

# World Trademark Review™

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# Country Correspondents



The Country correspondents section of *World Trademark Review* is a feature in which leading firms from countries across the globe take a detailed look at a specific topic affecting trademark owners

## Advertising

This issue contains an array of insights on advertising, ranging from legislative updates to the impact on brand owners' marketing strategies of new regulatory measures. Several jurisdictions consider new laws – or the need of them – to clarify “inconsistent” rulings. All the articles underscore the importance of raising awareness about how trademarks are used in advertising.

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# The customer is always right: Denmark's consumer protection focus

While a fully joined-up European advertising policy remains a dream, at least the Danish system has been updated to provide comprehensive coverage. Moreover, individuals have a strong ally against unfair advertising in the shape of the Consumer Ombudsman

Despite increasing harmonization between EU member states over the last few years, there remain substantial differences between national law and practice on advertising. The preamble to the EU Unfair Commercial Practices Directive (2005/29) even states that are uncertain as to which national law applies to unfair commercial practices can undermine consumer confidence in the internal market. Businesses, therefore, must and do generally recognize that advertising is subject to national law and practice, and that cross-border advertising and other sales promotional activities remain difficult and expensive. Having said this, increasing harmonization is beginning to change this situation, in particular with respect to consumer protection.

Operating in this environment – where consumers must be protected, but in different ways from country to country – requires an understanding of the variations in national laws and practice to manage and limit the risk of violating those laws. This article aims to outline the background of advertising law in Denmark, show how advertising is governed according to Danish law and list some of the key changes introduced by the current Marketing Act.

## The evolution of consumer protection

For over a century Denmark applied the principle of free competition, including the right to freely advertise products and services. However, as in most other jurisdictions, it soon became necessary to regulate this freedom to counter the most obvious cases of abuse.

The first real law on advertising was the 1912 Trade Designations Act, which governed misleading advertising and the denigration of competitors. In 1937, inspired by German law, the act was amended to include a general prohibition on acts of unfair competition.

In 1974 the Trade Designations Act was replaced by the first Marketing Act, although the core material provisions remained unchanged. However, whereas the Trade Designations Act solely governed the relationship between businesses, the Marketing Act was designed to serve the interests of business, consumers and society in general. This was underpinned by the establishment of the Consumer Ombudsman, a public institution that has wide powers to safeguard consumers' interests by ensuring compliance with the Marketing Act.

While the current Marketing Act (the 2005 Marketing Act, as amended) has a separate section on consumer protection, which seems to indicate a growing separation between the interests of businesses and consumers, the act continues to serve equally the interests of business, consumers and society in general. This is evidenced by the development of the prohibition on acts of unfair competition. The prohibition is considered a legal standard, which acknowledges that advertising develops with society and that the law must develop with it. It has often been applied where a marketing activity does not fall within the scope of a specific prohibition set out in the Marketing Act, but is considered to violate the legal standard of what should and should not be allowed. It has developed its own scope of application outside advertising law, where it is used to prohibit product imitations that do not

otherwise infringe IP rights.

In addition, the Consumer Ombudsman has developed into a powerful force for consumer protection, not only by ensuring compliance with the Marketing Act and other consumer protection acts, but also by participating in public debates. Businesses advertising in Denmark should thus be aware that there is a forthright public institution that is willing and able to test borderline legal issues in the interests of consumer protection.

## The legal framework

Advertising in Denmark is generally governed by the 2005 Marketing Act, as amended. The act applies to all advertising by both private and public businesses to the extent that products and services are offered on the market. There are certain exceptions for financial services, which are governed by the Financial Services Act.

In addition, the advertising of certain products or services, such as food and pharmaceuticals, is governed by specific provisions in the relevant laws. With regard to other products, various industries (eg, alcoholic beverages) have entered into voluntary agreements on marketing to avoid interference from the legislature. It is generally assumed that if such agreements are breached, the legislature will step in and reduce the scope of what is permitted; this balance of power makes the agreements just as effective as legislative measures.

“The act continues to serve equally the interests of business, consumers and society in general”

Further, it is likely that any marketing activity that breaches such an agreement would be considered to have violated the general prohibition against acts of unfair competition.

Advertising must therefore comply with specific provisions governing the relevant product or service, as well as the general provisions of the Marketing Act.

### The Marketing Act 2005

The Marketing Act 2005 was designed to implement the government's New Consumer Policy, which includes simplifying the legislative framework. While the provisions on unfair competition, misleading advertising and comparative advertising remain unchanged, the following changes have been introduced.

With a view to preventing hidden advertising, the act introduced a new requirement that all advertising must be clearly labelled as such. Previously, hidden advertising was governed by the general prohibitions against unfair competition and misleading advertising. However, it was found necessary to introduce a specific obligation to identify ads in response to increasingly sophisticated advertising, such as ads in editorial text and, in particular, product placement in films and computer games.

Advertising directed towards children was originally governed by the general prohibition against unfair competition and misleading advertising supported by the ombudsman's guidelines, but this too is now specifically governed by the 2005 act. Such advertising must (as was the case previously) take into account the fact that children are easy to influence. This provision has been supplemented with a specific prohibition, backed by criminal penalties, against advertising directed against children that directly or indirectly promotes the use of violence, drugs (including alcohol) or other dangerous or reckless behaviour; or unduly uses violence, fear or superstition.

Before it was amended, the Marketing Act contained specific prohibitions against:

- free gifts;
- stock limitations;
- discount coupons; and
- sweepstakes.

Although there were proposals to remove the strict requirements for these activities when the act was amended, the use of discount coupons and sweepstakes is still very tightly controlled.

To ensure that consumers understand offers that form part of a promotional



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activity, the act requires that:

- the terms of offers be clear and easily accessible;
- the value of any supplementary services be readily apparent; and
- businesses that do not expect to be able to meet demand inform consumers of this in the marketing material.

These requirements are somewhat ambiguous, but the ombudsman has since published guidelines, which have substantially increased legal certainty in this area. Failure to comply with the rules is subject to criminal penalties.

Requirements about pricing information were also introduced by the 2005 amendments and thus fall under the ombudsman's control. The obligation covers not only goods, but also services, where businesses must inform consumers of either a total price or the basis on which the price will be calculated. If discounts are offered to certain groups of people or organizations, this must be clearly displayed.

The 2005 act also improved the system through which monetary relief can be claimed for violations of the act. As before, any party with a legal interest may claim injunctive and monetary relief against a violation. Criminal relief is available in certain circumstances; such relief is rarely claimed by private parties but is frequently sought by the ombudsman.

Monetary relief is calculated as damages according to the general law on torts and reasonable compensation for any infringement of rights. A similar right to compensation is found in IP law. It was expected that compensation would be awarded in cases of unfair competition in the form of product imitations, but possibly also in cases of illegal comparative advertising. However, so far there has been no substantial change in the amounts being awarded.

### The Unfair Commercial Practices Directive

The EU Unfair Commercial Practices Directive was implemented by an administrative order to the 2005 Marketing Act, which defined the commercial practices that were 'unfair' for consumers. Regardless of the fact that the directive was designed to approximate the national laws on unfair commercial practices, including unfair advertising, no changes in the general prohibition against unfair competition were made and changes in practice neither are expected nor have been seen so far. However, this may change with the European Court of Justice's interpretation of the concept of the 'average consumer'. **WTR**