

Report on the application of Directive 2005/29/EC on Unfair Commercial Practices (UCPD)

Questionnaire for the Member States

As provided for by Article 18 of Directive 2005/29/EC on Unfair Commercial Practices (the "Directive" or the "UCPD"), the Commission should submit to the European Parliament and the Council a report on the application of the Directive (the "Report"). In addition to providing an overview of the implementation of the UCPD in the Member States, the Report will address specific issues such as the application of the Directive in the fields of financial services and immovable property; and the application of the Directive on specific areas of regulation, such as sales promotions. If appropriate, the Report will identify some possible areas for revision.

The Commission will take into account the feedback received by the Member States, ECCs, consumer associations and other stakeholders to prepare the Report and to determine what follow-up should be given to it.

*To this end, the Commission has prepared the following questionnaire to which we would appreciate receiving your input at your earliest convenience and **no later than 30 September 2011**.*

The issues raised by this questionnaire are based on the Commission's experience in cooperating with the Member States and other stakeholders during the transposition and first years of enforcement of the Directive: they also take into account the discussions held in Brussels during the working group meetings of 14 and 30 June 2011 with the UCPD enforcers and CPC network. The Commission is planning to organize an additional working group meeting in November 2011.

The following questionnaire is divided into three parts.

- The first part will focus on general issues concerning the implementation of the Directive in the Member States.*
- The second part will focus on the provisions of the Directive including definitions (Article 2), scope (Article 3), the full harmonisation character of the directive (Article 4), the criteria for assessing the unfairness of commercial practices (Articles 5 to 9), and the list of commercial practices that shall be prohibited in all circumstances (Annex I).*
- The third part will focus on the application of the Directive to specific areas such as environmental claims and social networks.*

For each part the Commission would like to know whether there have been any problems of interpretation / application of the Directive and will seek the views of the Member States as to whether there are sufficient grounds for a possible review of the Directive.

You will receive separate questionnaires for the areas of financial services and immovable property from Civic Consulting (contractor for the Commission)¹.

In addition, an Annex in the form of a table has been enclosed to this questionnaire to gather information on the main unfair commercial practices encountered by national authorities since the adoption of the Directive.

Please return your responses to the questionnaire with the reference: "Consultation on the application of Directive 2005/29/EC on Unfair Commercial Practices" to either:

European Commission
Directorate-General Justice
Unit A3 – Consumer and Marketing Law
Rue Montoyer 59
B-1049 Brussels
Belgium

or by e-mail to JUST-COMMUNICATION-A3@ec.europa.eu to the attention of Mr. Angelo Grieco and Ms Sophie Ridoux or by fax to +32 2 2967669 at the latest by:

30 September 2011.

For any queries or clarifications, please contact either

Mr Angelo Grieco (e-mail: angelo.grieco@ec.europa.eu tel: +32 2 2960433) or
Ms Sophie Ridoux (e-mail: sophie.ridoux@ec.europa.eu tel: +32 2 2993772).

Member State: [Denmark]

I – The Implementation of the Directive in the Member States

1 National Legislation Please indicate whether, since the transposition of the UCPD in your country, there have been any changes in national legislation which relate to the implementation / application of the Directive

Denmark implemented the UCP-Directive in 2006 by an amendment to the Marketing Practices Act. At that time Denmark was of the opinion that sales promotions did not fall under the scope of the Directive, as that field was expressly covered by the proposal for a regulation COM(2001) 546 final concerning sales promotions, which was withdrawn by the Commission in 2006. Subsequently Denmark maintained a ban on sales promotions in the form of trading stamps/collectable vouchers and draws and prize competitions.

However in recent judgements the European Court of Justice has stated, that sales promotions does in fact fall within the scope of the Directive, and that the Directive must be interpreted as precluding national legislation, which provides for specific

¹ The questionnaire on financial services has been sent in June.

prohibitions , without taking account of the specific circumstances of individual cases of commercial practices (Case no. C-269/07, C-299/07, C-304/08 and C-540/08)

In the light of the judgements from the European Court of Justice Denmark has made a new amendment to the Marketing Practices Act that lifts the ban on sales promotions in the form of trading stamps/collectable vouchers and draws and prize competitions. The amendment has had effect since 1 July 2011.

On that background Denmark strongly recommends a revision of the Directive that will exclude all forms of sales promotions from the scope of the Directive.

In addition to that, Denmark has had a dialogue with the Commission regarding literal implementation of Directives.

Denmark would therefore not fail to draw attention to the fact that the Commission more often tend to require literal implementation of Directives. Denmark regards this as a limitation of the room for manoeuvring that has been ascribed the Member States when implementing Directives, cf. article 249 part 3 of the treaty of the European Union, which leaves national authorities the choice of form and methods when implementing Directives.

Denmark finds this development problematic and has therefore sent a letter to the Commission dated the 4th of December 2008 regarding this subject.

- 2 Decisions / Sanctions (by country) Please provide the data you have available on decisions taken and sanctions imposed for infringements of the UCPD (e.g. leading cases, total amount of the sanctions imposed for violation of the UCPD etc.) possibly classified by the provision(s) infringed, type of practice and/or business sector concerned.

