

Consumer Protection and Premium Rate Services In Denmark

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In Denmark

by

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Consumer Protection and Premium Rate Services in Denmark

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Preface

The regulation of the telecommunication industry in Denmark is quite liberal. There are no requirements to register with national authorities when providing telecommunication services or Premium Rate Services. Only Network Operators, who want to make use of the scarce frequency resources, must register with the National IT and Telecom Agency. This liberal approach may be a contributory factor to the fact that there are no official statistics on Premium Rate Services available from public authorities.

This article is structured into five parts concerning 1) Premium Rate Services in Denmark, 2) relevant actors, 3) regulation concerning Network Operators, 4) regulation concerning Content Providers, and 5) telecommunication services that are not Premium Rate Services. The proposed structure has been departed to reflect the general division of regulation concerning the Network Operator and the Content Provider, respectively. The areas covered, reflects the regulation that is relevant to those Premium Rate Services provided in Denmark. The emphasis of the article is laid on the regulation safeguarding consumers in the context of Premium Rate Services. This regulation may be grouped into regulation that:

- sets requirements for carrying out business as Network Operator or Content Provider,
- concerns which Premium Rate Service may be provided, and under which number-series or applications codes,
- imposes certain information requirements,
- ensures fair and truthful marketing of the Premium Rate Services, or
- allows the User to monitor his bill, limit his usage, or limits the liability in connection to unauthorised usage.

Infringement of the legislation in question is mainly sanctioned by administrative or civil sanctions. The overall impression is that the Danish telecommunication industry is quite active in securing compliance with the law.

Jan Trzaskowski
Copenhagen, February 2006

1. Premium Rate Services in Denmark

There were 5,415,978 inhabitants in Denmark as of 30 June 2005. At that time, there were 96.2 mobile subscriptions per 100 inhabitants and 63.0 fixed network subscriber lines per 100 inhabitants.¹ The trend goes towards more mobile subscriptions and less fixed network subscriptions. There has been a substantial growth in the sending of messages via mobile phones (SMS and MMS messages). From the first half of 2003 to the first half of 2005 the number of sent SMS messages has grown from 1,517 million messages to 3,951 million, and the sending of MMS messages has grown from 498 thousands to 12 millions.² Unfortunately, there is no available information about the development in the usage of Premium Rate Services. The telecommunication industry has also not elaborated such statistics itself.³

For the purpose of reading this article, it should be noted that EUR 1 is approximately the equivalent of DKK 7.5 (1 DKK is approximately EUR 0,13).

1.1. Premium Rate Services

This article concerns Premium Rate Services to be rendered on-line, via phone, or fax. Premium Rate Services are defined as telephone services where the User is charged a premium on top of the normal call-rate.⁴ The relevant actors are the User ('end-user'),⁵ the Network Operator (the telecommunication company) providing the means of communication, and the Content Provider offering the Premium Rate Service.

The Network Operator may also act as Content Provider. Most definitions of premium rate services focus on the situations where the Network Operator is charging the premium and splits it with the Content Provider. This definition is also used in this context.

There are a number of services where the User makes an agreement directly with the Content Provider, and where the Content Provider himself charges the User. Such services can be ordered and delivered via both voice telephony and messages, and such services may easily be confused with Premium Rate Services. If the Content Provider himself charges the User, the Content Provider may not rely on the contract between the User and the Network Operator, but has to ensure that his agreement with the User is valid. These services are dealt with under 5 ('telecommunication services that are not Premium Rate Services').

One major distinction between the Network Operator and the Content Provider is that the User has a contractual relationship with the Network Operator concerning the use of services and the billing hereof (terms of service). This is a prerequisite for obtaining Premium Rate Services. The Content Providers must establish a contractual relationship

1 Telecom statistics, first half of 2005, National IT and Telecom Agency, Denmark.

2 Telecom statistics, first half of 2005, National IT and Telecom Agency, Denmark.

3 The National IT and Telecom Agency has elaborated statistic material on the telecommunication in general. See below.

4 In section 3(4) of the Act on Competitive Conditions and Consumer Interests in the Telecommunications Market information and content services are defined as any form of electronic provision of information or content to which other end-users get access via a telecommunications network or a telecommunications service on the basis of an individual request.

5 In connection to the sector-specific telecommunication regulation, the User (end-users) means users of electronic communications networks or services who do not make such electronic communications networks or services available to others on a commercial basis. Section 4 of Consolidated Act No. 784 (28 July 2005) on Competitive Conditions and Consumer Interests in the Telecommunications Market, as amended by Act No. 1427 (21 December 2005).

with the User in order to make use of Premium Rate Services. A telephone is a means of payment, which may be used to purchase particular services such as phone conversations, sending messages and the purchase of Premium Rate Services.⁶ According to the terms of service, the User is, as a starting point, liable for all amounts registered for the use of his telephone connection.

A main distinction is made between premium charging through voice-telephony (both fixed lines and mobile networks) and through messages (Short Message Services [SMS] and Multimedia Message Services [MMS]). Telefax services and computer dialers fall under the category of voice-telephony since these services utilise the same protocols. A third category could be data-services such as variations over Digital Subscriber Line (ADSL and VDSL) and Wireless Application Protocol (WAP). Those services are based on fixed rates (data calls) which do not allow for premium charging depending on the content.⁷ These protocols may, however, be used for services that are not Premium Rate Services.⁸

Legally, there is an important distinction between Premium Rate Services provided as Code 900 Service (numbers 90cdefgh) and message-based services (numbers 1bcd). The former category is regulated by law, whereas the latter category mainly is regulated by a Framework Agreement (self-regulation). Common to both categories is that normal legislation applies to the marketing and provision of Premium Rate Services. This includes criminal law, marketing law, contract law and sales law. An exhaustive examination of these fields are not sought, and focus has been on legislation and cases of particular interest for protecting consumers in the context of Premium Rate Services as offered and provided in Denmark.

1.1.1. Delimitations

The focus of this article is Danish legislation, whereas community regulation is only dealt with in the way it is implemented in Danish law. There are only limited Danish case law on this subject matter, so the sources of law are mainly acts, preparatory works, guidelines, industry self regulation, judgments and board decisions. However, a number of court decisions of fundamental importance has been entered by Danish courts.

This article is limited to Premium Rate Services offered and provided to consumers. It is assumed that the User, the Network Operator, and the Content Provider are all established and situated in Denmark.⁹ It is assumed that the User is not a minor. Even though Danish financial institutions are testing possible mobile banking solutions, the special and extensive regulation of that industry has been excluded.

Only to a limited extent, Premium Rate Services has been purchased in connection to the elaboration of this article. Much factual information has been obtained through phone conversations with, in particular to the Danish IT and Telecom Agency, the National Consumer Agency, the Ministry of Justice, the Telecommunication Industries in Denmark, and a number of operators and providers of Premium Rate Services.

6 See 3.5.

7 WAP is used as the delivery mechanism of some Premium Rate Services.

8 See 5.

9 This article does not deal with international issues, such as those dealt with in the country of origin principle of the 2000 E-Commerce Directive.

1.2. The Danish Market for Premium Rate Services

Premium Rate Services is a growing business in Denmark, and the services may be found in a variety of places. Premium Rate Services over voice telephony includes donations, erotic services and hotline/service phones. The premium is charged either as a fixed amount or at a per-minute amount. As elaborated on below, voice telephony services are mainly utilising numbers starting with 90 (numbers '90cdefgh', 'Code 900 Service'), but there are other numbers to which a premium may be charged.¹⁰ When Code 900 Services were introduced in the nineties, they were mainly used for erotic services, which gave those services a frivolous reputation. Premium rated telefax services are not widely used in Denmark.

