety, or*
- d) employs aggressive means like violence, sexuality or drugs."*

Marketing must not be contrary to good marketing practice; see also MCA section 2. In the general assessment, emphasis is placed on whether the marketing is an affront to general ethical and moral viewpoints, or whether it uses offensive means. In the assessment of whether marketing aimed at children is considered contrary to good marketing practice, emphasis shall be placed on such factors as those listed in MCA section 21, subparagraphs (a) to (d).

The mentioned factors are examples which in previous practice have proven to be relevant in the assessment of whether marketing aimed at children is contrary to good marketing practice. The list is not complete and these factors are not the only ones which could be relevant in the assessment of good marketing practice towards children and youth. Each individual case must be specifically assessed, and in accordance with the legislative history, there will be several other factors that may be taken into consideration, including whether the marketing is difficult to identify or

³ In this context, see also Point 8.1 below.

considered as particularly invasive due to design, format, extent or other characteristics; see also Proposition No. 55 to the Odelsting (2007-2008), p. 72 ff.

6.2 Previous practice

6.2.1 Unsuitable marketing methods

In assessing previous cases, The Consumer Ombudsman and the Market Council have concluded that, among other things, sending out directly addressed marketing for weight loss products and erotic materials to children, is unfair and contrary to good marketing practice.

6.2.2 Encouraging dangerous behaviour or breaches of the law or ordinary safety norms

Encouraging breaches of the law, dangerous behaviour and breaches of ordinary safety norms will be unfair and contrary to MCA section 21, subparagraph (a).

In marketing aimed at children and youth, strict requirements apply regarding marketing of dangerous products or the portrayal of dangerous situations. Marketing to children and youth for products that are unsuitable or dangerous for them, will as a norm be considered unfair and contrary to good marketing practice.

The Market Council has handled three cases concerning the encouragement of breaches of the law, dangerous behaviour or breaches of ordinary safety norms:

MR case no. 1.99 The Consumer Ombudsman - Ideal Wasa AS

This case concerned a TV advertisement for Wasa crispbread, showing a family on a camping trip. The family were unable to light their grill and resorted to relatively extreme means to achieve this. The Market Council found the advertisement humorous, but pointed out that the type of slapstick humour used is primarily directed at adults and will not be perceived by all children. The decisive factor must be whether the ad contains situations that are recognisable for children and whether there is a danger that children may imitate the actions portrayed in it. The Market Council further states: *"As the Market Council sees it, barbecuing is a widely recognisable situation for children. Pouring excessive amounts of lighter fluid on a grill that will not light is a serious violation of safety rules associated with grilling. It cannot be ignored that children may get ideas about carrying out similar actions. The use of a hairdryer outdoors in rainy weather, as shown in the TV advertisement, is a violation of safety rules associated with the use of electrical devices. One cannot assume that all children know that one should not use electrical devices in wet conditions. The Market Council finds that both of these situations depicted in the video advertisement may result in such serious consequences if children should decide to imitate what is depicted in the video advertisement, that it is unfair and contrary to good marketing practice if it is shown at an hour when many children are watching television."* The Market Council thus banned the advertisement from being shown on TV before 21:00.

MR case no. 13.93 The Consumer Ombudsman - Nodest A/S

This case concerned a TV advertisement for Butinox paint showing a little boy painting his parents' car. At the end of the video, an adult voice said: "Butinox contains so much joyful colour that it must be stored out of reach for children. To make sure that the kids stay away, you must keep the paint stored in a locked room or cupboard." The Market Council's findings included that by portraying a situation which showed a lack of respect for the applicable safety rules for this type of product, the video advertisement included a violation of the norm of caution in the Marketing Control Act section 1, first paragraph. The advertisement was banned from being shown on TV before 21:00.

MR case no. 21. 99 The Consumer Ombudsman - Esso Norge AS

This case concerned whether Esso Norge's TV advertisement, "The Car Chase", was contrary to MCA section 1, first paragraph.

The film showed an undercover police officer who chose to let a speeding driver running a red light go in order to eat a hot dog in peace. According to the Market Council's perception, this TV advertisement was on the borderline of what is acceptable as "good marketing practice". In the Market Council's view, neither running a red light nor the resulting car chase would be sufficient for the ad to be affected by the law. Neither did the fact that the police officer quit the car chase require such a result, in the Market Council's view. However, the Market Council did find it difficult to accept the final line of the video, in which the police officers trivialised a crime. The comment normalised running a red light, and this was perceived as particularly serious in relation to youth, who were the target group of the advertisement. After a specific assessment, the Market Council found that it is offensive and contrary to the Marketing Control Act to communicate the message that running a red light will not be taken seriously by the police, and the advertisement was banned from being shown.