The Consumer Ombudsman has had approximately 575 cases – with reservations for even more - concerning breach of the UCPD.

It is important to notice, that the number of cases should be seen in connection with a well incorporated enforcement system.

- 3 Most frequent unfair commercial practices Please use the table in the Annex to provide information on the most frequent unfair commercial practices you have encountered.

The cases mainly concern breaches of article 6 and 7.

The Consumer Ombudsman has not had any cases concerning breaches of article 8 and 9.

The Consumer Ombudsman does not distinctly register if a case concern any of the misleading commercial practices mentioned in Annex 1 of the Directive. The abovementioned number on misleading practices therefore might also concern breaches of Annex 1 of the Directive.

However the Consumer Ombudsman has distinctly registered that a number of 52 cases concerned breach of Annex 1 no. 2 (displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation).

4 Effectiveness of national enforcement of the UCPD:

- a) In general terms, how would you assess the effectiveness of the enforcement action against unfair commercial practices in your country:

In Denmark the Consumer Ombudsman - who is an independent public authority - is the relevant enforcement authority. Negotiation and dialogue are his preferred means when seeking to induce business and trader to act in accordance with the regulation regarding unfair commercial practices, and a wide majority of the cases are settled by those means.

The negotiations with businesses and traders will often conclude in the issuing of guidances or guidelines. These include guidelines on price information, covert advertising, environmental marketing claims and so forth.

However, negotiation is not always enough. Court enforcements for instance will sometimes be necessary.

- i) Do you think that your national authorities dispose of sufficient enforcement powers and/or resources in this respect?

National authorities dispose of sufficient enforcement powers when dealing with national cases/cases that are not related to cross-border commercial practices.

However the Consumer Ombudsman – being the central Danish enforcement authority of the directive – has had problems with the enforcement when dealing with cross-borders commercial practices within the EU, mainly due to lack of motion in enforcement requests handed over to authorities in other countries.

- ii) Are the available sanctions and remedies adequate to prevent the unfair commercial practices?

The available sanctions and remedies are adequate to prevent unfair commercial practices in national cases/cases that are not related to cross-border commercial practices.

As mentioned above the relevant Danish authorities have had problems with the enforcement when it comes to cases regarding cross border commercial practices within the EU.

- b) Please indicate whether there are any measures that, in your opinion, would allow a better enforcement of the UCPD.

Denmark very much appreciates the workshops and meetings that the Commission has held regarding the application of the UCP-Directive.

Denmark finds that further regular meetings between the national authorities and the Commission where the application and interpretation of the Directive are discussed would be very valuable. Especially there is a need to discuss the enforcement of the UCP-directive related to cross-border commercial practices.

Furthermore Denmark is of the opinion that uniform interpretation of the Directive between all member states is of high importance. Therefore Denmark finds regular discussions between the Commission and the member states regarding the guidelines on implementation/application of the Directive would be very useful as well as continuous development of the guidelines. Furthermore Denmark appreciates the initiative taken to establish a database with access to view all relevant judgements and administrative decisions regarding the UCP-Directive, as this would be very useful to support uniform interpretation.

5 Enforcement of the UCPD and Self Regulation / ADR mechanisms

- a) Please indicate whether you are aware of the existence of codes of conduct concerning unfair commercial practices in your country (Article 10 of the UCPD). If applicable, please indicate what are the fields/sectors concerned.

Denmark does not have any codes of conduct that falls within the scope of the UCP-Directive.

- b) Please provide, where possible, a short description of the role of the respective self-regulatory bodies / authorities and their competences. In particular, please indicate how well, in your opinion, the self-regulatory bodies cooperate with enforcement agencies.

Denmark does not have any self regulatory bodies concerning unfair commercial practices.

- c) In relation to the codes identified under (a) please indicate how effective is, in your opinion, the respective enforcement system and / or compliance to the rules of the code(s) by operators in the sector concerned.
- d) Please indicate whether measures have been taken in your country to encourage self-regulation.

The Danish Marketing Practices Act authorizes The Danish Consumer Ombudsman to negotiate guidelines and guidances in dialogue with businesses and traders. The Consumer Ombudsman uses this possibility to a great extend.

The Consumer Ombudsman has regular meetings and on going dialogue with the businesses and trades regarding self regulation. The Consumer Ombudsman is also active in educational work regarding self regulation.

II – Provisions of the Directive

6 Definitions (Art. 2)

a) Have you encountered difficulties in the implementation of the UCPD in relation to the following definitions / concepts:

- i) Trader / consumer
- ii) Professional diligence
- iii) Invitation to purchase
- iv) Any other definition

In the affirmative please describe the problems encountered.

b) Have you issued any guidelines / principles at national level in order to help enforcers implementing these definitions?

Denmark has not issued any guidelines at national level in order to help enforcers implementing these definitions. However the adopted amendment of the Marketing Practices Act implementing the Directive does contain explanatory notes helping enforcers implementing the definitions.

c) Are you aware of any court / administrative decision taken at national level in relation to the concept of trader / consumer / professional diligence / invitation to purchase / any other definition?

There are not any court decisions or administrative decisions taken at national level, that specifically take a stand on the definitions in the Directive.

d) Do you have any suggestions as to whether any of the definitions under Article 2 of the UCPD can be improved?