Premium Rate Services via messages are mainly utilising SMS and to a limited, but growing, extent MMS. These services include a variety of services where the premium may be charged as a fixed amount for a single message/service, or as an amount depending on how many SMS messages the User is receiving through the service. Some Premium Rate Services are also designed as a subscription service, where a fixed amount is charged repeatedly for example every month. A number of message-based Premium Rate Services regards service that can be delivered through SMS or MMS. The SMS system allows to charge the premium on the consumer when he sends or receives a message. Premium Rate Service via messages are using four-digit application codes starting with 1 (numbers '1bcd').

Premium Rate Services are mainly marketed in television, radio, traditional print media such as newspapers, flyers etc., and on the Internet.

The dominant Network Operator in Denmark is TDC A/S (former national telecommunication company). In 2004, TDC had 81.6 percent of subscriber lines, 74.3 percent of xDSL subscriptions, and 31.4 percent of mobile subscriptions. Other dominant mobile companies are Sonofon (21.2 percent, owned by Norwegian company Telenor) and Telia (21.5 percent, Swedish owned).¹¹

There are a number of businesses providing services to facilitate Premium Rate Services. The most dominant provider is Unwire.¹² There are other players such as Responsfabrikken, Mobitech and Realtime.¹³ It has not been possible to obtain statistic material concerning Premium Rate Services in Denmark. It has, however, been suggested that the market of Premium Rate Services has an annual turnover of approximately DKK 400 mill., and that there are no one service driving the market ('killer-application'), but that the dominant services seems to be content for mobile phones (ringtones, logos, and java games), news services and connections to broadcast shows.¹⁴

1.2.1. Examples

The following examples and categories shows typical examples of Premium Rate Services (and some which are not Premium Rate Services) offered in Denmark. The message services are offered as either a subscription or per request, and the charge is

¹⁰ See 3.1.

¹¹ The National IT and Telecom Agency's Tele Yearbook 2004. Telia has bought the telecommunication company Orange since the yearbook was issued.

¹² www.unwire.dk.

¹³ www.responsfabrikken.dk, www.mobitech.dk, and www.realtime.dk, respectively.

¹⁴ Phone conversations with tele-analyst John Strand, Strand Consult and Jacob Lind, TDC, 24 January 2006.

usually fixed to the product. Code 900 Services are either charged at a per-minute rate or as a fixed amount. This list of services is illustrative, not exhaustive, and may not be representative.

Mobile Cash. MobilCash offers a money transfer service.¹⁵ You send an SMS to 1208 with the message 'cash opret' ('cash establish'), and an SMS with a 6 digit password is returned. Hereafter you can log on to the business' website where you are asked to agree to their terms of use and enter contact details. Hereafter, it is possible to transfer money to the MobilCash account, which again may be used as payment via the mobile phone or the money can be transferred to other people with a mobile phone. People who receive money via MobilCash must register with MobilCash in order to transfer the money to a private bank account.

Parking charge. In the Sound region (greater Copenhagen and Malmö area), it is possible to pay for parking via the mobile phone. It requires registration with the provider and is not based on premium rates. The User receives a sticker with a bar code, which can be scanned by the parking authorities. The User sends a code¹⁶ to the Content Provider or calls a voice-response system to pay the parking fee.¹⁷ The User is billed by the Content Provider on a monthly basis. A normal call rate is charged by the Network Operator.

Ringtones, wallpapers, games etc. There are a number of providers of ringtones. Other similar services include jokes and horoscopes. The most active providers seems to be SMS A/S (1208),¹⁸ Jamba GmbH (1925), and Aspiro Danmark (1208).¹⁹ There are numerous other providers, including the largest mobile operators (TDC, Telia and Sonofon). Most of the services are based on the sending of a code to the Content Provider, upon which the product is received. **Jamba** differs from the other providers, since its Premium Rate Service is based on subscription. It offers two packages that can be ordered independently. The subscription runs for a maximum of two months, but can be cancelled after one month. Each package costs DKK 30 per month. The subscription allows the User to download a limited number of products (ringtones, pictures or software). The products may be ordered via SMS (when advertised in media) or via its website.

News, weather and other professional services. News services are usually based on subscription. The services varies from traditional news²⁰ to football results²¹ based on particular interest in certain teams. One provider²² offers 10 messages over 1.5 or three month respectively at the price of DKK 10, and another²³ provides 50 messages (an average of 5 messages per month) for DKK 75. The provider of football results is charging DKK 1.5 per received SMS. It is also possible to get stock information upon request (DKK 4 per request).²⁴ WAP-based news services is a growing business in

15 www.mobilcash.dk. E-wire (www.ewire.dk) is offering a similar service.

16 www.easypark.dk.

17 Siemens Mobile Parking.

18 www.smsland.dk.

19 www.ringtoner.dk. Same street address as SMS A/S.

20 For example www.dr.dk (1212) and www.borsen.dk (1231).

21 www.bold.dk (1284).

22 Danmarks Radio.

23 Børsen.

24 The Danish Stock Exchange, www.cse.dk (1231).

Denmark.²⁵

Chat services. There are a number of chat service, where the User is teamed up according to age and where the User pays for every send and received SMS. The services comprise general chat and flirt chats. One provider²⁶ charges DKK 5 for each message.

Radio and television shows. A number of broadcasters offers services where the User may interact with a particular radio or television program. This could for example be in connection to polls. The premium ranges from approximately DKK 1 to DKK 5. Danmarks Radio (the Danish National Radio) charges only DKK 1, which only covers its costs in order not to carry out a commercial business. Other broadcasters may earn money on those services. Some broadcasters also carry out competitions. One example is Radio100FM,²⁷ where a SMS message with the text 'DVD' can be send to 1277 (DKK 5 + normal SMS rate) in order to participate in a draw of 20 DVDs.

Charity. A number of charity organisations collect donations through Premium Rate Services. This is usually set up so that the sending of an SMS or making of a call results in a donation of a fixed amount. As an example²⁸ one SMS with the text 'RED' sent to 1279 leads to a donation of DKK 50, and a call to 90565756 leads to a donation of DKK 100. A similar set-up is found in connection to donations which are collected via TV shows, such as one instituted after the tsunami in 2004.

Phone sex services. A number of phone sex services are provided as Code 900 Services. This is probably the most used type of Premium Rate Service provided as Code 900 Services. Phone sex services are also found as telecommunication services that are not Premium Rate Service, i.e. where there is no use of a premium rate phone number, and where the Content Provider is charging the User without the assistance of the Network Operator.

1.2.2. Price Points

There are no statutory regulation of which price points for premiums may be offered. There are, however, set limits to the amount to be charged. As for Code 900 Services, there are six categories of services.²⁹ Categories I, II, III and IV concerns services charged on a time basis, whereas categories V and VI are charged on a call basis. The legislation only sets maximum charges, but does not specify particular price points. For services charged on a time basis (categories I-IV), the charging of a premium must end after 30 minutes.

For categories I and II, the overall charge, excluding the traffic charge, must not exceed DKK 4 per minute, including VAT. For categories III and IV, the overall charge, excluding the traffic charge, is allowed to exceed DKK 4 per minute, including VAT. Category IV may be combined with an additional charge per call. For category V, the overall charge, excluding the traffic charge, must not exceed DKK 4 per call, including VAT. For category VI (charitable collections), the overall charge, excluding the traffic charge, must not exceed DKK 150 per call, including VAT.

25 Phone conversation with Jacob Lind, TDC, 24 January 2006.

26 www.ringetoner.dk.

27 www.radio100.dk.

28 Red Barnet ('Save the Children'), www.redbarnet.dk.

29 See 3.3.

[DKK]	I	II	III	IV	V	VI
Max per minute	4	4	unlimited	unlimited	0	0
Max per call	0	0	0	unlimited	4	150
Max total	120	120	unlimited	30 x time-per-minute-charge + per-call-charge	4	150

Table 1: Code 900 Services

The Framework Agreement³⁰ concerning SMS-based Premium Rate Services, specifies a number of price points which must be offered by the Network Operators. The parties to the agreement are not restricted to using these price points alone. Price points may be offered up to DKK 75, excluding charitable appeals, for which the maximum price point is DKK 150. Price points may be offered in excess of DKK 75, provided the Network Operator institutes such additional operational, technical, security and/or other measures as may be necessary in order to ensure that the payment system continues to be secure and well-functioning, or as may otherwise be necessary in order to ensure continued compliance with the statutory requirements.

