

The Consumer Ombudsman's Guidelines on

Regulations for Marketing by E-mail, SMS, etc. – The Marketing Control Act § 15

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1. Preamble

These guidelines contain a closer specification of which regulations apply for marketing communications made by means of electronic communications such as e-mail, SMS, fax, etc.

The guidelines are based on the wording of the Marketing Control Act (MCA) § 15 and the legislative history of the ruling. The points not directly expressed in these legal sources are taken from practice within *Markedsrådet* (the Market Council) and the Consumer Ombudsman.

The Marketing Control Act § 15 prohibits, as a main rule, electronic marketing communication to natural persons who have not consented to receiving such marketing.

The reasoning behind this prohibition is that this form of marketing is perceived as particularly invasive, and constitutes an unwanted strain on the communication networks. In using electronic communication methods, it is also possible to “spam” (mass sending of marketing messages) a large number of recipients, without involving any significant expenses or inconvenience for the business.

These guidelines are developed according to the Marketing Control Act of 9 January 2009, applicable from 1 June 2009, and will replace the Consumer Ombudsman’s guidelines for the Marketing Control Act § 2b (spam), which built upon the Marketing Control Act of 26 June 1972. The new Act implements, among other things, the EU directive on unfair commercial practices.¹

The Marketing Control Act (MCA) § 15 is a furthering of the previous MCA §2b. Only minor, linguistic adjustments have been made, and the changes are not intended to alter the material content of the old § 2b.² This also implies that previous practice and the legislative history³ of the regulations are still relevant in interpreting § 15.

The Marketing Control Act § 2b was put into effect on 1 March 2001, and changed on 1 February 2005 as a result of Norway’s implementation of the EU Directive on Privacy and Electronic Communications (2002/58/EC).

Businesses which after reading these guidelines are unsure whether their marketing communications will be in accordance with the requirements of the MCA § 15 may contact the Consumer Ombudsman for assistance. The Consumer Ombudsman cannot preapprove any marketing, but can provide further information on which requirements apply.

¹ Council Directive 2005/29/EC

² Cf. Proposition no. 55 to the Odelsting (2007-2008) p. 201 in the special comment to § 15.

³ Proposition no. 62 to the Odelsting (1999-2000) and Proposition no. 92 to the Odelsting (2003-2004)

2. The Marketing Control Act § 15 – Wording and demarcation

2.1 Wording

The regulation reads:

"§ 15. Restrictions on the use of certain methods of communication

It shall be prohibited in the course of trade, without the prior consent of the recipient, to direct marketing communications at natural persons using electronic methods of communication which permit individual communication, such as electronic mail, telefax or automated calling systems (calling machines).

The prior consent requirement specified in the first paragraph shall not, however, apply to marketing where the natural person is contacted orally by telephone.

The prior consent requirement specified in the first paragraph shall also not apply to marketing by means of electronic mail where there is an existing customer relationship and the contracting trader has obtained the electronic address of the customer in connection with a sale. The marketing may only relate to the trader's own goods, services or other products corresponding to those on which the customer relationship is based. At the time that the electronic address is obtained, and at the time of any subsequent marketing communication, the customer shall be given a simple and free opportunity to opt out of receiving such communications.

"Electronic mail" shall in this section mean any communication in the form of text, speech, sound or image that is sent via an electronic communications network, and that can be stored on the network or in the terminal equipment of the recipient until the recipient retrieves it. This includes text and multimedia messages sent to mobile telephones.

The provisions of the E-commerce Act, including section 9 on electronic marketing, shall apply in addition to this provision."

2.2 § 15 Paragraph One – Prohibition against marketing communications by electronic methods of communication

The regulation contains a prohibition against addressing marketing communications to natural persons by means of electronic methods of communication which permit individual communication, without the prior consent of the recipient.

It is necessary to demarcate the domain of the regulation according to which senders and which recipients it affects. In addition, it is necessary to specify the types of communications that require the prior consent of the

recipient, as well as the requirements that must be met in order for this to in fact be considered as valid, prior consent.

2.3 What are “Electronic methods of communication that permit individual communication”, cf. § 15, Paragraph One and “electronic mail”, cf. § 15, Paragraph Four?