According to Article 2 (a) in the Directive on misleading and comparative advertising 84/450/EC (2006/114/EC) advertising means the making of a representation *in any form* [.....] in order to promote the supply of goods or services, [.....]

According to Article 2 (d) in the UCP-Directive "business-to-consumer commercial practices" means any act, omission, course of conduct or representation, [..ect..], *directly connected with the promotion, sale or supply of a product* to consumers.

The preamble of the UCP-Directive (7) states, that the Directive "addresses commercial practices *directly related* to influencing consumers' *transactional decisions in relation to products*. It does not address commercial practices carried out primarily for other purposes, including for example commercial communication aimed at investors, such as annual reports and corporate promotional literature".

The Danish Consumer Ombudsman had a case where the above mentioned difference came up. In the specific case the question was raised if or not a webpage – a computer gaming site targeted to children, with the purpose of teaching them financial mechanisms in society – should be identified as advertisement.

A financial institution was behind the gaming page and the typography, choice of colours etc used at the page could give associations to the (very well know) financial institution. At first glance, The Consumer Ombudsman was of the opinion that even though the game was educational and neutral as such with no mentioning of the institutions name, the game page was a branding of the company and should therefore be identified as an advertisement.

However, the gaming page was not "directly connected with the promotion, sale or supply of a product to consumers" whatsoever. The Consumer Ombudsman was therefore in doubt if the gaming site, though considered branding, was "commercial practice", cf. the UCP-Directive, and thereby covered by the provision and advertising identification in the Marketing Practices Act, which so far had been interpreted in accordance with Article 2 in the old Misleading Advertising Directive.

Subsequently the questions are:

- Is the difference between the UCP-Directive and the MCA Directive intentional?
- Do commercial practices *not* related to a product fall outside the scope of the UCP-Directive?
- Is branding not "commercial practices"?

7 Scope (Art. 3)

Application of the Directive to B2B or C2B or C2C or other transactions / practices

- a) Do you apply the provisions transposing the Directive in national law to business-to-business, consumer-to-business or consumer-to-consumer transactions? If so, please explain to which extent.

The provisions in the Danish Marketing Practices Act transposing the UCP-Directive should be interpreted in compliance with the UCP-Directive, thus the provisions only applies B2C.

- b) Is there a need, in your opinion, for an extension of the Directive to some business-to-business, consumer-to-business or consumer-to-consumer transactions? *In reply to this question, please provide concrete examples of transactions which, in your opinion, should be included in the scope of the Directive.*

Denmark sees no need to extend the Directive. If the Directive is extended to some business-to-business transactions it is important that the level of consumer protection in general is not lowered.

- c) In case (see previous question 7 (b) above) you consider that the UCPD should be extended to cover (some or all) business-to-business relationships, would it be appropriate, in your opinion, to use this opportunity to merge the UCPD with Directive 2006/114/EC on misleading and comparative advertising? This would create a unified legal regime to fight unfair commercial practices (including illegitimate comparative advertising) applicable to business-to-business and business-to-consumer transactions. *Please describe the arguments against and in favour of this possibility.*

Section 5 of the Danish Marketing Practices Act implements the Directive on misleading and comparative advertising:

According to Section 5 comparative advertising means any advertising which explicitly or by implication identifies a competitor or products or services offered by a competitor.

Comparative advertising is permitted under the Marketing Practices Act if the conditions in the MCA Directive are met.

Section 5 applies to business-to-business, but it also has an effect on consumers if the comparative advertising is misleading – even though the practice should be assessed by the UCP Directive

This speaks in favour of merging the two Directives.

If the Directives are not merged it is very important that the two Directives are in agreement with each other, cf. the answer to question 6 (d).

- d) Do you apply the UCPD to misleading and aggressive demands for payment outside of a contractual relationship (i.e. in relation to practices which are not directly connected with the promotion, sale or supply of a product to consumers)? *This would, for instance, include misleading and aggressive demands for money in relation to wheel-clamping and car parking "fines" by private companies; so-called "civil recovery" whereby those accused of minor shoplifting are asked to pay fixed sums in compensation; or where a trader sends an invoice demanding payment to the wrong person who was never a customer.*

No

- e) Is there a need, in your opinion, to regulate the practices identified under 7 (c) (or similar practices) in the UCPD?

On the present basis Denmark does not see a need to regulate the practices mentioned under 7 (c).

Relationship with sector-specific directives

When sector-specific directives overlap with the general provisions of the UCPD, the provisions of the lex specialis will prevail (Art. 3(4)). The UCPD complements sector-specific provisions by filling the gaps in the protection against unfair commercial practices.

- f) Please specify whether you encountered difficulties in assessing which directive to apply, in the case where a practice may fall under the provisions of two directives (e.g. the UCPD and: Directive 2000/31/EC on e-Commerce; Directive 93/13/EEC on unfair terms in consumer contracts; Directive 98/6/EC on price indication; Directive 2008/48 on credit agreements for consumers; Directive 2006/123/EC on services in the internal market and Directive 2009/136/EC on universal service and the processing of personal data).