[DKK]	In general	charitable appeals
0-10	0.5, 1, 1.5, 2, 2.5, 3, 3.5, 4, 4.5, 5, 5.5, 6, 6.5, 7, 7.5, 8, 8.5, 9, 9.5, 10.	
11-30	11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30.	
31-75	35, 39, 40, 45, 49, 50, 55, 59, 60, 65, 69, 70, 75.	
76-100		79, 80, 85, 89, 90, 95, 99, 100.
101-150		101-150: 110, 120, 130, 140, 150.

Table 2: Obligatory price points in connection to SMS-based services

30 See 3.4.

2. The Relevant Actors

Public supervision of the provision of Premium Rate Services is mainly undertaken by the National IT and Telecom Agency and the Danish Consumer Ombudsman (who's secretariat is provided by the National Consumer Agency). The former is responsible for the regulation of telecommunication, whereas the latter takes care of the marketing of Premium Rate Services.

There are three complaint boards dealing with the relation between the User and the Network Operator (Telecommunications Complaint Board), the User and the Content Provider (Consumer Complaints Board), and cases concerning Code 900 Services (Code 900 Board).

Two private organisation are important in this context, i.e. the Danish Consumer Council and the Telecommunication Industries Association in Denmark – representing the User and the Network Operators respectively.

2.1. National Authorities

2.1.1. The National IT and Telecom Agency

The National IT and Telecom Agency³¹ is part of the Ministry for Science, Technology and Innovation³² and has a staff of about 250. The Agency's principal task is to develop and implement initiatives within key areas of the Government's IT policy strategy. A strategy that aims to ensure an optimal framework for IT and telecommunications and conditions that will enable citizens, businesses and the public sector to realise the network society.

In this connection, the Agency, as an element in the Ministry's unit organisation, also takes an active part in providing input to the Minister. Thus the National IT and Telecom Agency assists in advising the Minister on matters and legislation concerned with telecommunications, communications and information technology. The Agency also assists in the drafting of policy proposals, bills and executive orders in cooperation with the Ministry's departments. Furthermore, the National IT and Telecom Agency assists in answering questions from the Danish Parliament ('Folketinget') and letters from citizens etc.

The National IT and Telecom Agency's mission is to work actively to create the best possible framework for citizens and businesses in order to realise the vision about Denmark as a network society. The principal task of the National IT and Telecom Agency is to develop and implement initiatives within key areas of the Government's IT policy strategy. A strategy that aims to ensure: 1) an available, effective, secure and inexpensive digital infrastructure for citizens, businesses and the public sector, 2) competition, consumer protection and efficient management of scarce resources in the telecommunications area, 3) an innovative and coordinated implementation of Government IT initiatives and other IT projects where the Ministry participates in a partnership, 4) optimal framework conditions for a digital reform of the public sector, and 5) an optimal and secure use of IT and other technologies among citizens and

31 IT- og Telestyrelsen. www.itst.dk.

32 Ministeriet for Videnskab, Teknologi, og Udvikling. www.vtu.dk.

businesses.

2.1.2. The Danish Consumer Ombudsman

The definition of the Danish Consumer Ombudsman³³ and his field of responsibility is laid down in the Danish Marketing Practises Act. To ensure that trade, business and public enterprise of an equal status comply with the Danish Marketing Practises Act and the principles of fair marketing practises in general is one of the most important aspects of his work. When the Danish Consumer Ombudsman seeks to induce trade and business to observe the Act and the law in general, negotiation is his preferred means of enforcement. The Danish Consumer Ombudsman may negotiate and issue guidelines.³⁴

The Danish Consumer Ombudsman may issue injunctions to invoke the Danish Marketing Practises Act by bringing civil cases before the Maritime and Commercial Court in Copenhagen.³⁵ Further, he has the authority to issue a temporary injunction in situations where it is crucial to sustain a case against a business as awaiting a court order otherwise would make the whole purpose of bringing an action for injunction fail. However, legal proceedings against the business in question must commence no later than the next work day in order to uphold the injunction.

Violation of some the provisions of the Danish Marketing Practises Act are punishable by fine, although a more severe penalty may be imposed for the same act under other laws. The Danish Consumer Ombudsman may request the police to initiate investigation and the prosecution to bring a charge against a business. In cases of general importance, the Danish Consumer Ombudsman acts as prosecutor himself. The Danish Marketing Practises Act may also be invoked by private parties.

The Danish Consumer Ombudsman also supervises the Danish Act on Payment Instruments, and seeks to induce business and trade to comply with this Act and regulations under the Act.

2.2. Complaint Boards

2.2.1. Consumer Complaints Board

The Consumer Complaints Board³⁶ deals with complaints from private consumers concerning goods, labour or services provided by businesses. Complaints may be lodged against a party who can be sued in a Danish court under the general provisions of Danish law in respect of the matter with which the complaint is concerned. In addition to the Consumer Complaints Board there are a number of private complaints and appeal panels that are approved by the Consumer Complaints Board. This includes the Telecommunications Complaint Board as dealt with below.

The Danish Ministry of Economic and Business Affairs has laid down regulations governing the scope of the Board's activities in the Executive Order on Consumer Complaints. Certain goods and services are exempt from the Board's jurisdiction under these regulations, e.g. vehicle repairs and services provided by craftsmen. Maximum and minimum limits have also been specified under which the price of the goods or

33 Forbrugerombudsmanden. www.forbrug.dk.

34 See under 4.1.

35 Sø- og Handelsretten. www.domstol.dk.

36 Forbrugerklagenævnet. www.forbrug.dk.

services must be at least DKK 800 and not more than DKK 100,000 (for complaints concerning textiles and shoes, the figure must be at least DKK 500 and for motor vehicles DKK 10,000).

A complaint is dealt with on the basis of written documentation and oral statements may not be made by the parties during meetings of the Board. A complaint may be referred to the Board only if it has already been addressed to the business concerned.

The Consumer Complaints Board consists of a chairman and members representing the interests of consumers and trade and industry. The chairman must be a judge and may not have any specific affiliation to consumer or trade and industry organisations. The consumer and trade and industry representatives are appointed by the Minister of Economic and Business Affairs for four years at a time, on the recommendation of the organisations concerned. The Danish Ministry of Economic and Business Affairs has laid down regulations governing the handling of complaints in an executive order.

Decisions are not binding or enforceable. When the Board has made a decision, the matter may be brought to court by either party. If the Board's decision is not complied with, the secretariat may bring the matter to court at the request and on behalf of the consumer. If a decision is not complied with by a business, the case may be brought before the civil courts. Such cases are subject to special regulations under which the consumer may receive legal aid. Under a special scheme, a decision may also be brought to court by the Danish Consumer Council. An innovation in this area is a list published on the Internet (firmatjek.dk) listing businesses that have not complied with Consumer Complaints Board decisions. However, if the business wants the case brought to court, its name may not be published until final judgment is pronounced in the case.

2.2.1.1. Telecommunications Complaint Board

The Telecommunications Complaint Board³⁷ is a private complaints panel that is approved by the Consumer Complaints Board. It was founded in July 2003 by the Telecommunication Industries Association in Denmark and the Danish Consumer Council in order to deal with complaints concerning telecommunication services. The term 'telecommunication services' concerns both fixed line, mobile and Internet connections. The complaint may concern the billing and the terms of service which is agreed with the Network Operator. The complaint board deals with consumer's complaints, but may take on certain business's complaints concerning billing. The Telecommunications Complaint Board received 1234 complaints in 2004.

