

# Electronic commerce and marketing law

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## Introduction

- Electronic commerce
  - Information requirements
- The Internal Market
  - Free movement of goods and service
    - However, »justifiable restrictions«
  - E-commerce directive (00/31)
  - Distance selling directive (97/7)
  - Unfair commercial practices directive (05/29)
  - Misleading and comparative (06/114)

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## The cases

- De Agostini
- VTB, Total and Sanoma

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## *The Distance Selling Directive*

- Scope of application
  - Distance contracts
    - Certain exemptions
- Consumer
  - Both goods and services
- The binding nature of the provisions
  - Minimum directive
- Unfair commercial practices directive
  - Misleading omission

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## *Prior information*

- In good time prior to conclusion
  - Identity of the supplier
  - Main characteristic of the product
  - The price including all taxes
  - Delivery costs
  - Payment, delivery and performance
  - Existence of right of withdrawal
  - Possible cost for communication
  - The period, the offer is valid
- Clear and comprehensible manner



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## *Written confirmation of information*

- A durable medium available to the consumer
  - »Prior information«
  - Conditions and procedures for using right of withdrawal
  - Where to send complaints
  - After-sales-services and guaranties
- In good time during the performance and at latest at delivery

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## *Right of withdrawal*

- Seven working days (Denmark: 14 days)
  - From delivery of goods, conclusion of service contract or fulfillment of information requirements
    - No longer than 3 months
- Consequences of withdrawal
  - No charge for withdrawing
  - Cost of returning the goods

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## *The E-Commerce Directive*

- Scope of application
  - Information society services
- The country of origin principle
  - Home country control
  - Mutual recognition
- General information
  - Name and address
  - Contact details incl. e-mail address
  - Registration numbers

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## *Commercial communication*

- Clearly identifiable
  - The commercial communication
  - The person behind the communication
- Clear identification of and provision of terms
  - Promotional offers (discount, premium and gifts)
  - Promotional competitions and games

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## Contracts concluded by electronic means

- Not deprive legal validity
- Information to be provided
  - The different technical steps
  - Whether the contract will be available
  - Tech. means for correcting input errors
  - The languages offered for conclusion of contracts
- Acknowledge receipt of order
  - Electronically and without undue delay
  - Not »e-mail-contracts«



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## Marketing law

- Unfair commercial practices directive (05/29)
  - Legal standard
    - Contrary to professional diligence
    - Distort economic behavior materially
  - Misleading / aggressive practices
    - Blacklisted commercial practices
- Misleading and comparative advertising directive (06/114)



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## Unfair commercial practices

- Business-to-consumer; during and after a commercial transaction
  - Without prejudice to contract law
  - The misleading advertising directive
- Unfair commercial practices are prohibited
  - 1) contrary to the requirements of professional diligence and 2) impair the ability to make an informed decision
    - Vulnerable groups (mental or physical infirmity, age or credulity)



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## Misleading actions

- False information
  - Likely to deceive average consumer
    - Even if the information is factually correct
- Regarding
  - Nature, main characteristics, or price of the product
  - The motives for the commercial practice
  - Rights, qualifications, status affiliation etc.
  - The consumer's rights
- Causes or is likely to cause consumers to take a transactional decision that he would not have taken otherwise



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## Misleading omissions

- Omits material information that the average consumer needs to take an informed transactional decision
  - Unclear, unintelligible, ambiguous or untimely presentation of material information
  - Fails to identify the commercial intent
  - Information requirements under Community law
    - Including 'invitation to purchase'
- Causes or is likely to cause...



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## Misleading practices

- Examples (Annex I)
  - 10. Presenting rights given to consumers in law as a distinctive feature of the trader's offer
  - 11. Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear (advertorial)
  - 20. Describing a product as 'free' etc. if the consumer has to pay anything other than the unavoidable cost of responding and/or delivery



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## Aggressive practices

- Harassment and coercion that is likely to significantly impair the average consumer's freedom of choice or conduct
  - With regard to:
    - Timing, location, nature or persistence
    - Threatening or abusive language or behavior
    - Exploitation of specific misfortune or circumstance
    - Barriers to exercise rights under a contract
    - Threat to take action that cannot be taken



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## Aggressive practices

- Examples (Annex I)
  - 26. Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media
  - 28. 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



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## Unsolicited advertising

- E-privacy directive (2002/58)
  - What is »electronic mail«?
    - Sent by who?
    - Opt in or opt out
  - Concealing the identity
  - Omit reply address
- Aggressive commercial practice
  - 26) persistent and unwanted solicitations



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