If there is a conflict between two Directives the sector specific Directive should prevail. If there is not a conflict between two Directives, both Directives should apply. The UCP-Directive is the fundamental Directive and should only give way to the sector specific directive if the latter is in conflict with the UCP-Directive. In other words, if a company can comply with national legislation implementing both directive provisions, the UCP directive should apply, and the conflict is only relevant if a company can only comply with one provision by infringing the other.

Denmark is of the opinion that this practice should be clarified.

- g) Is there a need to modernise the current provisions of Directive 98/6/EC on price indication and include them in the UCPD? *In this case the Directive 98/6/EC would cease to exist and merged with the UCPD.*

There seems no need for the time being.

- h) The Guidance provides some clarification on this issue. Would there be a need, in your opinion, to further develop either in the UCPD or in the Guidance the application of the *lex specialis* criteria in specific cases?

Only if there is a conflict between two Directives the sector specific Directive should apply. If there is not a conflict between two Directives, both Directives should apply. The UCP-Directive is the fundamental Directive and should only be dispensed with, if a provision in one of the above mentioned Directives is in conflict with the UCP-Directive. This practice should be clarified.

Minimum harmonisation clause

- i) Please specify whether your country applies more restrictive implementing other EU Directives (Art. 3(5)). In the affirmative, please list / describe such provisions.

Denmark has not made use of the possibility to lay down more strict regulation than provided for in existing minimum directives.

8 Full harmonization character (Art. 4)

- a) Do you have any national rules restricting the use of specific commercial practices (such as in the field of sales promotions, price reductions, advertising to children, doorstep selling...) *In reply to this question, please provide a short description of these provisions (e.g. the obligation of displaying a reference price when announcing sales / promotions and the associated requirements).*

Minors

According to the Danish Marketing Practices Act marketing directed at children and young people shall be framed with specific reference to their natural credulity and lack of experience and critical sense, as a result of which they are readily influenced and easy to impress.

Marketing directed at children and young people must not directly or indirectly incite

them to violence, use of intoxicants (including alcohol) or other dangerous or inconsiderate behaviour, nor make unwarrantable use of violence, fear or superstition in order to influence.

In relation to this subject Denmark would like to inform the Commission that Denmark intends to put more focus on children's and young people's conditions as consumers. Minors are increasingly subjects to commercial campaigns, but they do not always have the experience needed to see through complex purchase situations. Therefore Denmark would like to take the opportunity to encourage the Commission to also put focus on this subject in the evaluation and possible revision of the Directive.

The Danish rules regarding advertising addressed to minors or featuring minors in television, radio and on demand audiovisual media services are laid down in Executive Order no. 338 of April 16, 2011 concerning Radio and Television Advertising and Programme Sponsorship.

According to section 13 of the Executive Order, advertisements for alcoholic beverages in television, radio and on demand audiovisual media services shall not be aimed specifically at minors. Advertisements in television and radio shall not show minors consume alcohol.

According to section 17, advertisements directed at minors may not be presented in such a way that they may have a physical or morally detrimental effect on such persons. Also, they shall not be formulated in such way that they exploit minors' natural credulity and loyalty and their special confidence in parents, teachers or other persons. They may not undermine such persons' authority and responsibility.

According to section 18, advertisements in television and radio shall not without reason show minors in dangerous situations. Furthermore, advertisements in radio and television shall not encourage minors to stay at or enter dangerous places, use dangerous products or in any means put themselves in dangerous situations.

According to section 19, advertisements in television and radio shall not directly encourage minors to persuade others to purchase the goods or services being advertised or promise them prizes as a reward for winning new purchasers.

According to section 20, advertisements in television and radio shall not undermine social values e.g. by conveying the impression that possession, use, or consumption of a product in itself gives minors physical, social or other psychological advantages over other minors who do not own, use, or consume this product or that it can have the opposite effect. Furthermore, advertisements in television and radio shall not give the impression that minors that fail to own, use, or consume the relevant product will in any way make them less privileged than other minors, or expose them to contempt or ridicule.

According to section 21, particular care shall be taken to ensure that advertisements in television will not mislead children and young people as to the size, value, type, durability or performance of the advertised product. Advertisements in television for toys shall clearly state the size hereof. Where the use or the shown or described result

of the product requires an extra attachment (e.g. batteries), this shall clearly be stated. If a product is part of a series, this shall also clearly be stated. Statements of price may not give children and young people an unrealistic idea of the value of the product, e.g. by using the word "only". No advertisement in television may suggest that the advertised product is easily affordable by any family. Advertisements in television shall indicate the degree of skill required to use the product. Where the result of the use of the product is shown or described, the result presented in the advertisement shall be reasonably achievable by an average child in the age group for which the product is designed.

According to section 22, figures, puppets and similar which are important and regular elements in programmes for children under 14 years may not appear in advertisements in television and radio for products of particular interest to children. Likewise, persons affiliated with programmes for children under 14 years may not advertise products of particular interest to children under 14 years in television and radio.

According to section 23, advertisements in television and radio for chocolate, sweets, soft drinks, snacks and similar may not indicate that the product may replace regular meals.

According to section 24, children under the age of 14 may only appear in television advertisements where such appearance is either a natural element of the depicted environment, or necessary in order to explain or demonstrate the use of products associated with children. Children under the age of 14 may not recommend or provide testimonials endorsing products or services of any kind.