Complaints against Network Operators are divided into 1) complaints regarding the terms of use, the formation of contract, and other situations relating to the subscription such as quality and coverage, and 2) complaints regarding the billing, including wrongful registration of calls, the expected 'call-time' on prepaid cards and unauthorised use of SIM cards.

Services, that are neither Premium Rate Services or teleservices, provided via a 'normal' Danish phone number or a foreign number is dealt with by the Consumer Complaints Board if the requirements concerning price are satisfied.³⁸ The Consumer Complaints Board also deals with Premium Rate Services if the complaint regards the marketing of the service, such as right of withdrawal, missing or misleading

37 [Teleankenævnet. www.teleanke.dk](http://Teleankenævnet.www.teleanke.dk).

38 See examples of services that are not Premium Rate Services under 5.

information, or the price of the messages. The Telecommunications Complaint Board deals with the content of Premium Rate Services in cases concerning the performance of the Premium Rate Service. Such complaints are dealt with as claims concerning billing. If the Premium Rate Service concerns the use of a Code 900 Service, the case is dealt with by the Code 900 Board.

The Minister of Science, Technology and Innovation had set up a Telecommunications Consumer Board.³⁹ The board was abolished 1 December 2004, and its competences transferred to the Telecommunications Complaint Board.⁴⁰ The Minister of Science, Technology and Innovation has set also up a Telecommunications Complaints Board⁴¹ consisting of seven members representing expertise in legal, financial and market-related fields as well as competition law and telecommunications technology. The Ministry of Science, Technology and Innovation makes secretarial assistance available to the Board, and the board deals with complaints in relations between Network Operators and the National IT and Telecom Agency. Decisions made by the IT and Telecom Agency concerning a Network Operator may be brought before this board by the Network Operator.

In cases where the User complains about the recorded usage and payment, the Network Operator must make a decision not later than three months after the date on which the complaint was initially lodged. If the consideration of such complaints implies that special recording or monitoring of usage, billing etc. is to be established for a certain period of time for the purpose of exposing possible sources of error, the time limit is to be extended to six months.⁴² If the Network Operator decide not to accept the User's complaint, the User must be informed about his rights to file a complaint with the Telecommunications Complaint Board.⁴³

When considering complaints about recorded usage and payment, Network Operators must suspend the collection of the disputed amount and omit disconnecting the User's connection. However, the User's connection may be barred to outgoing traffic in case the User's traffic usage during the period in which the amount billed is suspended exceeds, within an invoiced month, an amount corresponding to the highest monthly traffic usage recorded during the last three months prior to the disputed period.⁴⁴ The User must still have access to calls the public emergency service (112), and it must be possible for the User to prevent barring of outgoing traffic by providing security for the disputed amount of the bill.

If the Network Operator does not accept the User's complaint, the Network Operator must suspend collection of the disputed amount of the bill for a period of four weeks after the date on which the decision was communicated to the User. During that period, the Network Operator may not disconnect the User's connection.⁴⁵ The User's connection may be barred to outgoing traffic in case the User's traffic usage during the

39 Telebrugernævnet. Part 26 of Consolidated Act No. 784 (28 July 2005) on Competitive Conditions and Consumer Interests in the Telecommunications Market, as amended by Act No. 1427 (21 December 2005).

40 Provided for in Section 98.

41 Teleklagenævnet. Part 27 of Consolidated Act No. 784 (28 July 2005) on Competitive Conditions and Consumer Interests in the Telecommunications Market, as amended by Act No. 1427 (21 December 2005).

42 Section 11 of Executive Order No. 638 (20 June 2005) on the Provision of Communications Networks and Service.

43 Section 13 of Executive Order No. 638 (20 June 2005) on the Provision of Communications Networks and Service.

44 If the customer relationship has had a duration of less than three months, the highest monthly traffic usage is calculated on the basis of the months elapsed so far. In cases where a credit maximum has been agreed between the User and the provider, this replaces the highest monthly traffic usage.

45 Section 12 of Executive Order No. 638 (20 June 2005) on the Provision of Communications Networks and Service.

period in which the amount billed is suspended exceeds, within an invoiced month, an amount corresponding to the highest monthly traffic usage recorded during the last three months prior to the disputed period.⁴⁶

A consumer, who had his Internet connection, fixed line and mobile telephone with one Network Operator, had a dispute with the Network Operator concerning the fixed line. The disputed amount was rather small (DKK 43.63), but the Network Operator chose to close down all services without notice. The Consumer Complaints Board found that the missing payment did not constitute a substantial breach of contract and the Network Operator was not entitled to close the connections.⁴⁷

2.2.2. Code 900 Board

If the complaint concerns a Code 900 Service (90cdedgh), complaints are dealt with by the Code 900 Board.⁴⁸ The National IT and Telecom Agency provides the secretariat of the board. Decisions made by the Code 900 Board cannot be brought before other administrative authorities,⁴⁹ but may be brought before the Judiciary. Only very few cases has been handled by the board and there are currently no cases pending.

The board is set up by the Minister of Science, Technology and Innovation, and it consists of three members appointed by the Minister of Science, Technology and Innovation for four years at a time. The State defrays all expenses related to the activities of the Board. The expenses are covered by a number charge collected from the Network Operators. In its activities the Code 900 Board is independent of instructions on how to deal with and decide individual cases.⁵⁰

The Code 900 Board is responsible for dealing with the following:⁵¹ 1) complaints about decisions made by Network Operators providing Code 900 Services, and 2) complaints about failure by a provider of electronic communications networks or services to fulfil its supervisory duty in connection to the Code 900 Services.

The board may: 1) order the Network Operator to dispossess the Content Provider of a number already assigned, 2) order the Network Operator to assign the Content Provider a number or to reopen a number of which he has previously been dispossessed, and 3) in case of repeated or gross omissions to fulfil the supervisory duty, withdraw the Network Operator's right to offer Content Providers recording of usage as well as invoicing and billing of this to the User.⁵²

A fine may be imposed on a Network Operator who gives incorrect or misleading information to the Code 900 Board, or fails to disclose matters of importance to the case

46 If the customer relationship has had a duration of less than three months, the highest monthly traffic usage is calculated on the basis of the months elapsed so far. In cases where a credit maximum has been agreed between the User and the provider, this replaces the highest monthly traffic usage.

47 Forbrugerklagenævnet j. 2002-4054/7-182. The Consumer Complaints Board, Case 2002-4054/7-182.

48 Service 900-Nævnet. Part 28 of Consolidated Act No. 784 (28 July 2005) on Competitive Conditions and Consumer Interests in the Telecommunications Market, as amended by Act No. 1427 (21 December 2005).

49 Section 105 of Act on Competitive Conditions and Consumer Interests in the Telecommunications Market.

50 Section 103 of Act on Competitive Conditions and Consumer Interests in the Telecommunications Market.

51 Section 104 of Act on Competitive Conditions and Consumer Interests in the Telecommunications Market.

52 A provider of electronic communications networks or services whose right to offer providers of information or content services recording of usage as well as invoicing and billing of this to the User has been withdrawn may request the Board to review such withdrawal after one year's exclusion. Section 104(4) of Consolidated Act No. 679 (23 June 2004) on Competitive Conditions and Consumer Interests in the Telecommunications Market.

in question.⁵³

2.2.3. Bringing the Case to a Court of Law

The User who purchases a Premium Rate Service is invoiced and charged by the Network Operator. The User may choose to go after either the Network Operator or the Content Provider. Usually, the User will go after the Network Operator, but the Danish Consumer Agency encourages users to also approach the Content Provider. The Consumer Complaints Board has established that the Network Operator may only charge the User for usage, the User is legally liable for.⁵⁴

Any decision taken by one of the above-mentioned boards may, by either of the parties, be taken to a court of law. The User may also choose to initiate proceedings before a court of law without bringing the case to one of the complaint boards. There are, so far, no signs of any case concerning Premium Rate Services being dealt with by a Danish court of law.

