

Intervention by Hagen Jorgensen, Danish Consumer Ombudsman - European Commission, Annual Assembly of Consumer Associations, Brussels, 12th-13th November 1998

The role of the Danish Consumer Ombudsman is to keep an eye on commercial communications in the broadest sense taking into account the interests of consumers, business and society.

In Nordic law the word "Ombudsman" is commonly used about an official whose task is to protect the ordinary citizens against misuse of political or administrative power, a guardian of the civil rights.

The Danish Parliamentary Ombudsman still has that task, whereas the Consumer Ombudsman - appointed by the government - shall make sure that private and public business activities are conducted in accordance with good marketing practices.

The Consumer Ombudsman in Denmark and in Sweden, Norway and Finland is the dynamic public but independent element in market supervision with the task to actively influence development in the area of marketing practice.

The Nordic Consumer Ombudsmen have no powers to make binding decisions as to how the law should be interpreted and complied with. If business and trade will not comply with the statements, suggestions or recommendations of the Danish Consumer Ombudsman, the ombudsman could be forced to ask the courts to issue injunctions. If for instance the prohibition of misleading advertising in the Marketing Practices Act is violated, the Consumer Ombudsman can act as Public Prosecutor and ask the court to sentence the companies that violate the law.

Cases of principle interest are tried by the Maritime and Commercial Court of Copenhagen. The court is composed of a legal judge and representatives from business and trade and consumer representatives. Appeals from this court go directly to the Supreme Court.

The Consumer Ombudsman's aim is to protect the consumers on basis of an average norm. The consumer who wants to seek restitution as a civil action can go to the Danish Consumer Complaints Board or to one of the number of private boards set up by trade associations in co-operation with the Consumer Council and approved by the Consumer Complaints Board. However, the Ombudsman may intervene in civil actions in order to support the individual consumer. The Ombudsman may also claim restitution for the individual consumer by means of a trial on illegal marketing practices.

Class-action is not recognized in Danish law, but if a number of consumers have equal claims of compensation connected to a violation of

the law the Consumer Ombudsman can claim their compensation collectively.

There is no court practice with regard to restitution or compensation for consumers, but a few cases have been solved through negotiation.

The Consumer Ombudsman's efforts in negotiation may be carried out individually with each company, but often the problems are common to a trade or of importance to the market in general. Over the years (we started in 1975) the Danish Consumer Ombudsmen have made several guidelines e.g. on price marketing, on the contents of guarantees and contracts terms, on environmental claims, on sex discrimination, on the ethics of advice given by banks to customers, and on principles for charge-backs. The guidelines are normally respected, because they have been acknowledged by the trade organizations and the Consumer Council. Otherwise it is of no interest to keep such guidelines in force. They are certainly considered as a blue stamp by the trade organizations.

Something they do not want to lose.

The work of the Consumer Ombudsman is not in any way meant to hinder self control in the business world. The codes of the International Chamber of Commerce play an important role in interpreting what is fair trading.

Self control in the individual company is, however, the goal. The Consumer Ombudsman has produced a booklet "Ethics, Dialogue, Responsibility" in close co-operation with the leading Danish business schools. The aim is to inspire companies to look at ethics as a tool in value based management, where companies enter into dialogue with their employees, with consumers, authorities, the media etc.

On our homepage www.consumer.dk you will find all relevant data about consumer protection law, guidelines, cases, initiatives, writs in civil cases, the Consumer Ombudsman's projects and statistics.

Since 1990, when I came into office, 13.500 cases have been closed. The Prosecution has conducted about 165 criminal cases at the city courts on the request of the Consumer Ombudsman. At the same time the Consumer Ombudsman has conducted more than 60 cases at the Maritime and Commercial Court, the High Courts and the Supreme Court for contravention of the Marketing Practices Act, the Payment Cards Act, the Door-to-Door Selling Act and the Act on Credit Contracts. In 49 cases the Ombudsman's claim was sustained. About 25% of the cases were civil cases.

The Consumer Ombudsman has no staff, no budget. It is the National Danish Consumer Agency which provides the secretariat functions. The Agency is also secretariat for two other independent public institutions, viz. the Consumer Complaints Board and the Government Home Economics Council. At the same time the Agency is a government

institution implementing the functions in relation to consumer interests on behalf of the Ministry of Business and Trade.

Only 14 persons' work are provided by the secretariat. None of the employees are working solely for the Consumer Ombudsman. Indeed it is a very small unit, but quite effective. The homepage, which started 2 years ago, has improved our productivity immensely. It has more than 5 million hits per year!