Examples of electronic methods of communication that are affected by the regulation are electronic mail, including SMS/MMS, telefax and automated calling systems (calling machines). By automated calling systems is meant automatic calls to telephone subscribers with the automatic playback of a recorded marketing message when the call is answered. The list of examples of electronic methods of communication is not exhaustive.

The concept of “electronic mail” is subject to the Directive on Privacy and Electronic Communications, Article 2, Letter h.⁴ In addition to “regular” e-mail, this also encompasses text and multimedia messages to mobile telephones (SMS and MMS).

Only those methods of communication that permit individual communication are covered by this regulation. This implies that forms of communication where the sender has no influence on who receives the messages, such as radio and television, are not covered. Regular telemarketing approaches are also specifically exempted, cf. MCA § 15, Paragraph Two.

2.4 “... conduct of business...” – Which senders are affected?

The regulation only applies in instances where the sender is conducting business. By business conduct is meant any lasting activity that has financial gain as its primary aim. Business conduct does not, however, apply only to the private sector. Activities in which the proceeds go to a good cause, so-called “non-profit” activities, and public activities may also be considered as business conduct, depending on the circumstances.⁵

Charitable organisations, sport teams or other organisations that do not have financial gain as their primary aim must be considered to be conducting business in those cases when they are engaging in marketing with a primary aim of raising money for the organisation through e.g. sales of lottery tickets or other products.

The Consumer Ombudsman has specified, and it also follows as a condition of the legislative history of § 15 that pure fundraising campaigns do not fall under the concept of business conduct; an example is approaching the consumer when the organisation is only asking for monetary support.

⁴ Council Directive 2002/58/EC

⁵ Cf. Proposition no. 55 to the Odelsting (2007-2008) p. 30

Market and opinion questionnaires also fall outside the concept of business conduct, and are thus not affected by MCA § 15. See nonetheless Point 2.6.3.⁶

2.5 "... natural persons..." – Which recipients are affected?

The prohibition in § 15 applies to marketing directed at all natural persons.⁷ Marketing directed to businesses is not affected by the regulation.

Marketing directed to a natural person's private e-mail address, mobile telephone or fax machine will be affected. The same applies to marketing directed to a natural person's individual e-mail address at work, e.g. john.doe@companyX.com, regardless of whether the e-mail contains offers for the business. The prohibition also applies even if a natural person's e-mail address is registered as the contact address of the business in the Brønnøysund Register Centre or in another company registry.

Nevertheless, it is permitted to send marketing to e-mail addresses that do not belong to a specific natural person, e.g. mail@companyX.com.

There may be instances of uncertainty when for instance it is unclear whether or not an e-mail address belongs to a natural person. In such cases, it will be considered a breach in regulations if advertisements are sent to addresses that in fact belong to natural persons. The business must therefore ensure that this does not occur.

2.6 "... marketing communication..." – Which communications are affected?

2.6.1 General

A marketing communication will primarily be an approach with the aim of influencing the recipient to purchase a good or service. In addition to what may traditionally be regarded as marketing or advertisement, that which according to normal linguistic usage is regarded as information or newsletters may in some instances be regarded as marketing. According to the assessment of the Consumer Ombudsman, the determining factor is not what the marketing communication is called or presents itself to be, as long as an assessment of its contents shows that the aim of the communication is marketing.

Communications containing a combination of news/user information and marketing are also affected by the wording of § 15. Therefore, as for other marketing approaches, it is required here that the consumers give their prior consent to receive this type of communication.

⁶ Cf. Proposition no. 55 to the Odelsting (2007-2008) p. 30

⁷ With the implementation of the EU Directive on Privacy and Electronic Communications in 2005, the former MCA § 2b was changed. The consequences of this change included that the business was required to obtain consent for each "natural person" and not merely from "consumers".

Sending of requests for consent shall be considered as marketing communications. Such requests can therefore not be sent out by means of the electronic methods of communication affected by MCA § 15.⁸

2.6.2 Invitations to participate in contests

Sending out unrequested e-mail and similar items from a business with an invitation to participate in a contest is according to the assessment of the Consumer Ombudsman in conflict with § 15. This is because contests are held to attract attention to products of the sender or the sender's associates.