6.2.3 Taking advantage of social insecurity, a bad conscience or poor self-confidence

Taking advantage of feelings of social insecurity, a bad conscience or poor self-confidence will be unfair and contrary to MCA section 21, sub-paragraph (b).

In its assessment of previous cases, the Consumer Ombudsman has found it unfair to take advantage of the social insecurity of children and give the impression that children will be excluded from their circle of friends if they do sport the right brand names. Furthermore, it has been assessed as unfair to take advantage of parents' conscience in relation to their children, for instance by claiming that they must have a certain type of computer equipment for the children to do well in school or that the children need full credit on their mobile phones in order to be happy.

6.2.4 Use of frightening means or likely to cause fear or anxiety

Marketing which unnecessarily causes terror, anxiety or fear or in any other way uses means that may be frightening to children will be unfair and contrary to MCA section 21, sub-paragraph (c). In this assessment, both the message and the means of the advertisement will be relevant factors, as will the medium used.

In the assessment of previous cases, the Consumer Ombudsman has found it unfair to use means which are frightening in themselves, such as scary music, sound effects or images, as well as creating anxiety by taking advantage of children's fear that their parents might die, or focusing on an abusive situation.

6.2.5 Use of aggressive means such as violence, sexuality and drugs

Marketing which makes use of aggressive means such as violence, sexuality or drug use will be unfair and contrary to MCA section 21, subparagraph (d). The nature of the medium, and possibly the time of broadcasting, may be of significance in the assessment. The Consumer Ombudsman has previously handled several cases concerning the use of violence in cinema and TV advertisements. The issue is particularly relevant here due to the nature of the medium, in which the use of strong means strengthens the effect.

Amongst means considered unfair and contrary to the Marketing Control Act by The Consumer Ombudsman in previous cases are: Glorification and encouragement of use of violence, portrayal of a suicide situation or a gang fight and focusing on injuries and pain. Likewise, a provocative focus on nudity, the body and sexuality and joking about pornography have been assessed as unfair. It has been emphasised that any ironic or humorous angle will not necessarily be seen as neutralising the means used.

The Consumer Ombudsman has reasoned that advertisements which makes use of aggressive means such as violence, sex or drug use should not be shown in connection with presentations for children at the cinema or on TV at times when one must assume that children constitute a significant portion of the audience. In several such cases, the Consumer Ombudsman has also addressed the applicable cinema or TV company as a responsible party.⁴

7. Broadcasting regulations

The Broadcasting Act of 4 December 1992, No. 127⁵ with its regulations has particular rules on marketing aimed at children in broadcasting. The Consumer Ombudsman is the supervising body for these rules; see also Broadcasting Regulation of 28 February 1997, No. 153⁶ section 1-8.

The Broadcasting Act section 3-1, second paragraph reads:

"Advertisements may not be broadcast in connection with children's programmes, nor may advertisements be specifically directed at children."

A closer interpretation of this provision, as well as supplementary rules concerning children and youth under 18 years of age, is found in the Broadcasting Regulation section 3-6, which reads:

"Section 3-6. Advertising and its relation to children and youth under 18 years of age

Account must be taken of the fact that all advertising may be seen or heard by children, and particular care must be shown in respect of children's susceptibility and lack of experience.

No advertisements may be broadcast for products or services of special interest to children and young people that involve the participation

⁴ See Point 11.4 below.

⁵ See: http://www.lovddata.no/cgi-wift/wiftldes?doc=/usr/www/lovddata/all/nl-19921204-127.html&emne=kringkastingslov*&

⁶ See: <http://www.lovddata.no/for/sf/kk/kk-19970228-0153.html>

of persons or figures who in the preceding 12 months have featured regularly or over a long period of time as important elements in programmes for children or young people on a radio or television channel received in Norway.

No advertisements specifically directed at children may be broadcast, cf. section 3-1 of the Act. In the assessment of whether advertising is specifically directed at children, importance shall be attached, inter alia, to the following factors:

- *whether the advertisement concerns a product or a service of particular interest to children,*
- *the time at which the advertisement is broadcast,*
- *whether children under the age of 13 are participants,*
- *whether animation or other form of presentation which particularly appeals to children is used.*

No advertisements may be broadcast ten minutes immediately before or after a children's programme.

