

2024

The Marketing Law Year in Review

A Report from MarLaw Law Firm



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1. Introduction

The purpose of this report – which we are producing for the third year in a row – is to briefly summarise the most relevant news in marketing law for 2024, the reason being the difficulty in finding cohesive information in this dynamic and ever-changing field of law. MarLaw Law Firm has since its founding in 1969 had marketing law as a core area of its practice and will continue to have it in the future. This summary presents the past year's legislative news, judgements as well as general supervision in Sweden. We do not aim to be comprehensive in this report, our aim is rather to be as concise as possible in order to provide a quick and brief overview. This can invite further reading where interest arises. Firstly, some reflections on the last year.

YEAR 2024 – FOCUS ON GREEN CLAIMS AND SLOW AHEAD FOR ARTIFICIAL INTELLIGENCE

The past year has been characterised by tougher geopolitical competition during a major election year as well as the movement towards green transition. Notable EU marketing directives have contained a clear focus on the green transition. With new possibilities of sanctioning there is a high probability that future infringements will be costly for corporations. Additionally, major efforts have been made to combat unimpeded use of Artificial Intelligence (AI), primarily through the AI Act. Both areas have been of interest to the European Commission. Furthermore, The International Chamber of Commerce (ICC) has published updated rules for advertisement and marketing that place a certain responsibility upon advertisers that use AI.

Perhaps the most impactful piece of marketing law news is the implementation of the Directive for empowering consumer rights for the green transition (2024/825). Actors on the market now have a comprehensive regulatory framework to abide by when making sustainability claims, which also includes sustainability markings. The new provisions have not yet been tried in court, however The Swedish Consumer Agency's supervisory role in the area has been strengthened. The directive also prohibits private markings that have not been certified by a third party. As of this moment there is no concrete guidance on how such a procedure should be carried out. Only time will tell how each member state develops the procedure to certify private, in relation to public, markings, which additionally will be classed as environmental claims and therefore be viewed as such.

National and European supervisory efforts have led to warnings against e-commerce stores that conduct business known as *dropshipping*. Beyond *dropshipping*, the supervisory agency's work has revolved around correct pricing information which we believe will be a continued area of interest. Moreover, influencers have continued to be the object of investigations but have not been brought to court by the Swedish Consumer Ombudsman during the past year. However, the agency was successful in other court proceedings when demanding high market disruption fees. The more powerful sanctioning mechanism of up to four percent of yearly turnover has therefore taken effect and been reflected in practice, and we believe this trend will continue.

For 2025 we look forward to following how the Empowering Consumers Directive will be handled practically, by observing how case law is created to set out the new limitations for environmental claims that violate the new EU legislation. We will also closely be waiting to see if the final adoption of the Green Claims Directive will take place.

Enjoy the reading!

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Lawyer/Partner/CEO

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Stockholm the 30 January 2025

2. THE PAST YEAR'S LEGISLATIVE NEWS

The past legislative year is characterised by measures against misleading environmental claims. Additionally, the widely discussed and extensive EU regulation of AI has been adopted and will successively be integrated the coming two years. The ICC's updated rules also take AI into consideration. Moreover, EU law has had a deeper focus on the digital sphere by new product safety requirements that have to be available on e-commerce platforms.

27th MARCH

SUPPLEMENTS TO DIRECTIVE ON UNFAIR COMMERCIAL PRACTICES WITH AN ENVIRONMENT FOCUS

As a part of the European Commission's Green Deal the Directive (2024/825) for empowering consumer rights for the green transition was adopted, which supplements the Directive (2005/29/EG) on Unfair Commercial Practices. These changes take the shape of additions to the so-called Blacklist, containing practices which under all circumstances are prohibited. An addition that has received a lot of attention is the prohibition of environmental claims similar to "eco-friendly" that are unsubstantiated. The possibility of substantiating such claims is through the use of the EU Ecolabel or a certain eco rating according to specific certificates; in other words, there are very high expectations for clear and unexaggerated environmental claims.

17th JUNE

PROPOSAL FOR GREEN CLAIMS DIRECTIVE

The European Commission's proposal for a comprehensive new piece of legislation (COM(2023) 166 final) which takes a harsher stance on the occurrence of *greenwashing* has entered into its final phase of negotiation. The European Council's guideline includes among other things a differentiation between express environmental claims and so-called environmental marks. It also requires information related to environmental claims about CO₂-credits outside the corporation's value chain. The Directive is expected to be adopted around the year 2026.

1st AUGUST

REGULATING ARTIFICIAL INTELLIGENCE

In August 2024 the EU Regulation on Artificial Intelligence (2024/1689) entered into effect. Those using AI to edit and produce image, video or sound have a duty to mark the content as being AI-manipulated. Worth noting is that the limits for what constitutes an AI-edited falsification are currently far from clear, although they will be clarified in the future. The regulation also implements a sanctioning system with heavy penalties for AI users who violate the marking duty. The regulation's different parts will however successively become applicable until August 2026.