2.6.3 Newsletters and market research questionnaires

Electronic newsletters of businesses will be affected by the prohibition, if the aim of the newsletters is to market their own or others' products. Forms of communication that are actually marketing tools should be referred to as such and not as newsletters.

An electronic market research questionnaire that is actually a marketing tool for its sender or the sender's associates will also be affected by this prohibition.

2.7 "... prior consent..." – What is consent?

2.7.1 Consent in general

The consent given by the consumer shall be a voluntary, explicit and informed declaration.⁹ In addition, further requirements must be set to the actual process around the acquisition and subsequent use of consent. The following requirements apply:

Voluntary:

Consent must be given voluntarily. The consumer shall be able to withdraw his/her consent at any time.

Explicit:

Consent must be given actively. The consumer may not be bound by passivity. This implies that a pre-completed form or a condition in a contract is not sufficient to constitute valid consent. The business must design the form in such a way that the consumer must tick a separate box, or work out a similar arrangement, to obtain the consumer's consent.

Informed:

When the business obtains the consumer's consent, through e.g. online registration, the consumer must, in direct connection to the question of whether he/she consents, be given information on that to which he/she is consenting (declaration of consent). The consumer must in this context be informed of what it means to give his/her consent, for instance how often he/she will receive marketing messages and what types of products will be marketed.

⁸ Proposition no. 62 to the Odelsting (1999-2000) p. 33

⁹ Cf. Proposition no. 62 to the Odelsting (1999-2000) p. 33 ff. and NOU 1997:19 *Et bedre personvern* (Better Protection of Privacy) ch. 21.

It must also be stated clearly to whom the consent is given. If the consent is obtained to send out marketing messages on behalf of "business associates", then this must be stated, for one thing. For another, an updated list of names of these "business associates" must at all times be available, either directly within the declaration of consent or via a link to a website where this is stated.

If the issue is obtaining consent to send out messages with a combined content of news/user information and marketing, it must be made clear to the consumer that he or she consents to receive messages with such a combined content.

Form of consent:

Consent may be given in both oral and written form. It is the business that shall prove that the recipient has given his/her consent, and the businesses must therefore store the documentation of the consent. The Consumer Ombudsman reserves the right to request this documentation.

Duration of consent:

One interpretation of the consent and the circumstances around its acquisition may mean that the consent has a certain duration. For example, the duration of the consent will be limited if the consumer consents to a certain processing of the data, and this has been completed.

Passivity from the business may lead to termination of the consent, so that it may no longer be used as a basis for sending of marketing messages. If the business has not sent marketing messages on the basis of consent for a longer period of time, this may mean that the consent can no longer be used to send marketing messages.¹⁰

Other points on obtaining consent:

As mentioned in Point 2.6.1, the consent may not be obtained by using electronic methods of communication affected by the MCA § 15 (such as e-mail or SMS) to address the consumer and ask if he/she would like to give consent.¹¹

The Consumer Ombudsman recommends that businesses use a double opt-in model to avoid "harassment registration" and other misunderstandings. This implies that the recipient for instance after registration receives an e-mail from the business, where he/she is to confirm the registration. Only after the recipient has activated a link in the e-mail is he/she considered to have given consent.

¹⁰ See also Personal Data Act § 28 which determines that the party responsible for treatment shall not store personal data longer than necessary to fulfil the purpose of the treatment.

¹¹ Proposition no. 62 to the Odelsting (1999-2000) p. 33

2.7.2 Consent from children and youth

Minors under 15 years of age may not give consent to receive marketing messages via electronic tools of communication. Businesses may therefore not obtain personal information from minors under 15 years of age for this purpose, unless the business first obtains consent from the parents. For more information on obtaining and using personal information of children and youth, see the Consumer Ombudsman's guidelines on this.¹²

For minors under 15 years of age it is the parents who must give their consent for the minor to receive electronic marketing messages. When the parents have given their consent to this and messages are subsequently sent to children under 15 years of age, the Consumer Ombudsman's guidelines on "Marketing Towards Children" must be followed. These guidelines must also be given consideration when marketing towards minors between 15 and 18 years of age.¹³

2.7.3 Specific guidelines on consent databases

A number of businesses build up consent databases where consent is obtained for a group of further unspecified businesses to send out marketing messages within areas for which the consumers express interest.