According to section 25, advertisements in on demand audiovisual media services may not cause minors physical or moral damage and shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.

Communication by telephone

According to section 6 (1) in Act on Certain Consumer Contracts traders may not, without a prior request to do so, communicate in person or by telephone with a consumer at his residence or workplace or another place to which there is no public access with a view to obtaining, immediately or subsequently, an offer or acceptance of an offer to conclude a contract.

The ban in Section 6 (1) does not apply to communications by telephone concerning ordering books, subscribing to newspapers, weeklies and periodicals, brokering insurance contracts and subscribing to rescue services or ambulance transport with a company with which one or more municipalities have concluded contracts for the performance of rescue and extinguishing work in the event of fire.

According to Section 7 of the Act on Certain Consumer Contracts promise made by a consumer in connection with a trader's communication in contravention of Section 6 is not binding.

- b) How did the Directive impact this legislation? Do you consider that the full harmonisation character of the UCPD has created legislative gaps in certain areas (e.g. sales promotions) which have affected the effective enforcement against certain unfair commercial practices? *In reply to this question, please provide a detailed description of the problems encountered.*

Section 8 in the Danish Marketing Practices Act regarding marketing directed at children and young people have not been impacted by the UCP-Directive. Section 8 partly covers Article 5 (3) in the UCP-Directive and further vulnerable groups are protected by section 1 and 3 in the Marketing Practices Act, cf. below.

According to Section 1 traders subject to the Act shall exercise good marketing practice with reference to consumers, other traders and public interests.

Marketing in respect of consumers' economic interests may not be designed to significantly distort their economic behaviour.

According to Section 3 traders may not use misleading or undue indications or omit material information if this is designed to significantly distort consumers' or other traders' economic behaviour on the market.

Marketing whose content, form or method used is misleading, aggressive or subjects the consumers or traders to undue influence, and which lends itself to significantly distorting their economic behaviour, is not permitted.

Where factual statements are made, these must be capable of being substantiated by documentation.

The above mentioned Section 21 of the Executive Order no. 338 of April 16, 2011 concerning Radio and Television Advertising and Programme Sponsorship has been impacted by the UCPD:

Section 21 regards misleading of children in advertisements and is therefore covered by the UCPD. The provision, however, (along with the other mentioned rules) is within the field approximated by the Audiovisual Media Services Directive which contains minimum harmonisation clauses. Section 21 is therefore covered by article 3 (5) of the UCPD which states that Member States shall be able to continue to apply national provisions within the field approximated by the Directive which are more restrictive or prescriptive than the Directive and which implement directives containing minimum harmonisation clauses.

Therefore, the Danish government has upheld Section 21 with one exception: The Section used to include radio advertisements but as the Audiovisual Media Services Directive only concerns television it has only been possible to uphold the provision with respect to television. Hence, since September 25, 2009 radio advertisements have not been covered by section 21 as a consequence of the UCPD.

The use of Article 3(5) with respect to Section 21 has been notified for and accepted by the European Commission.

The consequence of the fact that radio advertising is no longer covered by Section 21 is that it is only the general rules of the Danish Marketing Practices Act (no. 1389 of December 21, 2005) on misleading advertisements that apply to advertisements in radio. As Section 8 of this Act deals with rules on marketing aimed at minors the Danish government does not find, however, that the UCPD has created a legal gap in the area of advertisements to minors.

When implementing the UCP-Directive there were not made any amendments to the above mentioned section 6 and 7 of the Danish Act on Certain Consumer Contracts, since the concerned sections do not fall within the scope of the Directive. The reason behind the ban in Section 6 of the Danish Act on Certain Consumer Contract is to protect the invasion of privacy (taste and decency), cf. the preamble (no. 7) of the UCP-Directive.

- c) Would there be a need, in your opinion, to further regulate any of these practices in the Directive?

Minors are increasingly subjects to commercial campaigns, but they do not always have the experience needed to see through complex purchase situations. Therefore Denmark would like to take the opportunity to encourage the Commission to also put focus on this subject in the evaluation and possible revision of the Directive.

- i) Would a clarification in the Guidance on the implementation / application of the UCPD be an adequate mean to address these issues?
- ii) Should specific commercial practices be excluded from the scope of the Directive?
In reply to this question, please motivate the reasons as extensively as possible.

When implementing the UCP-Directive Denmark – and several other Member States – were of the opinion that the UCP-Directive did not apply to sales promotions, as the latter were explicitly governed by the proposal for a regulation, COM(2001) 546 final concerning sales promotions, which was subsequently withdrawn by the Commission in 2006.

However the European Court of Justice has subsequently in a number of judgements stated, that sales promotions do fall within the scope of the Directive and that the Directive must be interpreted as precluding national legislation which provides for a prohibition against sales promotions in principle, without taking account of the specific circumstances of individual cases.

As a consequence of the above mentioned judgements Denmark has repealed two prohibitions in the Marketing Practices Act against sales promotions in the form of coupons/stamps and prize competitions conditioned by purchase. The reason behind the bans are among other things to ensure that consumers have equal access to discounts and that consumers are adequately protected against sales promotions that can withdraw the consumers attention from the actual price and quality of the product or service.