I put strong emphasis on my co-operation with the other Nordic Consumer Ombudsmen. At our frequent meetings we have found that there are many common problems. We have issued several Nordic guidelines, among which I would like to mention "Guidelines on Environmental Claims" (1994). We believe that such a guidance to business and trade is still much needed and we have decided to review the guidelines, taking into consideration the latest developments in international standardization (ISO).

The Danish Consumer Ombudsman is one of the founding members of The International Marketing Supervision Network (IMSN). In 1990 the Nordic Consumer Ombudsmen took the initiative to create the IMSN (see the Nordic Seminar- and Working Report. 1992:547 "Supervision of Marketing - Nordic and European").

The IMSN now consists of the leaders of marketing supervision in European countries, Canada, USA, Mexico, Australia, Japan and South Korea. The IMSN keeps a frequent contact, and discusses practical measures to prevent unethical cross-border marketing practices. Of course the Internet has become of great interest to all members of the Network, and certainly a challenge to supervisors, along with the development of new methods of marketing and advertising.

At present Belgium holds the chairmanship of the ISMN. The Network has its own homepage. Links can be found on our homepage.

Yes, the Internet is an important matter for consumers. Therefore, I have tried, and tried real hard, through the past six months to negotiate ethical guidelines for marketing and trade on the Internet. Recently, the negotiations collapsed. When it came to the point, business and trade organizations were not prepared to give the consumers the necessary protection.

The Internet is a good and cheap possibility of getting the attention of the consumers. But the main problem is that the business world is not willing to limit the means they intend to use in order to contact the consumers.

By way of example, business representatives claim that it should be legal to send unsolicited e-mails to consumers. Another problem in the negotiations was the need to protect children and young persons.

However, developments are on the way: On the European Council of Consumer Ministers' meeting on the 3rd of November a council

resolution was made on "the Consumer Dimension of the Information Society". This resolution includes a paragraph saying that a necessary condition for establishing consumer confidence, trust and participation in the information society among other things is the protection of the consumers against unsolicited, misleading and unfair marketing practices, including advertising.

Another progress is that the hard line of business and trade in this matter is softening, and will probably soften more, since the Danish Minister of Business and Trade last week at a conference on electronic trade, arranged by the Danish Industry Association and the Law Society, strongly urged trade and industry to return to the Consumer Ombudsman's negotiation table with the intention of taking the needs of the consumers into consideration. As the minister expressed it: "If business will not think of consumers, consumers will not think of business - at least not well".

From "The Board of Webgrrls, Copenhagen" I have received an e-mail supporting my negotiation position:

"We, The Board of Webgrrls, Copenhagen. have been asked to comment on the question about ethic guidelines for trade and marketing on the Internet. We are of the opinion that the Consumer Ombudsman and the Consumer Council are visionary when they require stricter claims in connection with marketing over the Internet than off-line. There is an extremely urgent need for protection of information which may be related to persons, because this kind of information will become very valuable, and already it is negotiated on a large scale. Therefore, we want to be asked before personal related information is used by others, and also we want to be asked before marketing material is distributed. Thus, we prefer to actively say "yes please" instead of, as it is to-day, to have to say "no thank you". It will be almost impossible to keep control of the digital society. At the same time we want a guarantee that our information is not sold on to others, when we accept marketing material from traders. With the new Data Register Law, which will soon be implemented when Danish legislation is adapted to a EU-directive on this subject, we are worried about how personal related information will be used in the future digital society. That is why we want an optimal protection."

At a meeting in October between the Nordic Consumer Ombudsmen it was decided to develop, as soon as possible, a common position with regard to marketing and trade on the Internet. This is not meant to hinder any negotiations with our respective national trade and consumer organizations. But it will make it clear that the Nordic market supervision authorities stand on common ground in this matter.

The work of the Commission's DG XV on commercial communications should be observed with the utmost attention by all consumers.

The Commission's strategy for optimizing the Internal Market includes an assumption that a long series of laws and administrative practices in the member states, mostly covered by the expression "general goods", makes it difficult for the companies to reap the benefits of commercial communications within the market. The strategy is to remove, if necessary by harmonization, such hindrances for commercial freedom of expression. The law of the country of origin should according to this philosophy be applied to commercial communications.