19th SEPTEMBER

UPDATED RULES FOR MARKET COMMUNICATION

In September the ICC's rules on responsible market communication were updated and published in Swedish shortly after, the 7th of November 2024. The rules do not constitute law but have had a profound impact in court over the years. Among the news is that marketers have a responsibility for AI-generated material.

13th DECEMBER

REQUIREMENTS FOR PRODUCT SAFETY

Following a supplementary regulation the General Safety Product Regulation (GSPR) (EU) 2023/988

which affects all products that aren't covered by harmonised EU legislation, was changed. Products released on the market now must have an economic actor based in the EU that provides necessary documentation to government agencies. The updated regulatory framework focuses especially on e-commerce and necessitates that certain product information must be provided during distance sales via the Internet.

3. MARKETING IN COURT

Violations of marketing law are regularly tried in the Patent and Market Courts. The most common party by far is the Swedish Consumer Ombudsman, "Konsumentombudsmannen" (KO), which was a party in approximately 25% of cases (a major decrease from 60% the previous year). The costs (sanctions and publicly made settlement sums) for violations totalled 3 053 940 SEK including 2 650 000 SEK of market disruption fees. This is a clear increase compared to the previous year where the corresponding total was 1 250 000 SEK (including 0 SEK in market disruption fees) which can be explained by the more powerful sanctioning possibilities. Compared to previous years the number of trials for 2023 increased at the trial level but decreased at the appellate level.

The Supreme Court

The Supreme Court has not ruled in any marketing law cases this past year.

THE PATENT AND MARKET COURT OF APPEAL

During 2024 the court tried only one marketing law case. This in comparison to the two previous years when the court delivered four (2023) and seven (2022) judgements respectively. Well worth noting is that the Court of Appeal has deviated from the main rule and allowed appeals to the Supreme Court in their final judgements, where leave to appeal has been granted by the Supreme Court.

21st MARCH

Case, PMT 7458-23

Case between KO and "Göteborgsvarvet" regarding consumer agreement terms that didn't allow repayment of marathon fees in the event of cancelled races. The Court of Appeal maintained the trial court's judgement which dismissed the claim of unreasonableness. The Court of Appeal allowed the judgement to be appealed and leave to appeal was granted by the Supreme Court.

THE PATENT AND MARKET COURT (PMC)

The court delivered a total of ten judgements in marketing law cases during the year. The corresponding number during 2023 was eight cases. This shows a reduction compared to the early 2020's when the court delivered around 20 judgements certain years.

2nd FEBRUARY

Case, PMT 15685-23

Case concerning hallmark usage in search engines of two competing dental care intermediaries. PMC sustained the sustained the suit in its entirety and therefore ordered damages to be paid for the hiring of experts. The defendant was prohibited from marketing their services in a way that had been done with the competitor's AdWords.

22th MARCH

Case, PMT 15468-23

Case concerning price information between two competing companies selling children's products. The defendant company had among other things marketed products that were realised when that was not the case and compared products' sale price with a reference price. PMC sustained the claim and prohibited further use.

10th APRIL

Case, PMT 12811-23

Case between two candy selling companies. PMC prohibited the defendant from continued sale of the candy on trademark grounds. They

18th APRIL

Case, PMT 2060-24

KO brought a claim against a company for their sales methods which included falsely marketing products as free and billing consumers for non-

did however deny the plaintiff's marketing claim since the candy packaging was not deemed to have a visual connection to the other one at the time of purchase.

13th MAY

Case, PMT 17837-21

Case between a car company and a tyre retailer. The PMC prohibited the retailer's marketing containing references to the plaintiff which created undue risk of confusion. In addition to prohibition under penalty of fine, the defendant was mandated to pay publishing costs of the judgement in multiple Swedish newspapers.

9th SEPTEMBER

Case, PMT 6872-24

KO brought action against marketing of "snus" which violated the moderation principle of the Act on Tobacco free Nicotine Products. The PMC ruled in favour of KO and prohibited the marketing on TikTok where the advertising had occurred as well as on comparable social media.

27th SEPTEMBER

Case, PMT 1020-24

The PMC announced judgement in a case between two law firms. The court found that the defendant's marketing was misleading and that the firm had omitted to inform its clients of statutory information for distance purchases. The PMC therefore prohibited further use of the marketing claims and ordered the law firm to give correct consumer information.

realised purchases. PMC sustained the claim and prohibited, partly provisionally, continued use of the sales methods in combination with the defendant being given a duty to inform consumers about applicable law. In addition, a market disruption fee was imposed.