2.3. Private Organisations

2.3.1. The Danish Consumer Council

The Danish Consumer Council⁵⁵ represents the interests of consumers and is independent of public authorities and commercial interests. Founded in 1947, the Consumer Council is the spokesperson for consumers' interests, lobbying vis-a-vis the Government, the Parliament, public authorities and the business community.

The council consists of representatives from 29 national organisations, such as household and women's organisations, organisations representing youth and the elderly, environmental organisations, trade unions and educational organisations. Local consumer groups are also represented on the council. The daily work is performed by a secretariat of about 40 staff members. The Consumer Council's main sources of income are the consumer magazine Tænk ('Think') and an annual subsidy on the Finance Act.

The Consumer Council is involved in a wide range of consumer issues, such as food quality, environmental protection, health services, financial and legal services and issues connected with media, telecommunications, and universal services. The Consumer Council represents the consumers in councils, on boards and committees and vis-à-vis the Government and the Parliament. The Consumer Council is represented on more than 200 committees, boards and councils dealing with matters important to consumers.

The Consumer Council has an extensive dialogue with the business community. This contact has among other things led to the establishment of several private complaint boards covering sectors such as insurance, banking and investments, travel and construction.

The Consumer Council is represented in the European Consumer Organisation, BEUC.

53 Section 112(1)(3) of Consolidated Act No. 679 (23 June 2004) on Competitive Conditions and Consumer Interests in the Telecommunications Market.

54 Forbrugerklagenævnet j. 2002-4054/7-182. The Consumer Complaints Board, Case 2002-4054/7-182.

55 Forbrugerrådet. www.fbr.dk.

2.3.2. Telecommunication Industries Association in Denmark

The Telecommunication Industries Association in Denmark⁵⁶ is a private organisation. Its purpose is to unite the Danish Telecommunications Industry with a view to: 1) looking after the common interests of the members in the area of Trade Policy, nationally as well as internationally, in particular vis-à-vis the legislative and administrative authorities, 2) establishing and maintaining relations with kindred Danish and Foreign Associations, including similar associations in Europe, 3) to bring about a collegial cooperation between the association's members, e.g. in the production of statistics and in the formulation and execution of projects of common interest et. al., 4) to establish contacts with foreign telecommunications companies with a view to industrial co-operation, and 5) to disseminate information about the facts and conditions of the telecommunications industry.

The Telecommunication Industries Association in Denmark has elaborated a self-regulatory Framework Agreement for Mobile Content Services,⁵⁷ which concerns provision, marketing and billing of Premium Rate Services via SMS and MMS.

56 Telekommunikationsindustrien i Danmark. www.teleindustrien.dk.

57 See 3.4.

3. Regulation Concerning Network Operators

The Network Operator is subject to a sector specific regulation concerning telecommunication services. The primary regulation of the Network Operator in this context is found in the Act on Competitive Conditions and Consumer Interests in the Telecommunications Market⁵⁸ and the executive orders issued under that act. The provisions relevant in this context is sanction by administrative and civil sanctions.

The purpose of the Act is 1) to promote the establishment of a well-working, competitive market for provision of electronic communications networks or services and associated facilities, 2) to ensure all Users who wish so access to a number of basic USO (Universal Service Obligation) services on reasonable terms and at reasonable prices, and 3) to ensure a number of basic user rights⁵⁹ for Users in connection with agreements on delivery of electronic communications networks or services with providers of electronic communications networks or services.⁶⁰

The act applies to providers of electronic communications networks⁶¹ or services,⁶² owners of electronic communications networks, providers of payphones, providers of

58 Lov om konkurrence- og forbrugerforhold på telemarkedet. Consolidated Act No. 784 (28 July 2005) on Competitive Conditions and Consumer Interests in the Telecommunications Market, as amended by Act No. 1427 (21 December 2005). This act contains provisions implementing parts of 1) Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, 2) Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines, 3) Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications, 4) Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, 5) Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications, 6) Directive 97/33/EC of the European Parliament and of the Council on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision, 7) Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, 8) Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment, 9) Directive 98/61/EC of the European Parliament and of the Council of 24 September 1998 amending Directive 97/33/EC with regard to operator number portability and carrier pre-selection, 10) Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, and Commission Directive 1999/64/EC of 23 June 1999 amending Directive 90/388/EEC in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities, 11) Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), 12) Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (Official Journal 2002 No. L 108 p. 51); parts of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), and 13) Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), and 14) Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

59 See 3.2.1.

60 Section 1(1) of Consolidated Act No. 784 (28 July 2005) on Competitive Conditions and Consumer Interests in the Telecommunications Market, as amended by Act No. 1427 (21 December 2005).

61 Electronic communications networks means any form of radio- or cable-based telecommunications infrastructure used for handling electronic communications services. Section 3(1) of Consolidated Act No. 784 (28 July 2005) on Competitive Conditions and Consumer Interests in the Telecommunications Market, as amended by Act No. 1427 (21 December 2005).

62 Electronic communications services means services that consist wholly or partly in electronic conveyance of communications in the form of sound, images, text or combinations thereof, by means of radio or telecommunications techniques, between network termination points, including two-way and one-way communications, point-to-point communications, and point-to-multipoint communications. Section 3(2) of Consolidated Act No. 784 (28 July 2005) on Competitive Conditions and Consumer Interests in the Telecommunications Market, as amended by Act No. 1427 (21 December 2005).

number information databases and registers, providers of information and content services,⁶³ providers of conditional access services and holders of industrial property rights to conditional access products and systems.⁶⁴

3.1. The Danish Numbering Plan

Under section 25 of the Act on Competitive Conditions and Consumer Interests in the Telecommunications Market, the National IT and Telecom Agency is responsible for administration and allocation of the overall Danish numbering plan. One main field within the overall Danish numbering plan is the national numbering plan, understood as the numbering used at the subscriber interface to telecommunications networks within country code [00]45 (prefix for Denmark).

Administration of the overall Danish numbering plan, including the deployment, assignment, modification and withdrawal of numbers, number series and addresses, is handled by the National IT and Telecom Agency, and charges are collected from providers of electronic communications networks or services who have been or are being assigned numbers, number series or addresses by the National IT and Telecom Agency.⁶⁵

The details of the Danish numbering plan is laid down by Executive Order on the Overall Danish Numbering Plan.⁶⁶ Those parts of the plan that start with digits 2-9 are designated for ('normal') 8-digit numbers, and those starting with digits 0 and 1 are designated for short codes of 2, 3, 4 or 5 digits, adapted to the purposes for which the individual number series are used.

3-digit numbers in number series 11 are solely used for the public emergency service (112) and provision of directory enquiry services included under the universal service obligation, 1 and provision of special services essential to society. Code 00 is solely used as the international prefix. 4-digit numbers in number series 100-109 are solely used for carrier select codes. 8-digit numbers in number series 801-809 are solely used for services where calls are made without call- or minute-based charging of the User. There are other reserved numbers for particular services.⁶⁷

8-digit numbers in number series 901-905 are solely used for Code 900 Services. 8-digit numbers in number series 909 are solely used for a provider's premium rate services on condition that these services are not Code 900 Services. In practice this

63 Information and content services means any form of electronic provision of information or content to which other end-users get access via an electronic communications network or an electronic communications service on the basis of an individual request. Section 3(4) Consolidated Act No. 784 (28 July 2005) on Competitive Conditions and Consumer Interests in the Telecommunications Market, as amended by Act No. 1427 (21 December 2005).

64 Section 2 of Consolidated Act No. 784 (28 July 2005) on Competitive Conditions and Consumer Interests in the Telecommunications Market, as amended by Act No. 1427 (21 December 2005).

65 Section 30 and 32 of Consolidated Act No. 784 (28 July 2005) on Competitive Conditions and Consumer Interests in the Telecommunications Market, as amended by Act No. 1427 (21 December 2005).

