

BUSINESS & Marketing Error Situations

In the course of everyday shopping, consumers may find that a special offer product has run out during a campaign or advertising information is incorrect in some other respect. In addition to disappointment, this causes consumers financial damage in the form of travel expenses and wasted time. A poorly planned campaign and dissatisfied customers also mean negative publicity for businesses.

Consumers should be able to trust that prices, restrictions and other information in advertising are correct. It is not fair for consumers if an advertiser can disclaim responsibility simply on the grounds that advertising contained an error or if a campaign has not been planned carefully.

Traditionally advertising has not been considered binding. Even mass ads have been regarded as urging consumers to come to a shop and make offers. Since advertising has not been binding, consumers have not been able to demand that products be sold at the advertised price.

This has led to market law actions by the Consumer Ombudsman which do not concern individual consumers who have bought a product. The Consumer Ombudsman's activities are future-oriented or aimed at influencing advertising after the intervention.

Business has changed

The world of contracts has changed over time. Mass marketing is a modern way to make offers to consumers, and marketing information often has a decisive influence when people make purchasing decisions. In many areas, such as current consumer goods, shops operate on a self-service basis nowadays. The buyer and the seller seldom meet to negotiate the terms of a sale.

Advertisers are also in a better position nowadays to ensure that information in advertising is correct. Advertisers can no longer shift the blame for printing errors to a newspaper, for example. Advertisers are responsible for designing an ad and the original is generally sent to a newspaper in the form in which it will be published. There is no way for price information to change along the way. With mod-

ern logistics advertisers can also ensure the availability of products in shops better than before.

In the light of these changes, consumers can justifiably expect businesses to bear greater responsibility for advertising.

The Nordic Consumer Ombudsmen studied the new contract reality in a report that was published by the Nordic Council of Ministers (TemaNord 2001:549, Reklamens Bindende virkning, see Consumer Protection magazine 4/2001). This report recommended reforms in the contractual consequences of marketing information. The statement issued by the Consumer Ombudsmen was also presented to the European Commission as a model. Two key points in the report were that

- advertising should be regarded as binding on the seller if consumers can reasonably expect to purchase the product according to the terms in the offer on the basis of the content or presentation or some other reason of the offer
- the information in an offer should be evaluated as part of a contract or in other words the contract should enter into force with the content that the consumer can assume on the basis of marketing.

Surprises can happen, of course. Stocks can run out in spite of precautions or advertising can contain a genuine error. In such situations the advertiser must be able to show that he has not acted negligently. Marketing must also be corrected in order to meet this requirement. If an advertiser can show that he has not acted negligently, he is not liable for financial damage on the basis of marketing.

The Consumer Ombudsman in cooperation with the

Federation of Finnish Commerce and Trade prepared guidelines on Price expressions as a marketing method in 2003. These guidelines combined and updated earlier guidelines concerning sales, clearance sales and special offers. The guidelines are backed by the Federation of Finnish Commerce and Trade and cover the principles and procedures to be observed in special offer marketing. The binding nature of advertising was treated in a general manner by recommending that the seller should compensate consumers for inconvenience. Reference was also made to the present guidelines, which were being prepared at the time.

Advertisers must exercise due diligence

The essential content of a contract is that the seller supplies the agreed product or competent service and the buyer pays the agreed price in the agreed manner. The contract parties must exercise due diligence when they enter a contract. A consumer, whose main obligation in a contract is to pay for the product, must make sure that he can pay the agreed price. If he fails to do so, he must face the consequences.

The seller must exercise due diligence in arranging marketing, among other things. Consumers have a right to expect that the information in an advertising campaign is correct, that the product is available and that the advertiser genuinely wants to enter a contract with consumers who come to the shop on the basis of a campaign. If an advertiser acts negligently in marketing, it is only fair for the advertiser to bear responsibility for the financial damage caused to consumers.

Burden of proof on the advertiser

Due diligence means

- arranging marketing in a proper way
- correcting marketing errors and updating information
- being prepared to compensate consumers if necessary.

If marketing includes incorrect information, advertisers must be able to show that an error has been made in spite of proper precautions. They must also have effective procedures for correcting advertising and making sure that changes are made without delay. Advertisers must also have adequate stocks in view of the scope of advertising and the nature of special offers. If there is any reason to suspect that stocks will run out, this must be mentioned in advertising (see Price expressions as a marketing method).

It is important to remember that simply saying “as long as stocks last” does not necessarily remove the advertiser’s responsibility to provide adequate stocks. Such an expression does not tell consumers how long the offer is valid. Advertisers can set certain limits on the availability of products, however. These are discussed later on in these guidelines and in Price expressions as a marketing method.

If errors do occur, it is reasonable for the burden of proof to be on the advertiser. Advertisers must be able to

show that they have exercised due diligence in planning and implementing marketing. Consumers have practically no way to prove negligence on the part of an advertiser. Advertisers must correct errors in advertising and compensate consumers for damage they may have suffered.