16th MAY

Case, PMT 5093-23

KO filed a claim against two companies for undue telephone sales. The PMC decided that the practice violated among other things the so-called blacklist of the Marketing Act. The court imposed a prohibition and duty to inform under penalty of fine, as well as a market disruption fee.

23rd SEPTEMBER

Case, PMT 14007-23

Case between an intermediary service of financial advisors and an information and advisory service through podcast and blogpost format along with advice for personal finances. The PMC forbid the defendant from using the marketing since it was found to be miscrediting and misleading by the competitor. The court weighed the interest of freedom of speech with the provisions of the Marketing Act, where the latter was deemed to be relevant since the posts were found to have a commercial purpose.

29th OCTOBER

Case, PMT 15901-23

Case between two companies in the beauty and skincare industry concerning comparative and misleading advertising. The PMC dismissed the claim with reference to the plaintiff's hallmark not being found to be known to the average consumer. Additionally, the court found that a certain word in the skin care industry could not be associated with the plaintiff's hallmark by the average consumer.

4. SUPERVISORY EFFORTS

The Consumer Agency has prioritised investigations of online retailers and so called *dropshipping*. During the past year the Consumer Agency has performed seven audits (status quo from the previous year). The Consumer Ombudsman (KO) initiated four court proceedings the past year (compared to two the previous year). Judgements of prohibitions and/or impositions were made in eleven cases, which is a profound increase from five judgement the previous year. Five of the cases concern pricing information, which has also been an area of focus for KO the previous year. Imposed market disruption fees totalled 2 650 000 SEK.

14th FEBRUARY

EU-wide influence audit

The European Commission along with the Consumer Agency and other supervisory authorities within the EU investigate influencers where 97% were found to post commercial content. The audit showed that only one in five complied with applicable law on advertising identification, especially the Unfair Commercial Practices Directive, and therefore violated the provisions of covert advertising.

25th APRIL

Audit of *dropshipping* companies

The Consumer Agency initiated an extensive audit of online stores engaged in so called *dropshipping*. The practice is not forbidden per se however the companies' actions could be unfair since the consumers were given a wrongful impression of the products' place of origin among other things. The products are marketed as being Swedish made with storage in Sweden, when in reality both manufacturing and storage is performed in a third country.

23rd MAY

Audit, dnr. 2024/69

The Consumer Agency reviewed insurance policies for vacation homes that consumers are encouraged to sign, since regular home insurance does not cover damages to vacation homes. The majority of the reviewed agreements were found to be difficult to read and very extensive. Some terms and conditions were deemed to be unreasonable, unclear or unbalanced.

12th MARCH

Audit of products dependant on mobile networks

The Consumer agency investigated tech products. Almost half of the reviewed companies marketed products that soon will be obsolete because of the coming decommissioning of 2G and 3G networks. The supervisory authority found that the sales could breach the Marketing Act and Distance Contract Act, as well as consumers potentially having the right of cancellation in accordance with the Consumer Purchases Act.

18th APRIL

Nordic stance on claims of carbon offsetting

The Consumer Agency along with the Nordic counterparts have performed a cooperative audit after a judgment in a case between Arla Foods AB and The Consumer Ombudsman. The agencies requested companies to review their environmental claims after assessing the difficulty of shaping environmental claims in accordance with the Unfair Commercial Practices Directive (2005/29/EG).

4th JUNE

Investigation of driving schools' marketing

The Consumer Agency initiated a review of driving schools' marketing. Some exaggerated claims in line with "Sweden's best driving school" were made. In addition, there were shortcomings of informing consumers of the right of withdrawal, which is provided for distance purchase of driving lessons.

14th AUGUST

Collective warning from agencies

The Consumer Agency alongside the Swedish Chemicals Agency and the National Electrical Safety Board collectively warned about the risks associated with *dropshipping* after a high number of reports to the Consumer Agency. The Agencies warned of the occurrence of prohibited substances such as lead and cadmium in addition to an unsatisfactory safety level according to common EU standards.

8th NOVEMBER

EU-common audit

The Consumer Agency and multiple European counterparts are collectively criticising the Chinese e-commerce platform Temu, after finding that marketing methods on the company's website have been misleading or aggressive, through for instance, forced games and false discount offers. The European Commission has not initiated a formal investigation.

2nd SEPTEMBER

Agency report 2024:3

The Consumer Agency's report shows that 2022's reform of the Pricing Information Act has not led to any noticeable changes, in that the majority of audited companies do not comply with the so called 30-day rule, which mandates pricing information of the lowest price available from the last 30 days during discounts.

20th NOVEMBER

Ordered prohibitions

The Consumer Agency has ordered four prohibitions by way of penalty because of misleading marketing of financial services. The cases are dnr. 2024/433 and dnr. 2024/434. The companies' activities consisted of individually recommending credit intermediary services while the average consumer was under the impression that the companies themselves offered such consumer credits.

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