On that background Denmark strongly recommends a revision of the Directive that will exclude all forms of sales promotions from the scope of the Directive.

9 Other provisions of the Directive (Art. 5-9)

a) Price information

- i) Have you experienced any difficulties in applying the requirements of the Directive in relation to the price of a product / service offered for sale (e.g. in the context of an invitation to purchase), in particular as concerns the requirement that the price be "final", inclusive of all applicable charges and taxes (Art. 6(1)(d) and Art. 7(4) (c)? Please provide some concrete examples.

It is important to ensure that all facts and conditions needed by the average consumer, according to the context, to take an informed transactional decision, that is, on an informed basis, are presented to the consumer.

The relevant Danish authorities have experienced cases where consumers are not given all information necessary in the relevant situation and thus the consumers can not take an informed transactional decision.

An example of this is an optician making an offer saying that a new pair of spectacle frames and spectacle lenses cost 100 €. However it might not be possible for all consumers to purchase the frames and the lenses at that price, since some consumers might have for instance special eye-conditions that need custom made lenses. If the offer on frames and lenses only applies to standard frames and lenses and not for instance costume made lenses, some consumers will need to pay more than 100 €.

In the above mentioned example the optician has informed about the final price. However the mentioned price might not be final to all consumers. This implies that the optician's marketing has been misleading in some individual cases based on specific circumstances.

Furthermore the relevant Danish authorities have experienced cases where some companies do not inform the consumers about all taxes and fees right away. This is for example the case with some air-line companies. When the consumer wants to buy a ticket on-line, the consumer needs to go through several "pages" in order to see the final price of the ticket.

- ii) In connection with 9 (a) (ii) above, do you consider that there is a need to further regulate the price information requirements in the UCPD? *It should be noted that payment surcharges are most likely to result in consumer detriment where they lack transparency and where consumers lack a practical way to avoid the surcharge, as the surcharges reduce the extent to which consumers shop around and compare full price offers. Improvement could be considered, for instance, to make it more difficult for traders to circumvent the obligation of providing a final price.*

iii) As concerns the relation between the UCPD and Directive 98/6/EC on price indication please refer to question 7 (g) above.

b) Misleading practices (actions or omissions)

i) Price comparisons tools / web-sites Have you experienced any difficulties in applying the UCPD price information requirements to price comparison media / web-sites? Please provide some concrete examples. *In response to this question please indicate whether, in your opinion, further action (e.g. further regulation / guidance or measures to improve enforcement) is needed to ensure that the information in these sites is not genuine (in that they create the opportunity for traders to engage in forms of misleading/hidden advertising).*

Denmark has not experienced any difficulties.

ii) Have you encountered any problems of interpretation / application of the provision related to the limitation of space and time of the communication medium and the measures taken by the trader to make the information available by other means, when assessing the existence of a misleading omission (Art. 7(3))?

iii) Would there be a need, in your opinion, to clarify the Directive in this respect?

If the trader due to limited space is compelled to leave out some information it is important that the information that the trader does give will provide the consumer with a true picture of the price. Denmark finds this need to be clarified in the Directive.

If the medium used to communicate the commercial practice imposes limitations of space or time the actual offer should be described in a clear, loyal and balanced manner in the first presentation/reference as regards benefits and conditions/limitations, and at the same time the consumer should be informed of the possibility to get the relevant conditions by e.g. a voice mail, a text message, a link etc.

c) Aggressive practices:

i) Have you encountered any problems of interpretation / application of the criteria for assessing the existence of an aggressive commercial practice (e.g. the use of disproportionate non-contractual barriers impeding the trader from terminating the contract or switching from one product / trader to another, in assessing (Art. 9(d)))? Please provide some concrete examples.

Denmark has not encountered any problems of interpretation/application of the criteria for assessing the existence of an aggressive commercial practice.

ii) Would there be a need, in your opinion, to further develop these concepts in the Directive? *In reply to this question, please list the provisions / concepts that should be clarified.*

Denmark does not see a need to further develop these concepts in the Directive.

10 The black list

- a) Have you encountered any difficulties in the interpretation / application of Annex I of the Directive (the "black list")? Below are examples of provisions / concepts which have in the past been brought to the Commission's attention by Member States and stakeholders. *In response to this question please explain the problems encountered in applying the following (or any other) provisions of Annex I of the Directive, by possibly giving some concrete examples.*

- i) The concepts of availability of the product and of "equivalent product" (n. 5);

No. 5 in the annex/black list stipulates that “Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered”

The relevant Danish authorities have had problems with the meaning of “equivalent products” and “other traders”.

Is “equivalent” also replacement by *other* brands, for instance an LG for a Sony, or does “equivalent” mean the same or higher quality and no substitute by other brands?

Does “supply by other traders” mean, that the consumer can be referred to another store? Or if inconvenient to the consumer, does the trader have a duty to procure the product *from* another trader?

- ii) Products which cannot be legally sold (n. 9);

- iii) Pyramidal schemes (n. 14);

- iv) Products which cure illnesses, dysfunctions and malformation (n. 17);

- v) "Awarding" a "reasonable equivalent" of the price (n. 19);

- vi) Use of the word "free" (n. 20);

According to the Commissions Guidance, point 3.4, pp: Annex n. 20 does not prevent traders from using the word “free” when costumers are required to buy other items.