66 Bekendtgørelse om den samlede danske nummerplan. Executive Order No. 653 (3 July 2003).

67 5-digit numbers in number series 160-169 are solely used for calls by Users who want to use or connect to the networks and services ensuring that Users are capable of using or connecting to: a) a provider of electronic communications networks or services other than the provider with whom the User otherwise has a customer relationship, for the purpose of using one or more of that provider's electronic communications services, or b) other electronic communications services under the same provider as the one with whom the User otherwise has a customer relationship. 4-digit numbers in number series 18 are solely used for access to a common entry portal to public authorities, directory enquiry services, for provision of services of particular importance to society, and for provision of common services of a special consumer-oriented or social nature related to the provision of electronic communications networks or services, cf. section 26, nos. 2, 3, 4 and 6, of the Act on Competitive Conditions and Consumer Interests in the Telecommunications Market.

concerns public payphones.

3.2. Provision of Electronic Communications Networks and Services

An Executive Order on the Provision of Communications Networks and Service,⁶⁸ lays down rules for the provision of electronic communications networks and services. There must be a contract as a basis for any customer relationship between the Network Operator and the User.⁶⁹ The contract must contain the following information:

1. the Network Operator's name and address,
2. quality and service level, including time of delivery,
3. all relevant prices, including how updated information about such prices may be obtained,
4. terms, including notice to be given, for termination, disconnection and cessation in case of default on the part of the User,
5. conditions for renewing the contract,
6. any minimum contractual period,
7. terms for compensation and refund in case the contracted service is not met,
8. procedure for settling disputes,
9. functions and facilities, as dealt with below, that the User may require to be made available to him, and
10. special functions and facilities concerning secrecy and procession if these are provided.

In the case of prepaid electronic communications services, the Network Operator must ensure that the User, not later than immediately before the User is enabled to put the service into use, receives information as mentioned under 1, 2, 3, 4, 5, 8, and 10. The Network Operator must further inform about terms for compensation and refund in case the contracted service is not met.

Network Operators must give the User access to a call-based charge advice facility.⁷⁰ Via the charge advice facility, the User must be able to get information directly about all relevant costs, including any call set-up charge and the list price per minute, by calling a number in the Danish numbering plan. The charge advice facility needs not contain price information regarding calls to number series designated for Code 900 Services. Nor needs information be given about the price for calls from abroad, e.g. when mobile telephones are used abroad. This facility must be offered free of charge or for a charge not exceeding the costs of providing the facility.

3.2.1. Basic User Rights

Pursuant section 10(1) of the Act on Competitive Conditions and Consumer Interests in the Telecommunications Market, the Minister of Science, Technology and Innovation may lay down rules for the purpose of obliging providers of public electronic

68 Bekendtgørelse om udbud af elektroniske kommunikationsnet og -tjenester. Executive Order No. 638 (20 June 2005) on the Provision of Communications Networks and Service.

69 Section 5 of Executive Order No. 638 (20 June 2005) on the Provision of Communications Networks and Service.

70 Section 4 of Executive Order No. 638 (20 June 2005) on the Provision of Communications Networks and Service.

communications networks or services to Users to ensure a number of basic user rights in connection with agreements on delivery of electronic communications networks or services to Users, including specific rules about the content of such obligation.

According to the Executive Order on the Provision of Electronic Communications Networks and Services,⁷¹ providers of public electronic communications networks and services including telephony via fixed networks, ISDN services and mobile communications, have to offer the User a number of services with a view to ensure that the User can prevent the use of certain services, including Premium Rate Service, limit or monitor his use of the services billed by the Network Operator. These services include call-based charge advice facility, access to current billing data, tariff-grouped billing and itemised billing, billing control arrangement, barring, barring of access to information and content services and current monitoring of billing fluctuations. Below is an overview of the facilities that the Network Operator must provide:

Call-based charge advice facility. Providers of public voice telephony services to subscribers that enable subscribers to call other end-users with numbers in the Danish numbering plan must give their own end-users access to a call-based charge advice facility. Via the charge advice facility, the end-user must be able to get information directly about all relevant costs, including any call set-up charge and the list price per minute, by calling a number in the Danish numbering plan. The charge advice facility needs not contain price information regarding calls to number series designated for certain information and content services (Code 900 Services).⁷² The obligation does also not extend to prices for calls from abroad, e.g. when mobile telephones are used abroad.

Access to current billing data. If usage-dependent charging is used in providing the service, the Network Operator is to grant the subscriber access to current billing data, i.e. information about the usage-dependent charging. Providers of public voice telephony must give access to current billing data via the voice telephony service. The subscriber must have access to current billing data for a minimum period of ten hours a day, and the data on which current billing data are based must be updated at intervals of 24 hours as a minimum.⁷³

Tariff-grouped billing and itemised billing.⁷⁴ The subscriber may demand that the bill he receives should either be a tariff-grouped bill, or an itemised bill. A tariff-grouped bill is a bill grouping the services charged into the tariff categories applied by the provider. An itemised bill is a bill itemizing the services charged to such a level that the end-user is able to identify his usage of the service, including details of the number called, date, time, duration, price, or similar data serving as a basis for billing the usage of the service.⁷⁵ Calls which are free of charge to the end-user needs not be itemised on the bill.

Billing control arrangement.⁷⁶ A billing control arrangement is a function whereby the service provided is barred to further usage directly after the usage has been found to exceed an amount agreed in advance between the provider and the end-user. Such barring must be immediately cancellable by the subscriber by keying a code. Providers of public voice telephony must ensure that it is possible to cancel the barring via the voice telephony service. Irrespective of barring, it must be possible to make calls to the public emergency service

71 Bekendtgørelse om udbud af elektroniske kommunikationsnet og -tjenester. Executive Order on the Provision of Communications Networks and Services, Executive Order No. 638 (20 June 2005).

72 See 3.3.

73 There are certain limitations to this obligation concerning calls made from, or received by, a mobile terminal abroad (roamed calls), calls made to manually operated special services, and calls made from abroad that are invoiced and billed by providers of public electronic communications networks or services to Users in Denmark on the basis of data from providers of electronic communications networks or services in other countries, e.g. collect calls.

74 Section 15(2) and section 19 of Executive Order No. 638 (20 June 2005).

75 Details of the number called, in the case of calls made from a mobile terminal abroad, shall solely be itemised if the provider is able to obtain data from the relevant provider abroad.

76 Section 15(2) and section 20 of Executive Order No. 638 (20 June 2005).

(112) and calls via free carrier selection. The data on which a billing control arrangement is based is to be updated at intervals of 24 hours as a minimum.

Barring.⁷⁷ Barring is a function whereby the subscriber can prevent use of the service by keying a code. The subscriber must be able to establish as well as cancel the barring with immediate effect. Providers of public voice telephony are to ensure that it is possible to establish and cancel the barring via the voice telephony service. Barring can be requested solely to apply to calls made to foreign numbers or mobile numbers. Irrespective of barring, providers of voice telephony to end-users must ensure that it will be possible to make calls to the public emergency service (112) and calls via free carrier selection.

Barring of access to information and content services.⁷⁸ Providers of public electronic communications networks or services to subscribers who give access to making calls to information and content services ('Code 900 Services') are to meet requests, and subsequently confirm such requests in writing, from individual subscribers for barring and cancelling barring of access to information and content services.

Current monitoring of billing fluctuations.⁷⁹ Current monitoring of billing fluctuations is an arrangement whereby the provider notifies the subscriber in case the usage during an invoicing period is 100 per cent higher than the usage during an invoicing period with average usage. The usage during an invoicing period with average usage is to be calculated on the basis of the recorded usage during the last 12 months.⁸⁰ The provider must notify the subscriber no later than three weekdays after the increased usage has been recorded. The provider need only notify the end-user if the increase in usage exceeds DKK 250.