When using consent databases, it is important that the design of the interest form and the content of the consent declaration ensure that the consumer's consent is sufficiently informed; cf. Pt. 2.7.1.

As a rule¹⁴ it is possible for a business to buy a consent database and send marketing messages to the consumers it lists. The condition for this is that the business sends a notification to the consumers that it has bought the database, along with information on how the consumer may withdraw his/her consent. How often and about what types of products the business may send marketing messages to the consumer will depend on the original consent.

In cases where the consent database does not actually change hands, such as in the case of a sale, but there is nonetheless a change in the ownership conditions, such as through transfer of stocks or a merger between two companies, a notification to the consumer will not always be necessary. To be on the safe side, the Consumer Ombudsman nonetheless recommends sending a notification, and information on how the consumer may withdraw his/her consent in these situations.

¹² <http://www.forbrukerombudet.no/index.gan?id=11037365&subid=0>

¹³ <http://www.forbrukerombudet.no/index.gan?id=11037365&subid=0>

¹⁴ An exception from this rule may be when the service or product categories of the database which are registered along with the consumer's personal data and contact information may reveal something confidential or sensitive about that consumer. In these cases, it is not certain that the database may be sold.

2.7.4 Specific guidelines on the requirement of consent to marketing as a condition for doing business

In entering an agreement on purchase of goods or services, it may not be set as a condition that the consumer must give consent to allow the business to subsequently direct marketing to him/her.¹⁵

2.7.5 Specific guidelines on rewards/prizes for consenting to receive marketing messages

The Consumer Ombudsman has seen several instances where consumers are offered advantages for consenting to receive marketing messages. This may involve free SMS messages for the consumer to send via the Internet, free downloads for his/her mobile telephone, a free trial session at a gym, the opportunity to participate in contests or special discounts on goods or services.

The Consumer Ombudsman is wary of the practice of persuading consumers with rewards and prizes to waive the protection to which they are entitled by law. Marketing measures that use rewards and prizes may be perceived to be in conflict with good, customary marketing practices according to § 2, but they may also be seen as unreasonable according to the general prohibition on unreasonable business practices in MCA § 6.

Whether it is legal to offer consumers payment or other forms of rewards for receiving marketing messages depends on specific assessments of the various marketing measures. In the assessments, emphasis will be placed on whether the arrangement is clear to the consumers. They shall have the opportunity to consider the advantages and disadvantages of the arrangement by having easy access to the terms and conditions. Furthermore, the extent of the marketing they consent to receive will be emphasised, and whether this is marketing from only the business giving them the advantage, or if it is a more general consent to receiving marketing messages from several businesses. This will be evaluated against the value of the advantage offered to the consumer. The group at which the concept is aimed will also be considered.

If the measure is specifically geared towards children, the threshold is lower for its being evaluated as in conflict with good marketing practice or unreasonable; cf. MCA Ch. 4: "Specific guidelines on protecting children".

The consumers shall also be able to at any time retrieve the reward, and they shall of course be able to freely withdraw their consent when they no longer wish to participate in the arrangement.

2.7.6 Specific guidelines on "Tell a friend" functions

By a "tell a friend" function is meant a function in which the business encourages the consumer to send out marketing messages for products or services or a link to the business's website or other electronic channels of communication to a person who has not requested it. In some cases the

¹⁵ Cf. Proposition no. 62 to the Odelsting (1999-2000) p. 33 (next to last point in the fifth paragraph under "To § 2b") and the Consumer Ombudsman's long-term practice according to the former MCA § 9a.

consumer will be rewarded for using the function, i.e. for “telling” his/her friend about it.

In such cases it is the consumer and not the business itself that initiates and completes the sending of the marketing messages. This is not affected by § 15. The question, however, will be whether the “tell a friend” function is illegal according to MCA § 6, which prohibits unreasonable business practices.

Markedsrådet (the Market Council) has assessed this issue in two previous cases.¹⁶ In both decisions, the Council evaluated the specific marketing tactics used, and in the assessment of whether the previous MCA § 1 was violated, they placed great emphasis on whether the business gave the person telling his/her friend the opportunity to achieve a reward for sending out the tip. *Markedsrådet* has nevertheless stated that there was no basis for a standpoint that any “tell a friend” function that rewards the “tellers” was in conflict with MCA § 1.

