



EUROPEAN COMMISSION

DIRECTORATE-GENERAL FOR INTERNAL MARKET, INDUSTRY, ENTREPRENEURSHIP  
AND SMES  
Single Market Enforcement  
E.2 – Enforcement II

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Dear Sir,

We would like to thank you for your letters of 21 December 2021, 26 January 2022 and 22 February 2022, referring to the note of 02 July 2021 by the Danish Competition and Consumer Authority concerning a Danish initiative for implementing an Opt-in scheme regarding unsolicited printed advertisements.

In your letters, you inquire over the compatibility of such scheme, intended to replace the non-statutory opt-out scheme currently in force, with EU primary and secondary law. You also explain that ‘the intention of introducing an opt-in scheme is to lower the amount of printed advertisements in order to limit the negative environmental impact of these advertisements.’

The present reply is intended to provide some preliminary informal and general guidance over the main elements of the scheme.

We note that the proposal envisaged in the note raises several questions with respect to free movement of goods and services as well as environmental and consumer protection.

The Commission has already stated in its reply of 30 April 2020 to the parliamentary question E-8/2020<sup>1</sup> that an ‘opt-in’ scheme for printed advertisement, which does not pursue, directly or indirectly, the objective of the protection of consumers' economic interests, but other goals such as environmental protection, would fall outside the scope of the Directive 2005/29/EC on unfair commercial practices<sup>2</sup>.

Furthermore, the Court of Justice has held that it is for the national authorities and courts to decide whether a national provision is intended to directly or indirectly protect the interests of consumers (C-13/15 *Cdiscount*). This position was reiterated in the letter of

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<sup>1</sup> [https://www.europarl.europa.eu/doceo/document/E-9-2020-000008-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-000008-ASW_EN.html)

<sup>2</sup> See the relevant case law of the Court of Justice (C-540/08 *Mediaprint* and C-206/11 *Köck*)

DG JUST of 2 February 2021 in reply to the letter of the Danish Competition and Consumer Authority 11 December 2020<sup>3</sup>.

When it comes to the fundamental freedoms, it is true that national rules restricting the free movement of goods or services need to be non-discriminatory, justified by an overriding reason of public interest and proportionate. However, any assessment of (1) the possible existence of a restriction of the free movement of goods or services and (2) the compatibility of a national measure with EU law depends on the specific features of each measure, including its concrete wording, the objectives pursued and justification, along with evidence presented.

Moreover, we note that the proportionality test to be carried out on national measures restricting fundamental freedoms is composed of three steps: the measure must be suitable to attain the overriding reason in the public interest, must not go beyond what is necessary to attain it and no less restrictive means should be available to achieve it. With respect to the latter, the abovementioned Danish note itself outlines a potential alternative scheme, which, in its own terms, would be less restrictive on fundamental freedoms. This appears to suggest that the Danish authorities themselves acknowledge the existence of less restrictive means.

At this stage however, as previously pointed out, the Commission services cannot provide a complete assessment, only on the basis of the information supplied in the brief explanatory note informally sent by the Danish Competition and Consumer Authority.

In order to receive a more detailed and comprehensive answer, we invite the Danish authorities to notify a draft under the applicable notification rules<sup>4</sup>. The notification procedure would allow all Commission services concerned as well as all other Member States to carry out a transparent and accurate assessment based on the concrete phrasing of the proposal and would also provide private stake-holders with the possibility to submit their views.

Such an open and comprehensive process of information and consultation would enable a complete assessment, on the basis of all the relevant aspects and comments.

We would like to thank the Danish authorities for their spirit of cooperation and remain at their disposal to pursue a fruitful dialogue.

Yours faithfully,

*[electronically signed]*

Salvatore D'ACUNTO  
Head of Unit

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<sup>3</sup> Danish Competition and Consumer Authority letter with reference: FORCE-20/12511-2/11 December 2020; European Commission letter with reference: Ares(2021)901964/02 February 2021

<sup>4</sup> Single Market Transparency Directive 2015/1535 (TRIS notification) or Directive 2006/123/EC on services in the internal market.