A programme is to be regarded as a children's programme when children are deemed to be the primary target group for the programme. In the assessment of whether a programme is to be regarded as a children's programme, importance shall be attached, inter alia, to the following factors:

- *the content and form of the programme,*
- *whether children under the age of 13 are participants,*
- *when the programme is broadcast,*
- *who are potential viewers in relation to the time of broadcast, actual viewers,*
- *the use of language in the programme.*

Teletext pages whose target group is children shall not contain advertising."

In contrast to the Marketing Control Act, in which it is the advertiser who is responsible for ensuring that the marketing is in compliance with the law, the Broadcasting Regulations are targeted at the broadcaster.

The regulations for broadcasting are in certain areas harmonised within the EEA through the TV Directive.⁷ One of the harmonised areas is the rules for marketing towards children. The TV Directive lays down the so-called "broadcaster country principle". According to the principle, it is the legislation in the country in which the broadcaster is established which is applicable, and it is the authorities in that country who may intervene. This means that the Consumer Ombudsman may not intervene against broadcasters established in another country pursuant to the Norwegian ban on marketing targeted specifically at children. This applies even if the channel has programmes in Norwegian, Norwegian subtitles, broadcasts Norwegian advertisements, etc. For example, TV3 may broadcast marketing aimed at children even though their broadcasts are directed

⁷ The Broadcasting Regulations are in certain areas harmonised through the Council Directive of 3 October 1989 on the coordination of certain provisions on the exercise of television operations, determined through law or regulation in the member states (89/552/EEC), which regulates television broadcasts within the EEA. The directive will be replaced by the [AMT Directive](#), which was approved in the EU in December 2007. The AMT Directive is at the moment not implemented in Norwegian law.

towards the Norwegian market, since they are established in the United Kingdom, which does not have any ban on such marketing.

However, the Consumer Ombudsman may, pursuant to the Marketing Control Act, intervene against the advertiser, for instance against misleading advertising.⁸ Furthermore, both the nature of the medium and its design may be of significance in the assessment of marketing, according to the Marketing Control Act and thus also according to the factors in the Broadcasting Regulation section 3-6.

Cases related to the Broadcasting Regulations will not be addressed further in these guidelines.

8. Particular areas of focus

8.1 Minors' legal capacity to enter into agreements

Children have a limited competence concerning contracts, and the main rule according to the Guardianship Act section 2 is that they cannot manage their own resources or commit to binding contracts, and that contracts entered with minors will be invalid. The minor is, out of practical considerations, given a certain right to manage pocket money, his/her own income after turning 15 years of age, as well as other resources which they are given the right to manage (see also the Guardianship Act section 33), and may also enter valid contracts concerning normal cash purchases.

Marketing and contractual terms that are contrary to the Guardianship Act's rules on the legal contractual competence of minors will also be unfair and contrary to the Marketing Control Act.

According to the assessment of the Consumer Ombudsman, children's use of mobile phones and the Internet involves a number of particular challenges in relation to the limited contractual competence of minors. The exception contained in guardianship legislation, that minors may enter contracts concerning normal cash purchases, cannot be naturally transferred to digital contracts on the Internet or via mobile telephone. This is because the question of whether the minor has the ability and right to enter the applicable contract must be assessed specifically in each individual case, with consideration given to the age and maturity of the minor, the amount of money involved and other circumstances around the contract. This assessment cannot be carried out by the trader, since entering into the contract and payment via the Internet and mobile phone take place without any physical presence of the parties to the contract.

8.1.1 Previous practice

The Consumer Ombudsman has previously assessed cases concerning the contractual competence of minors, for instance regarding school photography, book clubs, bank cards, top-up cards and Internet games. A

⁸ See the EC Court's ruling on 9 July 1997 in the case C-34/95 Konsumentombudsmannen – De Agostini (Svenska) Förlag AB and Marknadsdomstolen's ruling on 20 November 1998 in the same case. EFTA Court's ruling 16 June 1995 in the cases E-8/94 and E-9/94.

common characteristic of these contracts is that they involve a commitment from the minor, such as debt establishment or an automatically renewed subscription. In these cases, the Consumer Ombudsman has concluded that it would be contrary to the Marketing Control Act to give an impression through marketing and contractual terms that the minor may by him/herself enter such agreements, when the minor does not have the legal competence for this.

