



MARKETING LAW and UNFAIR COMPETITION

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Marketing

- Need to consider various legal areas:
 - Marketing law
 - Intellectual property rights
 - Competition law
 - Privacy & data protection
 - E-Commerce law
 - Freedom of expression





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MARKETING LAW

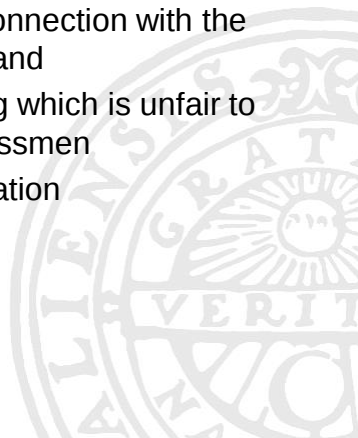


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Marketing law

Aims to

- promote the interests of consumers and of trade and industry in connection with the marketing of products and
- to counteract marketing which is unfair to consumers and businessmen
- legal rules & self-regulation
- offline and online





Marketing law

- European legislation guarantees consumers:
 - fair treatment
 - products which meet acceptable standards
 - a right of redress if something goes wrong



Legal sources

- EU E-Commerce Directive 2000
- EU Unfair Commercial Practices Directive 2005
- EU Misleading Advertising Directive 2006
- National marketing laws
- National broadcasting laws
- National media laws
- Terms and conditions of social media services



Unfair commercial practices

A commercial practice shall be unfair if:

- a) it is contrary to the requirements of professional diligence, and
- b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of **the average consumer** whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers



The average consumer

- The benchmark: an average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors
- Aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices (e.g. children)



Basic marketing principles



- Marketing communications should be clearly distinguishable as such
- Marketing communications should be honest and truthful
- Marketing should not mislead the consumer
- Provide customers with relevant information



Misleading advertising

- Account shall be taken of all its features [taken as a whole]*
- Not misleading as to the characteristics of the products



* You can't really see this?

Misleading actions - examples

- Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation
- "Bait advertising" or "Bait and Switch"
- Falsely stating that a product will only be available for a very limited time ("sale")
- Describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial and paying for delivery of the item.

Examples, contd.

- Falsely claiming that a product is able to cure illnesses, dysfunction or malformations
- Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.



Comparative advertising

- Any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor



Comparative advertising, contd.

- Ok, if:
 - goods intended for same purpose
 - objectively compares relevant and verifiable features
 - does not create confusion
 - does not discredit
 - does not take unfair advantage
 - not imitations or replicas



Spam

- **Spam**
 - unsolicited commercial communication
 - online environment
 - electronic messages, such as e-mail, sms, etc
- Sending of marketing requires prior consent (opt-in)
- For existing customers provide possibility to opt-out!



Price indication

- This price information must be:
 - unambiguous
 - clearly legible
 - easily identifiable





Marketing vs. Freedom of expression

- Promote product?
 - Marketing rules
 - Limited by unfair competition
- Express opinion?
 - Human right
 - Limited by defamation



Non compliance

- National rules
- Injunction
- Fines issued by
 - Marketing Authority
 - Consumer Protection Agency
 - Marketing Court
- Damages to competitors



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COMPETITION LAW

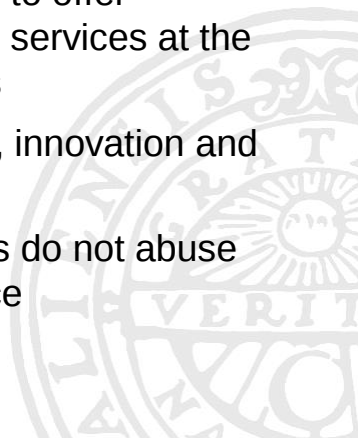


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Competition law

Aims to

- encourage companies to offer consumers goods and services at the most favourable terms
- encourages efficiency, innovation and reduces prices
- ensure that companies do not abuse their market dominance





Legal sources

- EU Competition law, several different Directives & Regulations
- National competition legislation
- Decisions by EU Courts and the Commission



The basic structure

- Prohibition of agreements between two or more independent market operators which restrict competition, e.g. cartels (anti-trust)
- Prohibition of abuse of a dominant position
- Mergers and acquisitions
- Larger companies generally have unfair competition compliance strategies



Cartels

- **Article 101** of the EU Treaty prohibits agreements between companies which restrict competition, unless they produce substantial benefits to customers and consumers
- Example – price fixing, market or customer allocation, production or output limitation
- Illegal agreements are void and may attract damages



Abuse of a dominant position

- **Article 102** of the EU Treaty outlaws abuses by dominant companies
- Example - charging unreasonably high prices which may exploit customers, charging unrealistically low prices, unjustified discrimination between customers, forcing unjustified trading conditions on trading partners etc.
- May attract damages



Mergers and acquisitions

- Aims at preventing that dominant positions are created
- If the companies turnover exceeds specified thresholds – the proposed merger must be notified to the European Commission



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THANK YOU!

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