Though interpretation difficulties as annex no. 20 does not leave much room for divergence, the Consumer Ombudsman’s comprehension of no. 20 is to some extent in line with the Commissions Guidance on that point.

In any case, the contents and meaning of the words “gratis”, “free”, etc. needs further discussion and clarification

vii) Making persistent and unwanted solicitations "to the extent justified under national law, to enforce a contractual obligation" (n. 26);

viii) Advertisements including a "direct exhortation" to children to buy products (n. 28);

The relevant Danish authorities have had problems regarding the understanding of “direct exhortation”.

Example: At the internet there are many gaming sites targeted to children where the children without any charge can play with other children. If the children want to do well in the competition with the other participants, they can buy virtual services for the game. Payment takes place via the children’s mobile phone.

By e-mails traders prompt children, who no longer participate in the game, to come back to the playing site and the game. The traders also e-mail news letters to the children with special offers – e.g. virtual currency and other services for the game. In some cases the children are even informed that they will improve their chances in the competition, if they buy some of the services.

Are such offers of sale virtual services a “direct exhortation to children” and thereby covered by annex n. 28?

In relation to the subject of minors Denmark has experienced, that minors are increasingly subjects to commercial campaigns, but they do not always have the experience needed to see through complex purchase situations. Therefore Denmark would like to take the opportunity to encourage the Commission to also put focus on this subject in the evaluation and possible revision of the Directive.

ix) Claiming a price subject to the consumer paying money or incurring a "cost" (n. 31)

b) Have you issued any guidance, at national level, on how to apply the provisions of the black list?

The Consumer Ombudsman has issued a guideline for price information in marketing.

The guideline on price information among other things deals with the use of the word “free” and “equivalent products”. Partially, the guidelines share the view of the Commission Guidance. We refer to the explanatory notes, points 17 and 16, in the Consumer Ombudsman’s guidelines for price information in marketing <http://www.consumerombudsman.dk/Regulatory-framework/dcoguides/Price-Information#p17>

- c) The Guidance on the application / implementation of the UCPD provides already some clarification on some of the above mentioned provisions. Would there be, in your opinion a need to provide further Commission's guidance on Annex I? *In this respect, please indicate clearly which are the relevant provisions which could benefit from further guidance and for what reasons;*

Denmark finds that the Guidance needs to provide further clarification on use of n. 5 equivalent product, n. 20 use of the word “free” and n. 28 "direct exhortation".

- d) Is there a need to modify specific provisions of Annex I to solve the difficulties / inadequacies identified under question 10 (a)? *In this respect, please indicate clearly which are the relevant provisions which could benefit from further guidance and for what reasons;*
- e) Would it be appropriate to add / remove provisions of Annex I? *In reply to this question, please provide concrete examples of provision that should, in your opinion, either be added (to prevent unfair commercial practices for which it would be useful to have a specific prohibition) to or deleted from Annex I of the Directive.*

Denmark finds it appropriate to look through Annex 1 in order to see if some of the provisions are still relevant or might need to be adjusted, e.g. n. 24 (creating the impression that the consumer cannot leave the premises until a contract is formed – hardly relevant in most member states).

III - Commercial practices related to specific sectors

11 Environmental claims

- a) Have you encountered any problems of application / interpretation of the Directive in relation to environmental claims? In the affirmative please describe the problems encountered giving some concrete examples.
- b) Have you issued at national level some guidance / studies in relation to the assessment of environmental claims?

The Danish Consumer Ombudsman has issued a guidance on the use of environmental and ethical marketing claims. The guidance covers areas such as general and more specific requirements to the use of claims as well as business profiling, the use of labelling schemes and certificates etc.

A copy of the guidance is attached.

- c) The Guidance on the implementation / application of the UCPD explains some of the main criteria used to assess the fairness/unfairness of environmental claims. Is there a need, in your opinion to further develop the Guidance in this respect? Or would it be appropriate to address this topic in a possible future review of the UCPD (or of other EU legislation?)

On the existing bases Denmark does not see a need to further develop the Guidance in this area.

12 Social networks

- a) How do you apply the UCPD to the practices of social networks (such as Facebook or Twitter), in particular in relation to hidden traders / advertising?

The Danish Consumer Ombudsman works closely together with his Scandinavian colleagues. The similarities in Nordic marketing law, and the way in which it is administrated owe itself to a long tradition of legal cooperation. The Scandinavian Consumer Ombudsmen are at the moment working on a common position regarding social networks.

- b) Have you issued some guidance at national level to help enforcers applying the Directive to these situations?
- c) Is there a need, in your opinion, to modify the Directive in order to better address the unfair commercial practices encountered in this area?

The UCP-Directive does not address the commercial practices that take place at the Facebook “Wall”, e.g. commercial ads. Since the adoption of the Directive new forms of commercial practices have developed. In that respect there can be a need to look at whether the existing regulation is sufficient.

- 13 Is there any other subject you would like to raise in the context of the Report on the application of the UCPD? In particular, have you encountered any emerging unfair commercial practice, particularly in the digital environment, which should in your view be addressed in a possible future revision of the Directive?

