

Zacco

# Norway's new Marketing Control Act – analysis of some key provisions

Norwegian law offers several means of enforcement against unfair and comparative advertising. This article analyzes the options available and provides an overview of recent amendments to the Marketing Control Act

Norway is a member of the European Economic Area (EEA) and is thus obliged to harmonize its laws with EU directives, ensuring the homogeneity of the internal market. Norway has implemented the Comparative Advertising Directive (97/55/EC). The new Marketing Control Act, which came into force on June 1 2009 implements the EU Unfair Commercial Practices Directive (2005/29/EC).

## The Marketing Control Act 2009

The new Marketing Control Act is finally in place after several years of work. The act contains new provisions regarding commercial practices that affect consumers. The provisions on unfair competition and comparative advertising remain unchanged, but a new chapter on marketing directed towards children has been introduced.

The act now prohibits direct exhortations to children to purchase advertised products or to persuade their parents or other adults to buy the advertised products for them. In the assessment of whether a commercial practice is in conflict with the Marketing Control Act, special emphasis shall be given to whether the advertising is directed especially at children, and if children can see or hear the advertising.

Before it was amended, the Marketing Control Act contained specific prohibitions against the promotion of sales of products through free gifts, discount coupons and sweepstakes.

The prohibition against free gifts (bundling of extra "gifts") has been lifted, but the new act still contains prohibitions against discount coupons and sweepstakes.

However, due to a new ruling by the European Court of Justice (Joined Cases C-261/07 and C-299/07, dated April 23 2009), the Ministry has announced that it will be

recommending that the prohibition against discount coupons or tokens be repealed. For this reason, the prohibition against discount coupons has not yet come into effect. As a consequence, there is currently no general or specific prohibition against combined offers or discount coupons under Norwegian law.

Despite this, it should be noted that marketing initiatives which involve combined offers or coupons could be affected by the act's ordinary provisions which prohibit, among other things, unreasonable and misleading marketing.

In relation to sweepstakes, the promotion of sales of products by organizing sweepstakes, competitions or similar measures for consumers is prohibited if participation is conditional upon purchase or a service in return.

The sanction system has also been improved in the 2009 Act. Under the previous version, the consumer ombudsman could impose a suspended fine. This meant that the fine only had to be paid if the practice was repeated. Now, a fine has been introduced as an alternative sanction. The fine can be issued for past practices; however, this sanction can be applied only in those cases involving a violation of clearly stated unfair practices, (ie, the use of sweepstakes where participation is conditional upon purchase or a service in return).

## Enforcement of unfair and comparative advertising

Businesses have several means of enforcing advertising law in Norway:

- judicial proceedings;
- complaint to the consumer ombudsman/Market Council; or
- complaint to the Committee for the Control of Unfair Competition (NKU – the equivalent to the Finnish and Swedish market courts).

The consumer ombudsman is an independent administrator with the task of ensuring that marketing methods used by businesses when selling goods and providing services are in conformity with the legislation. The ombudsman considers cases upon receipt of complaints from consumers and traders.

The ombudsman aims to arrive at voluntary arrangements through negotiation with traders. Where there is a failure to reach such a solution, the ombudsman may submit the case to the Market Council, which is a 'court of law' in that field. The ombudsman may also take matters of principle to the Market Council even when there is no dispute with the trader concerned.

The NKU acts as an arbitration board and gives advisory opinions in cases where there has been a breach of the Marketing Control Act. The NKU cannot instruct a party to do something or to desist from something. Nor is the NKU entitled to award legal costs or damages. The main advantage with the NKU is that the proceedings are in writing. This means that the proceedings are speedier and less costly than judicial proceedings.

## NKU determinations on unfair competition

The NKU has in several cases determined the general unfair competition standard (Section 25 of the Marketing Control Act), which is applicable if, even in the absence of a risk of confusion, an advertiser has made use of a competitor's rights. The NKU may consider the advertising unfair if the defendant has taken undue advantage of a competitor's rights or has made no effort to use any freely available variations of a protected right.

A notable example of where an

advertiser was found to be in breach of Section 25 (or Section 1 as it was at the time) was the use of the slogan “Things go even better with coffee” by Norsk Kaffeinformasjon (the Norwegian Coffee Association) in its advertising. The NKU felt that Norsk Kaffeinformasjon had taken undue advantage of the Coca-Cola Company’s famous slogan “Things go even better with Coke” – even though The Coca-Cola Company had ceased to use the slogan in Norway more than 16 years previously. It therefore ruled that use of this slogan was in breach of the act (Case NKU 15/1989).

Another example is the NKU’s decision in a case involving the Norwegian pharmaceutical company Nycom-Pharma (Case NKU 06/1996). The committee found that Nycom-Pharma’s use of the slogan “Vask og gå!” (“Wash and go!”) in its marketing was in breach of the Marketing Control Act because the slogan was too similar to that of Richardson-Vicks Inc’s WASH & GO slogan mark. The committee emphasized that Nycom-Pharma was using the expression “Vask og gå” as a way of attracting attention. It stated: “The defendant has taken the complainant’s well-known slogan WASH & GO, which is the complainant’s predominant marketing element, and is using a similar expression in its own marketing (to attract attention). This can hardly be for any other reason than the desire to connect to, and exploit, the goodwill that lies in the marketing of the complainant.”

#### The requirement of sameness

The NKU has also held in several cases regarding comparative advertising that acceptable comparative advertising necessitates that the goods or services compared are of the same kind and/or quality and/or intended for the same purpose.

According to the NKU, the comparison must be complete, objective and fair, and must compare relevant and verifiable features.



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Toril Melander Stene, who is currently acting Manager, Trademark and Legal, joined Zacco in 2001 and deals primarily with disputes regarding infringement of IP rights and unfair competition. She received her law degree from the University of Oslo in 1992 and holds a LLM from the London School of Economics with a specialization in European competition law and IP law. Ms Stene was admitted to the Norwegian Bar in 1996 and has worked as a deputy judge. At Zacco she primarily handles disputes regarding infringement of IP rights, counterfeiting and unfair competition. She has worked on several cases before the national courts and the European Free Trade Association Court. She also has wide experience with preparing and negotiating contracts. Furthermore, Ms Stene provides advice to clients with respect to all aspects of Norwegian marketing law such as advertising clearance and review of promotional marketing campaigns. She also provides clients with strategies for safeguarding IP rights. Ms Stene is a member of, among others, the Norwegian Association for Copyright and the Association for Competition and Marketing Law.

#### Word marks and logos

Reference to a competitor’s word mark or trade name is allowed to identify the goods or services under comparison. However, the reference must not be such that it takes unfair advantage of the good reputation of the competitor’s trademark or trade name.

The use of a competitor’s logo can confuse the public into believing that the advertiser is endorsed by or otherwise affiliated with the owner of the logo, which creates indirect confusion. When such a commercial connection does not exist, the use of another company’s logo in marketing material – including on websites – is held to be in conflict with good business practice under Section 25 of the Marketing Control Act (Case NKU 06/2004). [WTR](#)

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