In my view there is much more reason in applying the law of the country of the market place where the competitors and the consumers meet. This is already the case with regard to the 1984 Directive on Misleading Advertising. This was recognized by the Court of Justice of the European Communities in the case of *Konsumentombudsmannen v. De Agostini and TV-Shop* (1997).

If the choice is the country of origin there will be no end to "forum shopping", and business and trade will constantly claim that the consumer protection in their country should be softened in order to obtain equal conditions for competition.

In its efforts to promote commercial communications the Commission should focus much more on the interest of consumers. The principle of subsidiarity should not be claimed in support of the view that a harmonized consumer protection is unnecessary, while at the same time harmonization is applied in favour of commercial interests.

Transborder marketing in the Internal Market requires in my mind a common set of rules with minimum requirements for fair trading and for protection of consumers - a common general clause. The higher the level of protection is made through harmonization, the less need there is for drawing up national rules for consumer protection.

As an active participant in the International Marketing Supervision Network the Consumer Ombudsman wants to emphasize that European measures in this field should take the international aspects into account. Unfortunately, the grand OECD conference in Ottawa in October did not reach an agreement on a recommendation of a "Code of Conduct" in electronic trade. I am afraid this was due to the influence of big business who prefers self regulation to government interference. How much genuine consumer protection do you think will be the result of such business self regulation!

The financial sector is important to all consumers. Many of its services must be considered services of necessity for the ordinary consumer. Then, why is it, that development of consumer protection in this sector is always lacking behind? There is certainly a need for a minimum protection of the consumer, but the sector seems often to be able to call for exemptions from harmonization measures. I could mention the

Directive on Unfair Terms in Consumer Contracts and the Directive on Distance Selling.

Years later, after much pressure from the consumer associations, comes a proposal for a Directive on Distance Selling of Financial Services based on the principle of maximum harmonization. Seen from a consumer point of view minimum directives should be used.

The arguments for a special treatment of the financial sector with regard to harmonization are in general, that the sector is under heavy financial supervision, which makes special consumer protection unnecessary.

However, financial supervision is basically concerned with securing the solvency and liquidity of the banks, insurance companies etc. and not with consumer contract terms, commercial communication etc.

My experience about the Danish financial sector is that it always tries to buy time. The later the banks and the insurance companies need to react to consumer demands, the better. This certainly is also the philosophy of the very influential European Advisory Banking Committee, of which I was a ministerial member in the 80's. In Denmark years and years are spent on studies, negotiations and endless court cases with the banks. The patience of legislators seems to be unlimited.

In the September-edition of "Commercial Communications - the Journal of Advertising and Marketing Policy and Practice in the European Community", which is sponsored by DG XV, the "One-Stop Shop" of the Internal Market is promoted. A diagram shows the commercial communications' chain. Then you can identify where restrictions would have hampering effects in the communications' efforts to reach the target group.

Quite a military strategy.

If you look at commercial communication in a more balanced way, a number of problems arise seen with a consumer's eye. Let me mention a few:

Acts of violence, suicide or ethnic tragedies, for instance in the Balkan areas, as reported through the news media are being commercialized into something which can catch the eye of consumers and provoke the media, the public and the authorities at the same time increasing the effect of the marketing.

This is in clear conflict with Art. 4, points 2 and 3 of the ICC, International Code of Advertising Practice. All the Nordic Consumer Ombudsmen have reacted towards this kind of advertising.

The study made in 1996 by BEUC and the Dutch Konsumentenbond on "Children and Advertising" expresses profound concern at the proliferation of marketing practices aimed at children using increasingly more sophisticated and often covert marketing techniques.

The Danish Consumer Ombudsman has drawn the attention of the American companies Walt Disney and Kellogg's to this study. The two companies' homepages "www.disney.com and www.kelloggs.com are systematically applying interactive marketing to children and young persons in such a way, that the borderline between commercials and entertainment is undistinguishable. The companies have told me, that they will only comply with American laws, i.e. the law of the country of origin. I have warned them that they should also comply with the laws of the country to which the marketing is directed, and that they risk court cases in Denmark.

The Internet is a global media which means that their commercials are not only aimed at the American market, but at many others, incl. the Danish market. It is evident that the homepages of the two companies are closely linked with the domestic marketing efforts, at any rate in Denmark. Both companies refer to their US homepages on the products they sell in Denmark. Kellogg's homepage address is found on packages of corn-flakes, Disney's on posters for Disneypictures.

In August this year I issued guidelines on "Children, Young people and Marketing Practices". The guidelines include provisions with regard to children as a target group, school sponsorships, special types of marketing practices and marketing in television commercials and on the Internet.