Sometimes an error, for example in price information, is so obvious that consumers should realize that it is an error. In such cases the advertiser is not liable for compensation but only needs to correct the error clearly and without delay (section 32 of the Contract Act).

With regard to special offers, businesses have an even greater responsibility to exercise due diligence, since the purpose of special offers is to get consumers to come to the shop and buy the advertised product. For this reason the Consumer Ombudsman has agreed with the Federation of Finnish Commerce and Trade on how to deal with errors involving special offers. There is no need to investigate whether a business has exercised due diligence in a particular case; consumers are entitled to compensation as a rule.

Advertisers must compensate damage

Consumers seldom meet the advertiser’s representative in a shop to negotiate the terms of a sale nowadays, and they generally decide whether to buy a product or enter a contract on the basis of advertising and the impression they get in the shop. When a consumer sees an ad, goes to a shop and selects a product, he accepts the seller’s offer. If products are not available and this is due to negligence on the advertiser’s part, it is reasonable for the consumer to receive compensation for this.

The Consumer Complaint Board has striven in its rulings to correct the problem of errors in advertising by requiring negligent advertisers to compensate consumers for financial damage resulting from ads. The Board has ruled that an ad can be equated with a starting position in contract negotiations. Negligence in contract negotiations can lead to liability to compensate any damage suffered by the other party. Accordingly, an advertiser who is negligent must compensate consumers for resulting costs if an advertised product is not available during the campaign period because it has run out and if the advertiser does not promise to supply it later at the advertised price. The Board’s rulings are intended to return consumers to the financial situation they were in before he took action on the basis of advertising. In practice this has meant compensating travel expenses.

Simply compensating travel expenses is not always enough, however. The main damage to consumer involves wasted time. Consumers do not go to a shop just to see if advertised products are there. Their purpose is generally to buy a product that has been advertised.

If an advertiser has acted negligently and a consumer has wasted time and money going to a shop - and perhaps passed up some other offer - it is reasonable for the consumer to receive compensation.

Correcting information

During a campaign it may be necessary to change advertising information.

If a product runs out in spite of precautions or if price changes in the chain of supply require an increase in the price of a product, the advertiser must correct advertising. Steps must be taken to correct information without delay. Information must be corrected through the same channel that was used to convey incorrect advertising. Notices must also be used to correct information in shops.

An error in a newspaper ad can be corrected with a notice in the shop. Correcting information in the following day's paper generally does not help. Of course, if a campaign continues, new ads should contain correct information.

DIFFERENT SITUATIONS

Errors in advertising information and problems involving a campaign can occur because of negligence or even if the advertiser has exercised due diligence. The burden of proof is on the advertiser. If he cannot show that he has exercised due diligence, he must compensate consumers for any damage they have suffered.

Consumers should be able to trust that the price indicated in advertising is correct. If the price is not correct, the advertiser is still bound to honour it unless he can prove that he has exercised due diligence. If a "printing error" is blamed, the advertiser must prove that the error occurred for some reason beyond his control. However, if an error is so obvious that consumers should realize that it is an error, the price is not binding on the advertiser (section 32 of the Contracts Act).

Due diligence in special offer advertising requires that:

- Prices and restrictions are presented clearly. This is required by the Price Marking Decree, section 2 paragraph 4 of the Consumer Protection Act and other guidelines prepared by the Consumer Ombudsman in cooperation with the Federation of Finnish Commerce and Trade. The duration of the offer or when it starts and ends should be clearly indicated.
- Adequate stocks are available. Here the scope of advertising must always be considered. If an offer is advertised on the front of a national newspaper or on television, sales will be larger than if it is advertised inside a local paper. The adequacy of stocks can be influenced by setting restrictions such as the number of items per customer. In this way consumers can judge the availability of the product. Advertisers should also be prepared for eventualities such as normal wastage.
- If a special offer product runs out in spite of careful precautions during a campaign, the seller must correct information, as a rule through the same channel used for original advertising and also with notices in the shop. An offer valid for a short time must be clearly corrected with a notice in the shop window or near the entrance as well as in the appropriate part of the shop. Notices must tell customers that the product has run out and how the situation will be corrected.

- If a special offer product runs out during a campaign, consumers should be offered a similar product for the same price or the opportunity to buy the special offer product later on.
- The number of items per customer is often limited in a campaign. The purpose is to ensure the availability of products until the campaign ends. Even if no limit has been set on the number of items per customer, the seller can refuse to sell a customer an excessively large quantity of the product in comparison with normal consumption if the seller expects that the customer intends to resell the product, for example. It should be remembered, however, that the advertiser is responsible for gaps in marketing information.

What constitutes a normal quantity varies according to the type of product. Consumers should be able to buy a larger number of kilos of sugar than package tours, for example, if no limits have been set.