MR case 1/00 The Consumer Ombudsman - Den norske Bank ASA

This case concerned the bank's "Intro Account" offer, a deposit account with a bank card for children/youth without legal competence between the ages of 13 and 18, for which the withdrawal limit was set to NOK 10,000 in a four-day period. While wide agreement was achieved through the proceedings, the withdrawal limit of NOK 10,000 at POS terminals in a four-day period remained unresolved, and was presented to the Market Council. The Market Council found that this condition implied an unnecessary risk for the youngest age group to which DnB offered "Intro Account", and that the condition was thus unfair and contrary to MCA section 9a for this lower user group (ages 13+), considering the maturity level of the children and the pressures and temptations to which they may be subjected. The Market Council reasoned that DnB must have the duty to adapt their product to their various target customer groups, and since DnB had not differentiated their offer, the condition was considered unfair in its entirety.

MR-2006-18

The Market Council judged as unfair the condition of automatically renewed subscriptions to the children and youth magazine *Zoom* set by Barne- og ungdomsavisen AS (The Children and Youth Newspaper, Inc.), pursuant to MCA section 9a, and stated in this context that emphasis was placed on the fact that this concerned conditions in contracts entered on behalf of children, and that it is therefore of particular importance that the contractual terms and conditions are kept within the framework of what must be seen as fair.

8.2 Personal information

In 2003, the Consumer Ombudsman, together with the Norwegian Data Inspectorate, developed a set of guidelines concerning *Acquisition and use of children's personal information*. These guidelines establish that minors who have turned 15 years of age may as a main rule give consent on their own to the acquisition and use of their personal information. Acquisition and use of personal information from minors under age 15 requires the consent of guardians. The consideration behind this rule is that the person giving consent must be capable of understanding to what he/she is giving consent, and of critically assessing such a request. Children will often not be able to see the implications and consequences of providing personal information. Traders must develop good procedures for acquiring guardians' consent, so that they can check whether the consent acquired from guardians is legitimate.⁹

⁹ http://www.forbrukerombudet.no/asset/1507/1/1507_1.pdf

8.3 Children and mobile content services

8.3.1 The Consumer Ombudsman's efforts on mobile content services

"Content services" refers to services which are either delivered via a public telecommunication network or utilised by means of a mobile telephone. The services are paid for either immediately through top-up credit or subsequently through telephone bills. Such services may include ring tones, images, votes, competitions, tests, notices, chats, or overpriced information messages.

Children and youth are an obvious target group for the providers of these services, and this is an area in which the Consumer Ombudsman has received many complaints in recent years. As a result of this, the Consumer Ombudsman has focused particularly on issues concerning the marketing and sale of these services to children and youth.

A clear problem in many of the complaints received is that minors have been fooled into spending a lot of money on subscription services. The marketing of these services is to a large extent designed in such a way that children and youth do not realise that they are starting a subscription when they order a single content service. Such subscription services involve a future commitment for which minors do not have the legal competence to enter into according to the guardianship legislation. It will thus be unfair and contrary to the Marketing Control Act to give an impression through marketing and contractual terms that minors themselves may enter into such contracts.¹⁰

The Consumer Ombudsman's monitoring of mobile content services consists of relatively frequent inspections and close cooperation and dialogue with mobile network operators to ensure that the content providers follow the CPA (Content Provider Access) guidelines¹¹ and the Consumer Ombudsman's guidelines.¹² Several services have already been closed down by the operators for limited periods after clear violations of the guidelines have been observed.

The Consumer Ombudsman has also seen a great need among the consumers for information concerning mobile content services, and has therefore prepared The Consumer Ombudsman's Guidelines for Smarter Mobile Use. These guidelines contain information on what consumers should do if they receive unwanted content on their mobile phones, as well as advice for how they can avoid ending up in a situation where they are fooled into entering a subscription service¹³.

8.3.2 The Consumer Ombudsman's guidelines for mobile content services

The Consumer Ombudsman has in collaboration with the mobile network operators Telenor, NetCom, Tele2 and Network Norway prepared guide-

¹⁰ See Point 8.1 above.

¹¹ See Point 8.3.3 below.

¹² See Point 8.3.2.below.

¹³ http://www.forbrukerombudet.no/asset/3176/1/3176_1.pdf

lines for the marketing and sale of mobile content services.¹⁴ These guidelines were last revised in February 2009.¹⁵ The guidelines provide an overview of the most important requirements for marketing and sale of content services for mobile phones.