The facilities must be offered free of charge or for a charge not exceeding the costs of providing the facility. Barring, establishment of barring of access to information and content services, tariff-grouped billing and itemised billing,⁸¹ as well as current monitoring of billing fluctuations must be offered free of charge. Billing data must be offered at a charge not exceeding the lowest tariff used by the provider at the time when the function is used. Costs involved in the initial cancellation of barring of access to information and content services is to be borne by the provider of the public electronic communications network or the public electronic communications service.

3.2.2. Burden of Proof and Onus

Network Operators must ensure that the charging, billing and invoicing systems associated with the provision of public electronic communications networks or services are certified according to the ISO 9001 standard, leaving out 7.3 (module D) of the standard, or similar recognised standards.⁸² Network Operators must also ensure that procedures for the Network Operators internal investigation and administration in connection with billing complaints, including procedures for the special internal investigation unit, are certified according to the mentioned standards.⁸³

Network Operators must appoint a special internal investigation unit to make investigations and give opinions in connection with the consideration of complaints

77 Section 15(2) and section 21 of Executive Order No. 638 (20 June 2005).

78 Section 15(2) and section 22 of Executive Order No. 638 (20 June 2005).

79 Section 15(2) and section 23 Executive Order No. 638 of (20 June 2005).

80 If the customer relationship has had a duration of less than 12 months, the average usage shall be calculated on the basis of the invoicing periods elapsed so far.

81 Itemised billing arranged in connection with complaints must always be offered free of charge.

82 Section 9 of Executive Order No. 638 (20 June 2005) on the Provision of Communications Networks and Service.

83 In special cases, where the provision is only of a limited extent and where the costs of certification must be regarded as disproportionately large, the National IT and Telecom Agency may exempt from the requirements for certification. As a maximum, such exemption may be granted for two years at a time. Certification must be completed not later than eighteen months after the expiry of such exemption.

about the amounts billed by the Network Operator.⁸⁴

The Danish High Court has dealt with the burden of proof in connection to the Network Operator's billing of the User, and the agreement between the User and the Network Operator. The User was charged DKK 36.980 by the Network Operator for a total of 535 long-distance calls over a 12 month period.

The subscriber contested that the calls were made from his telephone. The Municipal Court found that it to a convincingly degree was made probable that the calls were not made from the User's phone. The case was following up on a critical television documentary which had showed how easy it is to intercept a phone connection. It was showed how a person without particular knowledge and without special tools can intercept the wires without leaving visible traces.

The decision was appealed to the High Court, which found that the User has to prove that the calls were not made from his phone, as long as the Network Operator had carried out necessary and sufficient investigation of the circumstances. The court found that the investigations by the Network Operator were sufficient and that the subscriber did not prove that the calls were not made from his phone solely based on his and his family's statements.⁸⁵

Based on the terms of use, agreed upon between the User and the Network Operator, the User is as a starting point obliged to pay for the usage ascribed to the User's telephone connection (fixed line or mobile). The User thus bears the burden of proof in connection to billing. The Telecommunication Complaints Board attach importance to the investigations carried out by the Network Operator concerning possible breakdowns in administrative and/or technical systems. Another factor that is attached importance to, is the time in between calls accepted by the User and calls that are not accepted.

In a case concerning the charging of DKK 2,750 for Premium Rate Service (SMS), the Telecommunications Complaint Board noted that it was only competent to examine the question of whether the billing was correct. Possible infringement of other legislation in connection to the service should be heard by the Consumer Complaints Board. The board should thus only examine whether the consumer had rendered probable that the messages were not sent or received as registered by the Network Operator. Based on the Network Operators technical examination, the board found it probable that the registration was correct. The consumer's view was not accepted.⁸⁶

In connection to cases concerning Premium Rate Services, the Consumer Complaint Board has mainly dealt with issues concerning people under age and failure to comply with the information requirements in Certain Consumer Contracts Acts. In these situations, the burden of proof is imposed on the Content Provider. When those situations happens to Network Operators, the burden also lies on the Network Operator.

In a case before the Consumer Complaints Board, a consumer under age had made an agreement concerning a telephone subscription with a prepaid card. The agreement was made via the Internet where the consumer gave wrongful information about her age. The

84 Section 10 of Executive Order No. 638 (20 June 2005) on the Provision of Communications Networks and Service. In special cases, where the provision is only of a limited extent and where it is not possible, organisationally, for the Network Operator to set up a special internal investigation unit, the National IT and Telecom Agency may exempt from the requirement. Such exemption may be granted for a limited period of time.

85 UfR2003.1396VLD. The Danish High Court (Western Division), 25 March 2003.

86 Teleankenævnet j. 10.01-1423-04. Telecommunications Complaint Board, Case 10.01-1423-04 (7 March 2005).

Network Operator was solely awarded minor damages for the missing payment for phone conversations. The decision was based on the law on guardian of people under age and not in accordance with the terms of use.⁸⁷ More cases concerning the burden of proof are dealt with below in connection to the use of dialers and the phone sex services.⁸⁸

It is assumed, that the Network Operator can not collect the charge if the Content Provider is not entitled to the payment. The Consumer Complaints Board has dealt with a case where an 11 year old consumer via his mobile phone had subscribed to a service, where jokes were sent regularly by SMS. The agreement between the consumer and the Content Provider was found to be void due to the boy being under age. The Network Operator was not entitled to collect the money from the boy's father, who had made the agreement with Network Operator on behalf of his son. The board noted that the fact that the father allowed his son to use the telephone did not entitle the son, on behalf of his father, to subscribe to a Premium Rate Service.

The board noted that the subscription, under all circumstances, was found to be cancelled in due time in accordance with the right of withdrawal in the Certain Consumer Contracts Act. The agreement concerning the subscription was found to be a distance contract, and since the Content Provider did not fulfil its obligation to inform the User in accordance with the Act on Certain Consumer Contracts, the User could withdraw from the contract until three months after getting notice on the agreement.⁸⁹

3.3. Information and Content Services with Integrated Charging (Code 900 Service)

Pursuant to the Act on Competitive Conditions and Consumer Interests in the Telecommunications Market,⁹⁰ an Executive Order on Information and Content Services with Integrated Charging⁹¹ is issued. The Executive Order specifies rules for 1) use of 8-digit subscriber numbers where the provider of telecommunications networks or telecommunications services, as an integral part of charging the call, is also responsible for recording the usage of an underlying information or content service as well as invoicing and billing of this to the User (premium rate subscriber numbers), and 2) Barring of calls to such numbers.

The executive order lays down six categories of Premium Rate services which may only be provided within the number series designated by the National Telecom Agency for information or content services (Code 900 Services).

***Category I.** Services charged on a time basis, where the overall charge, excluding the traffic charge, must not exceed DKK 4 per minute, including VAT. Services in category I must not be unsuitable for children under the age of 16, and must not contain: 1) descriptions of sexual or erotic matters, 2) arrangement of contacts for the purpose of sexual relations or other elements of such a character, 3) reference to other services or numbers with sexual or erotic*

87 Forbrugerklagenævnet, j. 2003-4054/7-275. The Consumer Complaints Board, Case 2003-4054/7-275.

88 See under 5.

89 Forbrugerklagenævnet j. 2003-4054/7-699. The Consumer Complaints Board, Case 2003-4054/7-699.

90 Section 28(1), section 29(1), no. 1, and section 33(1) and (3) of Consolidated Act No. 784 (28 July 2005) on Competitive Conditions and Consumer Interests in the Telecommunications Market, as amended by Act No. 1427 (21 December 2005).

91 Bekendtgørelse om informations- og indholdstjenester med integreret taksering (tidligere service 900-tjenester). Executive Order on Information and Content Services with Integrated Charging (Previously Code 900 Services), Executive Order No. 991 (6 November 2000) as amended by Executive Orders 1214 (18 December 2000) and 259 (10 April 2003).

content, 4) descriptions of violence, or 5) competitions or elements of this.