When implementing the UCP-Directive Denmark – and several other Member States – were of the opinion that the UCP-Directive did not apply to sales promotions, as the latter were explicitly governed by the proposal for a regulation COM(2001) 546 final concerning sales promotions which was subsequently withdrawn by the Commission in 2006.

However the European Court of Justice has subsequently in a number of judgements stated, that sales promotions do fall within the scope of the Directive and that the Directive must be interpreted as precluding national legislation which provides for a prohibition against sales promotions in principle, without taking account of the specific circumstances of individual cases.

As a consequence of the above mentioned judgements Denmark has had to repeal two bans against sales promotions in the form of coupons/stamps and prize competitions. The reason behind the bans are among other things to ensure that consumers have equal access to discounts and that consumers are adequately protected against sales promotions that can withdraw the consumers attention from the actual price and quality of the product or service.

On that background Denmark strongly recommends a revision of the Directive that will exclude all forms of sales promotions from the scope of the Directive.

Furthermore Denmark would like to inform the Commission that Denmark intends to put more focus on children's and young people's conditions as consumers. Minors are increasingly subjects to commercial campaigns, but they do not always have the experience needed to see through complex purchase situations. Therefore Denmark would like to take the opportunity to encourage the Commission to also put focus on this subject in the evaluation and possible revision of the Directive.

Denmark assumes that the Member States will be involved in the further process regarding the evaluation of the Directive and is looking forward to participate in that process and the on going dialogue with the Commission.

Annex – Overview of the most frequent Unfair Commercial Practices encountered in your country

Please provide a brief description of the unfair commercial practices most frequently encountered in your enforcement activities. *In response to this question: (i) please identify the provision(s) of the Directive to which the practice can be associated; (ii) the sector involved (in broad terms); (iii) and, if possible, go into greater detail as to the marketing method used (e.g. if the relevant practices took place on-line or off-line) and as to whether it is a national or cross-border practice. If precise data are not available, please provide estimates (e.g. approximately 20% of cases involved deceptive information, 60% of the practices was on-line etc...). Whenever possible, please provide some examples on concrete cases encountered.*

The Danish Consumer Ombudsman, who is the relevant enforcement authority, does not distinctly register if a case concerns any of the misleading commercial practices mentioned in Annex 1 of the Directive. Thus it is not possible for Denmark to fill in the overview below.

Practice (in relation with the provisions of the Directive)	Frequency ²	Sector ³	Off-line or On-line ⁴	National or Cross-border	Examples <i><u>(Please describe the concrete cases encountered)</u></i>
Unfair commercial practices under the General Clause (Art. 5)					
Misleading actions (Art. 6)					
Misleading omissions (Art. 7)					

² % of total case if you have data. Otherwise: F (frequent); A (average); V (view); NO (no case at all).

³ For example, within telecoms: mobile and fixed telephony, premium line services; or within financial services: consumer credit, loans etc.

⁴ Is the practice more frequent off-line or on-line? E.g. 60% of the practices were online etc...

Aggressive practices (Art. 8-9)					
Annex I – Black list					
Claiming to be a signatory to a code of conduct when the trader is not (n.1)					
Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation (n.2)					
Claiming that a code of conduct has an endorsement from a public or other body which it does not have (n. 3)					
Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation (n. 4)					
Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent					

products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising) (n. 5)					
Making an invitation to purchase products at a specified price and then: (a) refusing to show the advertised item to consumers; or (b) refusing to take orders for it or deliver it within a reasonable time; or (c) demonstrating a defective sample of it, with the intention of promoting a different product (bait and switch) (n. 6)					
Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice (n. 7)					
Undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not					

an official language of the Member State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction (n. 8)					
Stating or otherwise creating the impression that a product can legally be sold when it cannot (n. 9)					
Presenting rights given to consumers in law as a distinctive feature of the trader's offer (n. 10)					
Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial) (n. 11)					
Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product (n. 12)					
Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer					

into believing that the product is made by that same manufacturer when it is not (n. 13)					
Establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products (n. 14)					
Claiming that the trader is about to cease trading or move premises when he is not (n. 15)					
Claiming that products are able to facilitate winning in games of chance (n. 16)					
Falsely claiming that a product is able to cure illnesses, dysfunction or malformations (n. 17)					
Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions (n.18)					
Claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes					

described or a reasonable equivalent (n. 19)					
Describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item (n. 20)					
Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not (n. 21)					
Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer (n. 22)					
Creating the false impression that after-sales service in relation to a product is available in a Member State other than the one in which the product is sold (n. 23)					
Creating the impression that the consumer cannot leave the premises until a contract is formed (n. 24)					

Conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation (n. 25)					
Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation (n. 26)					
Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights (n. 27)					
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 (n. 28)					

Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer except where the product is a substitute supplied in conformity with Article 7(3) of Directive 97/7/EC (inertia selling) (n. 29)					
Explicitly informing a consumer that if he does not buy the product or service, the trader's job or livelihood will be in jeopardy (n. 30)					
Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either: — there is no prize or other equivalent benefit, or — taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost (n. 31)					
Other (please specify)					