The Market Court in ruling 1999:17 noted that standard practice in special offer marketing has been to ensure that products are available for the entire duration of an offer unless restrictions are mentioned in advertising. If a special offer product runs out in spite of the seller's precautions, this can cause inconvenience to a customer who comes to the shop to buy the product. The seller must in some way compensate the consumer for this inconvenience. The seller can offer the consumer a similar product on the same terms or allow the consumer to buy the special offer product later on. In the Market Court's opinion, consumers are entitled to compensation even if the seller has taken proper precautions. The ruling emphasizes the obligation to exercise due diligence in special offers.

Other advertising

In general advertising consumers have the right to expect that products will be available for an adequate period. The point of departure is that price and other information should be valid at least as long as the publication interval. This means that outdoor advertising is valid as long as it is displayed and ads in newspapers and magazines are valid at least until the next issue. If for instance an advertiser does not want a special offer in a weekly magazine to last for an entire week, this restriction must be indicated in advertising.

Consumers are seldom able to rush out and buy products advertised on television or radio, so special offers should be valid for a reasonable period so that consumers can take advantage of them. This means at least a few days.

Conflict between picture and text

If advertising information is conflicting, for example a picture does not correspond to the product, the point of departure in evaluating the content of advertising is what the consumer can reasonably expect. Consumers have the right to trust the content of advertising. The content of unclear advertising should be interpreted in the way in which consumers could reasonably expect.

Advertisers must ensure that the information in ad-

vertising is correct. Blaming printing or other errors does not eliminate responsibility and is not proof of due diligence.

SUMMARY

Determining whether advertising is binding, due diligence has been exercised by the advertiser and consumers are entitled to compensation often depends on the details of a particular case. The scope and volume of advertising, the attractiveness of the price and product and the correcting of advertising information must be taken into consideration, for example. Here are some rules:

- If advertising contains incorrect information but the advertiser has exercised due diligence and has corrected the advertising and the situation in a proper way, consumers are not entitled to compensation.
- If advertising contains incorrect information and the advertiser has not corrected it, consumers are entitled to compensation even if the advertiser has exercised due diligence.
- If an advertiser has not exercised due diligence in marketing, consumers are entitled to demand compensation. Whether or not advertising has subsequently been corrected is irrelevant. The advertiser must compensate consumers by offering a similar product if an advertised product runs out too quickly in view of advertising, for instance. If a consumer must make two trips to the shop to get a product that has been advertised, the seller must compensate the consumer's travel expenses the second time. If a consumer cannot get the product at all, the consumer is entitled to compensation for travel expenses at least.
- The advertiser can reasonably be expected to bear greater responsibility for errors that are intentional or the result of poor planning. If the main message in advertising is incorrect and gives a false impression of the availability of a special offer product, for example, consumers are entitled to demand the difference between the advertised price and the price of a replacement product that they buy. The more negligently an advertiser acts, the greater his responsibility to compensate consumers.

BINDING OFFERS

Some offers are automatically binding.

Prices in shops

Consumers must be able to trust that prices are correctly marked in shops. Nowadays it is hard to imagine the prices at a cash register differing from shelf prices. Modern technology allows shops to change shelf prices and other information as soon as an error is discovered. If there is a discrepancy between the shelf price and the price at

the cash register, the consumer should be entitled to the lower price. Correcting information at the cash register is too late, since the consumer has already made a purchasing decision - accepted the seller's offer - in selecting the product and proceeding to the cash register.

Addressed and other direct advertising

Decisions made by the Consumer Ombudsman and the Consumer Complaint Board have presumed for some time that personally addressed direct advertising is binding. Nowadays offers made by e-mail, mobile phone or other forms of personal contact are binding.

Similarly, if a consumer is given an opportunity to accept an offer without contacting the seller, the offer is binding. In mail-order sales, for example, a consumer can order a product from a catalogue with an order form. The two parties enter a contract when the consumer completes the order form and sends it.

Online advertising

The Internet is a forum for online businesses and other companies that want to advertise their products. In using the Internet for advertising or e-commerce, a company has itself selected its marketing and contract-making tool. A special feature of e-commerce and online advertising is that information can be updated quickly and practically at any time. In this way the Internet differs from other media. This gives online advertisers greater responsibility for correct information and emphasizes the obligation to exercise due diligence in online advertising.

An offer on the Internet is contractually binding on the advertiser. When a consumer accepts an offer on the Internet, a binding contract exists. An offer has been accepted when a consumer orders a product using an online form, for example.

In practice, however, it takes time to update web pages, especially if extensive changes have to be made. A consumer can also rely on an older version of a page. In this case the consumer can order a product before information has been updated on his computer. The burden of proof is primarily on the seller.

To avoid having to sell the product at the older price, the seller must prove that he started changing information before the consumer ordered the product. The seller must also be able to show that his computer system allows information to be changed as quickly as possible. Otherwise the seller has a contract obligation to fill the consumer's order. However, if an error is so obvious that consumers should realize that it is an error, the price is not binding on the advertiser (section 32 of the Contracts Act).

Bonuses and giveaways

If a consumer receives a discount coupon, gift card, bonus etc that can be used to purchase a particular product, the seller must compensate the value of the benefit if the product runs out. This type of benefit is part of a contract and the seller is contractually bound to honour it.