I have also found it necessary to take steps versus a marketing consultant company for its development of a marketing strategy towards children, "the future consumers". The strategy refers to children as a very interesting target group in marketing. The concepts of "pester power" and "character licencing" are explained, and constitutes an integral part of the strategies, as positive and important components in marketing towards children. By using children and young people as a target group also with regard to products meant for adults, it is possible to take advantage of the "pester power", i.e. children's ability to pester their parents.

The strategy paper says that "pester power" and "character licencing" (which is the use of for instance Barbie, Winnie the Pooh, Batman, etc.) is closely linked. The combination is able to exploit the parents' indulgence and reluctance to face conflicts when they are shopping.

The strategy as a whole is a guidance and an appeal to business and trade, which clearly is in conflict with the ICC International Code of Advertising Practice, article 14b. The Code states that "advertisements should not undermine the authority, responsibility, judgement or tastes of parents, taking into account the current social values. Advertisements should not include any direct appeal to children and young people to persuade their parents or other adults to buy advertised products for them"

But of course it is also a violation of the Danish legislation on good marketing practices.

I am afraid that this is not an isolated case. We see quite a number of important business conferences on "Kids in Marketing" etc. following the same line of marketing strategy. My Nordic colleagues tell me that the situation is the same in their countries. It seems that an extremely heavy pressure of advertising is directed to children, and we have only seen the top of the iceberg.

You can find several reasons in to-day's welfare societies: typically both parents have full-time jobs, while the kids are in schools and day-care centres. More money is available for consumption than earlier. However, many consumers tend to zap away from television commercials. But the kids see them! So why not use a combination of "pester power" and "character licencing" to circumvent such hindrances for commercial communications to reach the target group.

When accused of exploiting children's natural loyalty towards their parents, companies often defend themselves by saying that it is the responsibility of the parents to educate their kids to resist the effects of such marketing efforts.

Another side of commercial communication is the hidden advertising.

In my capacity as Consumer Ombudsman I am a member of the Danish Radio and Television Advertising Board, which has the authority to stop unethical or otherwise unlawful advertising in those media. The last couple of years the Board has had the competence to evaluate the presence of hidden advertising in radio and TV-transmissions. The Board only has limited resources at its disposal, but on the basis of about a dozen test cases the Radio and Television Board has now been able to give a report to the Minister of Cultural Affairs.

In summary the Board concludes that hidden advertising often is found like

- appraisal or particularly detailed mentioning of products etc. in non-commercial transmissions, sometimes including information about contacts, phone numbers etc.
- so-called "product placement", where different products are placed in the transmissions
- in connection with sponsoring of programmes with prize competitions

The Board proposes that hidden advertising is expressly forbidden in the Marketing Practices Act in the same way as misleading advertising to make it quite clear to advertisers that they risk penalty for violating such provisions. To-day it is stated in the Act on Radio and Television Transmission that it should always be possible to identify advertising. This provision is aimed at the transmission companies, not the advertisers.

With regard to product sponsoring the Board suggests that the products may only be mentioned in a short and neutral manner. In children's programmes the sponsored prizes should not be shown at all.

Recently I have asked the Press Council to investigate a case of violation of responsibility under the Press Act by hiding advertising in an apparently editorial text. The Press Council has informed me that the case raises principal questions, which will be discussed at a plenary meeting in the Council in December.

When the Consumer Ombudsman has taken up cases about marketing which violates the Marketing Practices Act I am often accused by the editorials of the newspapers that I am violating the freedom of expression of commercial communication. I do respect that freedom, as long as it respects the principles of good marketing practices. Those principles include that it is not allowed to try to cheat consumers.

The proliferation of editorial text with hidden advertising is not only a manipulation of the consumers, it also harms the fundamental freedom of speech, i.e. the freedom of the press. Because if readers, viewers and listeners no longer dare to believe in the objectivity and neutrality of the journalist or the medium, then you end up in a situation where freedom of commercial communication suppresses the freedom of the press.

That would be detrimental to the media as well as to the free debate in society.

My final remark would be, that in the Commission's work towards the so-called One-Stop Shop of the Internal Market the Commission should not only promote commercial communication which obviously can benefit businesses as well as consumers, but should pay equal attention to the interests of the consumers in a fair trading environment with a sufficient and effective level of consumer protection. That is the way to obtain consumer confidence and trust in "The Information Society".