According to the practice of the Consumer Ombudsman and *Markedsrådet*, therefore, it is legal to use “tell a friend” functions if the function is merely made available and the consumer is not encouraged to use it or rewarded for using it. This requires, however, that the business does not place independent marketing messages within the e-mail that is sent to the third party, but it may be acceptable for the business to include a link in the e-mail to the relevant website or article about which he/she is being informed. If a form of reward or recognition is used to persuade people to use the function, a specific assessment must be conducted to determine whether the marketing tactic is illegal.

3. Exceptions to the main rule of consent and other requirements

3.1 What exceptions exist?

There are two exceptions to the main rule that the business must have the recipient’s consent in order to direct marketing communications to natural persons by electronic methods of communication that allow for individual communication. The first exception is when the natural person is contacted orally by telephone (see Point 3.2), and the second exception is when there is an existing customer relationship between the business and the natural person (see below, Point 3.3).

3.2 § 15 Paragraph Two – “... contacted orally by telephone.”

Communications in which the consumer is contacted orally by telephone are, according to the second paragraph of the regulation, specifically exempted from the prohibition in § 15. The consumer may, however, decline from receiving marketing messages via telephone by registering his/her name, addresses and telephone numbers in the central reservation

¹⁶ MR case 05/01 Co-shopper and MR case 24/05 Caliber Media

registry for direct marketing ("*Reservasjonsregisteret*"), cf. MCA § 12. It follows from the same regulation that the consumer may also decline directly to the business.

The effect of declining is that the business may not contact the consumer unless the telephone call is due to some prior, existing customer relationship; cf. MCA § 13.

3.3 § 15 Paragraph Three– "... existing customer relationship..."

3.3.1 What does it take for a "customer relationship" to exist?

The requirement of prior consent is not necessary if there is an existing customer relationship, where the business has received the customer's electronic address in connection with a sale.

The purpose of MCA § 15 is to secure the right to privacy for natural persons, and the consideration for the consumers therefore takes precedence in the evaluation of whether or not a customer relationship is established. To avoid violating the prohibition, the exception must be interpreted narrowly.¹⁷

A one-time purchase will as a main rule not be sufficient to constitute a customer relationship. The central question is whether the purchase makes it natural to maintain contact between the business and the customer. If this is not the case, there cannot be said to be an "existing customer relationship". For the customer relationship not to be considered as terminated, the marketing approach must also occur within a reasonable amount of time following the sale.

One or several purchases of inexpensive, disposable items will never be sufficient to say that a customer relationship exists. However, with purchases of a capital good, such as a new car, it is more natural to continue contact with the customer.

The following are examples of situations where a customer relationship is established:

- Running, contractual relationships where customer service is necessary concerning a certain communication between the parties, such as subscriptions, account agreements, insurance policies, service agreements, agreements about regular contributions to charitable organisations/regular donor agreements, memberships and bonus card arrangements.
- Purchase of larger items, typically capital goods that might include service agreements.

The customer relationship is terminated as soon as a running agreement or a membership expires. The same applies if a service agreement expires or it has been such a long time since the customer made his/her last

¹⁷Proposition 92 to the Odelsting (2003-2004) point 3.2.3

individual purchase that it is no longer natural to have any contact between the buyer and the seller.

3.3.2 Acquisition of the customer's electronic address

The customer shall him/herself have given his/her electronic address (e-mail address or mobile telephone number for use in sending SMS and MMS messages, etc.) to the business in connection with the purchase of a good or service. The customer may for instance have stated this information on the business's website or by filling out a paper form in the business's shop in connection with a purchase.¹⁸

Addresses given in connection with the reception of a free gift, free advice, participation in contests or similar situations may not serve as grounds for marketing via electronic methods of communication according to § 15 Paragraph Three. In these cases, the business must rather acquire an active consent.

The business may not:

- Obtain the consumer's e-mail address or mobile telephone number from anyone other than the customer after the purchase of goods or services, or
- Use electronic addresses and mobile telephone numbers given by others, or which the business has obtained from the customer at an earlier time.