The requirements in these guidelines include that all marketing of mobile content services should be designed in a clear and intelligible manner so that they are not misleading. For example, a content service shall not be marketed as a single service if it is actually a subscription service.

Terms and conditions of prices and subscriptions shall be clearly displayed in all marketing, and always stated with the same or virtually the same communicative effect as the short code or the order form. The fact that the consumer may stop any service by sending "STOP" to the short code from which the service is received shall also be clearly stated in all marketing.

The guidelines also require that the content services be classified with a minimum age, and that an age check is conducted when content services are ordered. If the age check reveals that the user is under the minimum age, the order shall be cancelled and the contents shall not be delivered to the user.

Failure to meet the requirements set in the Consumer Ombudsman's guidelines may easily be seen as unfair and contrary to the Marketing Control Act. Here, as with all other marketing, stricter requirements apply to marketing that reaches children and youth.

8.3.3 CPA guidelines for mobile content services

The operators have set a number of principles and rules in the CPA guidelines, which are a part of the CPA agreement,¹⁶ with which the content providers must comply. If the content providers acts in breach with this agreement, the operators may sanction them, for instance by closing down the service.

Failure to comply with these industry norms will, depending on the circumstances, potentially be unfair and contrary to the Marketing Control Act.

8.3.4 Chapter 5a of the Electronic Communication regulation

The regulation on electronic communication networks and electronic communication services of February 16th 2004, No. 401,¹⁷ Chapter 5a contains rules on jointly billed services, including mobile content services. The regulation overlaps on a number of points with the requirements set in the Consumer Ombudsman's guidelines and the operators' CPA guidelines.

¹⁴ See the Consumer Ombudsman's guidelines for mobile content services: [\[link\]](#).

¹⁵ <http://www.forbrukerombudet.no/index.gan?id=11039483&subid=0>

¹⁶ An agreement between the mobile network operator and content provider which regulates the rights and duties between the parties.

¹⁷ See <http://websir.lovdato.no/cgi-lex/wiftzsok?bas=sf+stv+del+ins+bv+fv+nb+jb+sj+mv+pv+ov&emne1=ekomforskriften&button=S%F8k&sok=fast>

The regulation gives the consumer the right to block all or some access to the use of jointly billed services free of charge. The operator is obliged to inform the consumer of this option to block all or some services, including the different amount limits available. The consumer shall have the opportunity to stop delivery of mobile content services by sending the message "STOP", free of charge. The operator shall allow the consumer to register that the end user of the mobile phone is a minor, and have an interface for age verification which makes it possible to check the age of any user who orders a content service. If the age check shows that the end user is under a minimum age, the order shall be stopped and the content shall not be delivered to the end user.

Both the content providers and the mobile network operators are required by law to have a satisfactory arrangement for processing of complaints concerning mobile content services. If any dispute fails to be resolved by either the content provider or the mobile network operator, then such services may as of July 1st 2008 be appealed to *Brukerklagenemnda for elektronisk kommunikasjon* (the Users' Complaints Commission for Electronic Communication).¹⁸

9. Children and unhealthy food

Surveys previously conducted by the Consumer Ombudsman have shown that the marketing of various types of food, especially those with high levels of sugar, fat and/or salt, currently make up a large portion of the marketing aimed at children and youth. Often, this kind of marketing uses means which can create a great pressure to purchase, such as free gifts and competitions, which, combined with the nature of the products, can have an adverse effect on the health of children and youth.

The World Health Organisation (WHO) is currently developing international principles for the marketing of unhealthy foods aimed at children and youth.¹⁹

In 2007, the International Obesity Task Force (IOTF) – a global network of experts – launched a set of principles on how to reduce food marketing aimed at children. These principles include the point that self-regulation is not sufficient and stress the fact that regulation must be done internationally to cover cross-border marketing.

Also in 2007, the Norwegian Consumer Council launched its *Guidelines for marketing of food and drinks aimed at children and youth* in collaboration with various actors in the business sector. The purpose of these guidelines is to "supplement and expand on existing legislation and contribute to a sound and responsible market practice" and to "raise awareness in the business world of the challenges in marketing of food and drinks towards children and youth, and contribute to protecting these groups from adverse market influence".

¹⁸ <https://www.brukerklagenemnda.no/>

¹⁹ See more detailed information at the WHO website:
<http://www.who.int/dietphysicalactivity/marketing-food-to-children/en/index.html>

The Consumer Ombudsman has studied the issues associated with marketing of unhealthy food towards children and youth and fear that a self-regulation of this marketing is not sufficient, and has therefore suggested the introduction of a legal ban on marketing of these types of products towards children and youth.

