

MARKETING VIA SOCIAL MEDIA

Traders increasingly use social media such as Facebook and LinkedIn for marketing. Therefore, the Nordic consumer ombudsmen drafted a common standpoint on marketing via social media (hereinafter the "Standpoint") in November 2011.

The Standpoint must be considered a supplement to the common standpoint on trade and marketing on the internet drafted in May 2010. The Standpoint has been submitted for consultation, and the consultation period expires on 19 December 2011. If you have comments for the common Standpoint, there is thus a possibility of being heard before the 19 December 2011, see below.

The Nordic consumer ombudsmen's standpoint on marketing via social media

In November 2011, the Nordic consumer ombudsmen submitted a common standpoint on marketing via social media for consultation.

The purpose of the Standpoint is to provide information on how the Nordic consumer ombudsmen interpret the law in relation to marketing via social media. The Standpoint does not only concern Facebook, but is to a large degree inspired by the opportunities for marketing via Facebook. However, the Standpoint also addresses chat rooms, games and other social networks.

The Standpoint may thus be of use to citizens and traders who wish to gain insight into the consumer ombudsmen's standpoint on cases concerning marketing via social media. The Standpoint may therefore be taken as an indication of whether marketing or contemplated marketing via social media will be considered legal by the consumer ombudsmen.

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Below, the main points of the Standpoint will be reviewed.

Identification of marketing

The Standpoint states that traders who use social media in their marketing must be aware that it must always explicitly appear that the communication constitutes marketing when the users of the social media are exposed to the marketing. That is to say, that the marketing must be transparent enough for the users to understand that they are exposed to marketing or other commercial communication. Furthermore, it must be clear to the user on whose behalf the marketing is conducted. This follows from article 6, subsection a, of the Directive on Electronic Commerce.

It is a requirement that the trader does not leave the impression that he is not acting as part of his trade. If marketing is conducted in places not confined to marketing communication, the requirements are even stricter as concerns the consumers' possibility of determining that the communication in question constitutes marketing. This is for example the case when a trader uses his own private profile to market his business or products from his business.

In case the trader pays a private person – directly or indirectly – to mention or market the trader's business or products, this must appear from the marketing material. The Standpoint also states that the trader is obligated to inform the private person of this requirement. Furthermore, the Standpoint states that the trader may not reward the users of the social media for redistributing the trader's marketing to other persons who have not previously requested the commercial approach, see below for information on unrequested electronic marketing.

If the marketing is directed at children and youngsters below the age of 18, requirements are stricter, which entails, among other things, that it must be apparent to the target group in question that the communication constitutes marketing. Also, special attention must be paid to the drawing up of the commercial, as young people under 18 are regarded as easily affected and influenced, which is why children may not be directly urged to buy the product.

Information requirements at creation of profiles

When the trader creates a profile at a social medium for the use of the business, he must comply with certain information requirements. This is to ensure that consumers and authorities have easy, immediate and continuous access to information on the business. As a minimum, the information must contain the name, address, email and other information, e.g. CVR no., of the business, which makes it possible to contact the trader.

Prohibition against unrequested electronic marketing

In Denmark, a trader may not approach a physical or legal person via electronic mail for the purpose of the marketing of a product, unless this person has previously specifically consented hereto. The consent may not automatically be presupposed as part of the social media's general terms and conditions.

The definition of electronic mail appears from article 2, subsection h, of the directive on data protection in electronic communication. According to this provision, any communication in the shape of text, voice rendering, sound or image which is distributed via a public communications network and which is stored in the network or the receiver's data terminal equipment, in that the information is retrieved by the receiver, is encompassed.

According to the definition, the communication is not encompassed if it is not limited to a specific group of end users in advance. The question of whether the message is stored in the network in the end user's data terminal equipment until retrieved by the user is therefore decisive.

According to the Standpoint, the technical arrangement of the social media is important to the application of the rules on unrequested approach. If the social media does not make it possible to prevent receipt, the prohibition against unrequested electronic mail applies according to the consumer ombudsmen. In that connection, the Standpoint states that messages which the trader sends via Facebook or posts on the consumer's profile (the wall) must be considered electronic mail. A further implication of the definition is that pop-up commercials are not encompassed, in that these are not stored.

It must be noted that it is the trader's responsibility to ensure that the rules on unrequested approach at the use of electronic mail are complied with, and it is recommended that the trader refrains from performing marketing actions if in doubt that the law is complied with.

Banner ads

At the use of banner ads, ordinary legislative requirements must be met. This means that if a product or service is offered, information on the product, its price, composition, use, number etc. must be correct. As a consequence of their general mode of expression, commercials may not be misleading.

All material conditions must be mentioned in the banner ad. Prices stated must constitute the full price which the consumer must pay, including VAT, taxes, fees and other expenses which are connected to the purchase of the product.

If the above has been loyally stated, the trader may refer the consumer to the more specific conditions via a link in the commercial.

If you have any questions or require additional information on the legal aspects of marketing via social media or require assistance in connection with a hearing, please contact Attorney Thomas Weitemeyer (twe@mwblaw.dk) or junior associate Tim Rosenkrantz Buur (tbu@mwblaw.dk).

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