3.3.3 Additional requirements for the business when entering agreements

In addition to the aforementioned, there are other requirements in § 15, Paragraph Three, in connection with the purchase. When a customer relationship is established, the following requirements must be met:

- Before the marketing messages are sent out, the recipient shall have been informed that the business will send out marketing messages by means of electronic communication channels (e-mail, SMS etc.). See Point 3.3.3.1
- Before the marketing messages are sent out, the recipient shall have been given the opportunity to decline such communications. See Point 3.3.3.2
- The recipient shall have the opportunity to simply and free of charge decline every subsequent marketing communication that is sent out. See Point 3.3.3.3

3.3.3.1 Requirement for informing that e-mail addresses and telephone numbers will be used for marketing purposes

The business may only send out marketing messages by electronic methods of communication if the customer, before the first marketing messages are sent, has clearly and unambiguously been informed that the e-mail address or telephone number which he/she has given will be used for this purpose.

¹⁸ Even if e-mail addresses have been obtained in connection with a purchase, the consumer must have directly expressed that he/she wishes to receive e-mail advertisements by giving consent or by omitting to decline this (in instances where a customer relationship may be said to exist).

Such information may either be given when a customer makes a purchase at the business for the first time, or otherwise at the time a customer relationship can be said to be established.

3.3.3.2 *Statement of the opportunity to decline marketing*

When the consumer gives his/her electronic address, or possibly at a later time before the first marketing messages are sent out, the recipient shall be given the opportunity to decline the marketing.

It shall be possible for the customer to express, as soon as the customer relationship is established, that he/she does not wish to receive marketing via electronic methods of communication. The opportunity to opt out may be given for instance on the website or on the order form where the customer states his/her e-mail address or telephone number.

According to the long-established practice of the Consumer Ombudsman, it may not be set as a requirement for entering an agreement that the customer accepts marketing via electronic mail, cf. Point 2.7.4.

3.3.3.3 *Simple and free-of-charge access to opt out*

Customers who do not opt out when their customer relationship is established shall have simple and free-of-charge access to decline further marketing communications, and shall be informed of this opportunity every time they receive marketing.

When sending marketing messages via e-mail, there shall for instance be an opportunity to opt out by means of a link in each individual e-mail. For marketing via SMS, there should be an opportunity to opt out via SMS, as well as via the business's website.

The business party may not charge any fee for the customer to decline marketing. For instance, opting out may not occur via overpriced SMS messages or telephone numbers that the consumer must pay to call.

3.3.4 *Only separate and equivalent products or services*

Businesses may only market their own products or services that are equivalent to what the consumer previously has bought in the context of an existing customer relationship.¹⁹

The customer's electronic address may not be used to market the products or services of other businesses. In this context it is crucial whether the party in question is the same legal person. For example, a subsidiary company of the business from which the customer has made a purchase may not use his/her electronic address for marketing. Neither may the business from which the customer has made a purchase market the products of a subsidiary company.

¹⁹ The condition was included in the former MCA § 2b with the implementation of the EU Directive on Privacy and Electronic Communications in the Norwegian judicial system in 2005.

It follows from the legislative history that the exception shall be interpreted narrowly, and the businesses must take this into consideration when assessing whether the marketing messages are to be sent. Equivalent products or services shall nonetheless not necessarily be understood as totally identical products or services.

The basis of this assessment shall be the actual similarity between the products. The customer's expectations are also an important factor, which must precede the business's own perceptions of what is natural to market.

The rule must be interpreted in a technologically neutral manner. When purchasing a book in an online bookshop, digital books (for instance on CD) may also be marketed. In the following, some examples are given of what the Consumer Ombudsman has assessed as equivalent products or services:

- When purchasing a PC, other PCs may be marketed, but not other software or mobile telephones.
- When purchasing a pair of trousers, other clothing may be marketed.
- When purchasing a music CD, other music may be marketed (on CD, DVD, MP3, etc.), but not CD players.
- When purchasing toys, other toys may be marketed, but not other products for children.

A good that is composed of the products of several businesses may also be regarded as "own" goods. A travel package, which is typically composed of services from different businesses, must, for instance, be seen as the travel agency's own product.

The business shall be able to document that the conditions for the sending of marketing messages in pursuance of the exception in § 15 Paragraph Three are met.