The Ministry of Children and Equality will wait and see the impact of the Consumer Council's guidelines before considering any legal regulation. It is uncertain whether such a legal regulation should be brought in to the Marketing Control Act, since the concerns behind such a regulation will not primarily be consumer concerns, but rather health concerns.

10. Advertising in schools

The Act Relating to Primary and Secondary Education of July 17th 1998, No. 61 (The Education Act) contains a provision concerning advertising in schools.

The Education Act section 9-6 states:

"The school owner shall ensure that the pupils are not subjected to advertising which is likely to create commercial pressure or which to a large extent may influence attitudes, behaviour and values, e.g. on school grounds, in textbooks and in other teaching tools used in education.

The Ministry may give more detailed regulations."

An equivalent provision is included in the Act Relating to State Grants to Private Schools Offering Primary and Secondary Education of 4 July 2003, No. 84 (the Private Education Act) section 7-1a.

The provisions within the Education Act and Private Education Act give the school owner the duty to ensure that pupils are not subjected to advertising which could be considered to have an unwanted or adverse effect on the pupils. Each school owner must make an individual, discretionary assessment of what is considered likely to create commercial pressure or to a large extent influence attitudes, behaviour and values so that it cannot be permitted. According to the legislative history of the provision, the pupils' age and maturity level will be an important factor in this assessment.

The provision's list of school grounds, textbooks and teaching tools are intended as an exemplification of central parts of the pupils' school life and not as an exhaustive list of possible arenas for advertising in schools. In the legislative history, it is underlined that this provision is not meant to adversely affect the use of Internet, TV, newspapers, magazines, etc. in education, or hinder company visits and partnerships between schools and local workplaces and businesses. Likewise, advertising on external buildings used by some schools for instruction, such as swimming pools or sports halls, are not meant to be affected either.

Since this provision is discretionary, the details of its content must be clarified through practice. To prevent the development of diverging practices between schools, the Ministry of Education and Research has developed a set of guidelines for school owners on how the provision is to be understood and practiced.

The supervision of the Education Act and Private Education Act, including their bans on advertising in schools, lies with the Ministry of Education and Research and not with the Consumer Ombudsman. However, the Consumer Ombudsman may, pursuant to the Marketing Control Act, intervene against the advertiser, for instance in case of misleading advertising.

11. The Consumer Ombudsman and Market Council's sanctions

11.1 Decisions on prohibitions and orders

Upon violation of sections 19-21 of the Marketing Control Act, the Consumer Ombudsman and Market Council may, if intervention is necessary out of concern for the consumers, issue a decision on a prohibition according to section 40 or an order according to section 41.

Decisions made by the Consumer Ombudsman may be appealed to the Market Council. The Market Council's decisions may not be appealed.

11.2 Enforcement penalties

To ensure compliance with decisions according to sections 40 and 41, an enforcement penalty shall be fixed, which the party to whom the decision is directed shall pay, if that party violates the decision. The fixing of this enforcement penalty may be waived subject to particular circumstances; see also MCA section 42. The rules in section 42 are mainly a continuation of the previous enforcement fee system.²⁰

11.3 Infringement penalties

The Consumer Ombudsman may make decisions concerning infringement penalties for violation of section 20, second paragraph; see also MCA section 43. The conditions for issuing this infringement penalty are that the infringement is intentional or negligent and that the violation is either considered material or has occurred repeatedly.

Infringement penalties, like enforcement penalties, shall be determined following a specific assessment of each individual case. An overarching principle is that the infringement penalty should be set high enough that it shall not be financially profitable to break the law. In fixing the size of the fee, emphasis shall be placed on such factors as the severity, scope and effects of the violation; see also section 43, second paragraph.

²⁰ Proposition No. 55 to the Odelsting (2007-2008), p. 213

11.4 Accessories

Decisions may also be directed at accessories; see also section 39, third paragraph. While accessories can be legal persons such as advertising agencies and venues, they may also be natural persons such as a board chairperson or board member.

11.5 Criminal penalties

Intentional and material violation of section 20, second paragraph is, following prosecution from the prosecuting authority, also punishable by fines, imprisonment of up to six months, or both, unless a stricter penal provision applies; see also MCA section 48. Accessories can be liable to the same penalties.