Any customer communication other than marketing may nevertheless be sent without any restrictions related to § 15. This will typically be communications that are necessary to fulfil obligations in compliance with the law, communications as a step in fulfilling a contractual relationship, as well as communications in connection with a breach and practical service messages such as change of address and changes in the contractual relationship.

3.3.5 Difference between consent according to Paragraph One and existing customer relationship in Paragraph Three

Consent according to Paragraph One may simply be explained as agreeing to receive marketing messages, while in Paragraph Three it may be required that the customer actively opt out in those cases that fall under the regulation.

Another difference is that there is a limit to what the business may market by virtue of the exception in Paragraph Three, since it is only their own, equivalent products or services that may be marketed. If the business instead obtains positive compliance from the customer according to

Paragraph One, the business is limited only by the content of the compliance, which may also include other products and services.

The Consumer Ombudsman recommends that all businesses obtain voluntary, explicit and informed consent from consumers instead of basing the distribution of marketing messages on the existence of a customer relationship.

3.4. § 15 Paragraph Five –Regulations of the Electronic Commerce Act

It follows from MCA § 15 Paragraph Five that the regulations of the Electronic Commerce Act,²⁰ including § 9 on electronic marketing, apply in addition to § 15.

The Electronic Commerce Act § 9 reads:

*“The service provider’s duty to inform with respect to electronic marketing
In electronic marketing, it shall be clear on whose behalf the marketing is done. If unrequested marketing is sent by electronic mail, it shall be clear that the messages contain marketing when they are received.*

If prices are indicated in connection with an electronic information service (informasjonssamfunnstjeneste), any fees and delivery costs shall be stated. In consumer relations, the total costs for the consumer shall be stated, including all fees and delivery costs, unless the price information for the service is regulated in another legislation.

Promotional offers, such as discounts, prizes and gifts, shall be easily identifiable. Information about the terms for use of such offers shall be clear and easily accessible.

Promotional contests or games shall be easily identifiable. Information on terms for participation in contests or games shall be clear and easily accessible.

The regulations of the Marketing Control Act apply in addition to the regulations in this paragraph.”

This implies that the business must indicate on whose behalf the marketing is done, and that the message includes marketing. In addition to this, further requirements apply for promotional offers such as discounts, prizes, gifts and promotional contests and games to be easily identifiable as what they are, as well as requirements for good information on prices, terms and conditions associated with the offer.

²⁰ Law 23 May 2003 no. 35 on certain aspects of electronic commerce and other electronic information services (*informasjonssamfunnstjenester*) (Electronic Commerce Act)

4. Enforcement of MCA § 15

4.1 General

The Consumer Ombudsman shall out of concern for the consumers see to it that businesses adhere to MCA § 15. As a rule, the Consumer Ombudsman will prosecute all violations, with special emphasis on those of a serious nature. In this context, emphasis will be placed on the number of complaints, the number of unrequested marketing communications sent, repeated violations etc.

The Consumer Ombudsman cooperates in several international forums, such as in the OECD, EU and ICPEN, on the enforcement and investigation of cross-border spam cases. The ICPEN is the International Consumer Protection and Enforcement Network and consists of consumer authorities in 33 countries worldwide.

4.2 Sanctions

In cases of violation of § 15, the Consumer Ombudsman may, if intervention is necessary out of concern for the consumer, make individual decisions about prohibitions (§ 40), orders (§ 41), enforcement penalties (§ 42) and infringement penalties (§ 43); cf. § 39.

Decisions may also be directed at accomplices; cf. § 39 Paragraph Three. Liability for complicity may be imposed on legal persons, such as advertising agencies, but also on natural persons, such as the manager, board chairperson or board members. However, the formal title of a person or company does not determine whether liability for complicity may be imposed. If another person, through his/her role in the company, is in reality behind the violation, for instance through facilitating or assisting the violation of § 15, and this can be documented or otherwise shown, then liability for complicity may be imposed on the person.²¹

Furthermore, decisions may be made against persons without also being against a company.²²

Deliberate and significant violation of § 15 may also, following prosecution from the prosecuting authority, be punishable by fines, up to 6 months of prison or both, if more severe punishment regulations are not employed; cf. MCA § 48. Complicity may be punished in the same way.

4.2.1 Enforcement penalties (§ 42)

To ensure that a decision according to §§ 40 and 41 is complied with, an enforcement penalty shall be determined, payable by whom the decision is directed at if he/she violates the decision. The determination of this enforcement penalty may be omitted if particular reasons dictate this; cf. MCA § 42. The regulations in § 42 are largely a continuation of the previous enforcement penalty arrangement.²³

²¹ Proposition no. 55 to the Odelsting (2007-2008) p. 212

²² Proposition no. 55 to the Odelsting (2007-2008) p. 212

²³ Proposition no. 55 to the Odelsting (2007-2008) p. 213

The purpose of the enforcement penalty is to influence the business to refrain from its unreasonable action, and the penalty shall have a deterrent effect in relation to further violation.

The size of the enforcement penalty shall be determined following a specific assessment of the individual case. Emphasis shall be placed on that it shall not be profitable to violate the decision; cf. § 42 Paragraph Two, last sentence. Other relevant points of assessment are the nature of the case and the financial conditions of the accused.²⁴ The Consumer Ombudsman and *Markedsrådet* may require information about the business's financial conditions according to MCA § 33. Even though the business no longer earns money "on paper", there may be grounds for setting a relatively high enforcement penalty.²⁵

The enforcement penalty may be determined on a continual basis, for instance per day or week, until the business stops violating the decision. A one-time payment may also be added, possibly to an amount per violation.²⁶ In cases of violation of MCA § 15, there will often be a danger of frequent repetition of the same violation, because sending out marketing via electronic methods of communication is usually associated with very low costs.

A final decision about payment of an enforcement penalty is coercive grounds for distraintment; cf. MCA § 42 Paragraph Three.

4.2.2 Infringement penalties (§ 43)

The Consumer Ombudsman may determine infringement penalties in cases of violation of § 15 cf. MCA § 43, payable by the person at which the decision is targeted. The conditions for the determination of infringement penalties are that the violation is deliberate and negligent, and that the violation either is seen as significant or that it has occurred repeatedly.

Infringement penalties may be determined on an independent basis, but can also accompany an enforcement penalty according to § 42.

Infringement penalties shall, like enforcement penalties, be set following a specific assessment of each individual case. An overall principle is that infringement penalties should be set high enough that it shall not be financially profitable to break the law. In determining the size of the penalty, emphasis shall be placed on criteria including the seriousness of the violation, its extent and effect; cf. § 43 Paragraph Two. The criterion of "extent" implies that for instance in spam cases it will be relevant to consider the number of illegal communications made.²⁷

The final decision on an infringement penalty is coercive grounds for distraintment; cf. § 43 Paragraph Three.

²⁴ Proposition no. 55 to the Odelsting (2007-2008) p. 158 and p. 213 cf. Proposition no. 34 to the Odelsting (1994-1995) p. 20-21

²⁵ Proposition no. 55 to the Odelsting (2007-2008) p. 158 and p. 213

²⁶ Proposition no. 55 to the Odelsting (2007-2008) p. 213

²⁷ Proposition no. 55 to the Odelsting (2007-2008) p. 214

4.2.3 Previous cases

The Consumer Ombudsman has previously made decisions in a number of cases of violation of the former MCA § 2b.²⁸ Since the new MCA § 15 in its entirety extends § 2b, the latter will in practical terms continue to be relevant.

An important common factor in its decisions is that the Consumer Ombudsman has deemed it necessary to make decisions also against the board chairperson or manager in the companies for the most efficient enforcement of the law possible. Furthermore, in all the cases a continual enforcement penalty has been set per violation; cf. the former MCA § 16.

²⁸ Decision of 07 February 2005 against Comtive AS and Cocell AS
http://forbrukerombudet.no/asset/1653/1/1653_1.pdf
Decision of 20 April 2006 against Nattavisen (Nordisk Nettmagasin AS)
<http://www.forbrukerombudet.no/index.gan?id=11032779&subid=0>
Decision of 23 March 2007 against Robert Lund
<http://www.forbrukerombudet.no/index.gan?id=11037629>
Decision of 18 October 07 against Bodyform AS
<http://www.forbrukerombudet.no/index.gan?id=11038388&subid=0>

Overview of updates:

- First published at Forbrukerombudet.no **27.05.09**
- **December 3rd 2009:** Changes to 3.3.1