Category II. Services charged on a time basis, where the overall charge, excluding the traffic charge, must not exceed DKK 4 per minute, including VAT. Services in category II must not contain competitions or elements of this.

Category III. Services charged on a time basis, where the overall charge, excluding the traffic charge, is allowed to exceed DKK 4 per minute, including VAT. Services in category III must not contain competitions or elements of this.

Category IV. Services charged on a time basis, where the overall charge, excluding the traffic charge, is allowed to exceed DKK 4 per minute, including VAT, possibly combined with a charge per call. Services in category IV must not be unsuitable for children under the age of 16, and must not contain: 1) descriptions of sexual or erotic matters, 2) arrangement of contacts for the purpose of sexual relations or other elements of such a character, 3) reference to other services or numbers with sexual or erotic content, 4) descriptions of violence, or 5) competitions or elements of this.

Category V. Services charged on a call basis used for offering competitions, where the overall charge, excluding the traffic charge, must not exceed DKK 4 per call, including VAT. Services in category V must not be unsuitable for children under the age of 16, and must not contain: 1) descriptions of sexual or erotic matters, 2) arrangement of contacts for the purpose of sexual relations or other elements of such a character, 3) reference to other services or numbers with sexual or erotic content, or 4) descriptions of violence.

Category VI. Services charged on a call basis used for charitable collections, where the overall charge, excluding the traffic charge, must not exceed DKK 150 per call, including VAT. Services in category VI must not be unsuitable for children under the age of 16, and may not contain: 1) descriptions of sexual or erotic matters, 2) arrangement of contacts for the purpose of sexual relations or other elements of such a character, 3) reference to other services or numbers with sexual or erotic content, or 4) descriptions of violence. In order for a service to be placed in category VI, it is a condition that the collections are in aid of religious societies/communities, funds, associations, foundations and institutions etc. authorised under the Danish Tax Assessments Act.

Information or content services falling within the Executive Order must not contain games (gambling). In order for a service to be described as a competition that may be placed in category V or VI, the competition must have such degree of difficulty that it must be assumed that the question cannot be answered correctly by nearly everyone. The competition must constitute the primary part of the service in category V. Information and content services as mentioned in categories I-IV must not exclusively consist of call diversion or interconnection of two or more end-users.⁹²

Providers of Code 900 Services must ensure that after 30 minutes the charging of services charged on a time basis in categories I-IV does not contain elements other than the traffic charge. The Network Operator who has reassigned a premium rate subscriber number to a provider of information or content services are to ensure that the provider of information or content services in categories V and VI will exclusively receive one call per subscriber number per 24 hours to the service in question.⁹³

A Network Operator who gives access to making calls to information or content services must ensure that there is initial barring of calls to services in categories II-IV.⁹⁴

On any call to a Code 900 Service, the Network Operator, who gives access to

92 Section 10 of Executive Order No. 991 (6 November 2000) as amended by Executive Orders 1214 (18 December 2000) and 259 (10 April 2003).

93 Section 11 of Executive Order No. 991 (6 November 2000) as amended by Executive Orders 1214 (18 December 2000) and 259 (10 April 2003).

94 Section 12 of Executive Order No. 991 (6 November 2000) as amended by Executive Orders 1214 (18 December 2000) and 259 (10 April 2003).

making calls to Code 900 Services, must ensure that information is given initially about 1) the price, including the traffic charge, for using the service, or 2) the price, excluding the traffic charge, for using the service, and where access may be obtained by the User to information about the traffic charge for the call to the information or content service in question. The Network Operator must also ensure that information is given initially about the name of Network Operator who has reassigned the premium rate subscriber number to the Content Provider.⁹⁵

After being given the above-mentioned information, the User must be allowed a pause of at least 5 seconds for terminating the call, if desired, before charging at the premium rate starts. The Network Operator must ensure that charging for the call will not contain elements other than the traffic charge until the aforementioned pause of 5 seconds has elapsed.⁹⁶

Information about the Content Provider may be obtained on application to the Network Operator who has reassigned the relevant premium rate subscriber number to the Content Provider.⁹⁷ The above-mentioned information may be omitted in the case of calls to services being rung by means of fully automatic dialling equipment, e.g. fax or modems.⁹⁸ The information requirements and the pause is not required in connection to services under category VI, when a nationwide radio- or TV program, which has collection as its purpose, frequently provides information about the price, including the traffic charge, for using the service. This exemption may take place for a period of maximum of 24 hours distributed before, during or after the radio- or TV program.⁹⁹

According to section 28(2) of the Act on Competitive Conditions and Consumer Interests in the Telecommunications Market, the duty to supervise these rules rests upon the Network Operator who has reassigned the premium rate subscriber number to the relevant Content Provider. Network Operators must refuse to reassign a number to a Content Provider, or dispossess the Content Provider of a number already reassigned, if the Content Provider fails to substantiate within a short time limit set by the Network Operator that the rules will be complied with in future, or if the rules are violated repeatedly.¹⁰⁰

The National Telecom Agency maintains supervision and makes decisions in cases about compliance with the rules on barring and information about premium rate charging.¹⁰¹ Complaints concerning Code 900 Services may be launched before the Code 900 Board.¹⁰²

95 Section 13(1) of Executive Order No. 991 (6 November 2000) as amended by Executive Orders 1214 (18 December 2000) and 259 (10 April 2003).

96 Section 13(2) of Executive Order No. 991 (6 November 2000) as amended by Executive Orders 1214 (18 December 2000) and 259 (10 April 2003).

97 Section 13(4) of Executive Order No. 991 (6 November 2000) as amended by Executive Orders 1214 (18 December 2000) and 259 (10 April 2003).

98 Section 13(3) of Executive Order No. 991 (6 November 2000) as amended by Executive Orders 1214 (18 December 2000) and 259 (10 April 2003).

99 Section 13(5) of Executive Order No. 991 (6 November 2000) as amended by Executive Orders 1214 (18 December 2000) and 259 (10 April 2003).

100 Section 28(3) of Consolidated Act No. 784 (28 July 2005) on Competitive Conditions and Consumer Interests in the Telecommunications Market, as amended by Act No. 1427 (21 December 2005).

101 Sections 12, 13(1), no. 1, and 13(5) of Executive Order No. 991 of 6 November 2000 as amended by Executive Orders 1214 (18 December 2000) and 259 (10 April 2003). Cf. section 38(1) of Consolidated Act on Competitive Conditions and Consumer Interests in the Telecommunications Market, as amended by Act No. 1427 (21 December 2005).

102 See 2.2.2.

3.4. Framework Agreement for Mobile Content Services

The Telecommunication Industries Association in Denmark has developed a Framework Agreement for Mobile Content Services.¹⁰³ The Framework Agreement is made between Danish Network Operators,¹⁰⁴ and it is open for other Network Operators as well. The purpose of the agreement is to establish a framework for the provision of mobile funds transfer in the context of mobile, message-based Premium Rate Services, including for the use of associated application codes. The purpose of the agreement is further to guarantee a transparent market for these Premium Rate Services, with standardised communication with the consumers.

The agreement applies only to four-digit application codes (12cd, 13cd, 14cd, 16cd, 17cd, 18cd and 19cd) to be used for SMS and MMS messages. The administration of the assignment of application codes is performed by the Telecommunication Industries Association in Denmark.

The Network Operator to which an application code has been assigned may enter into an agreement with the Content Provider relating to the right to use the relevant application code on the operator's network. Where the Content Provider wishes to be able to use the application code in the networks of one or more of the other Network Operators, the Content Provider must enter into a separate agreement with each of the Network Operators.

Only the 16cd series may be used for the provision of services with adult content. Other series of application codes may not be used for this category of content. This application code is not used by any of the Danish Network Operators.¹⁰⁵ Premium charging is not permitted for special service notices, including error notices, notices relating to the termination of subscriptions and notices relating to the unsubscription procedure.

The agreement sets out a minimum of price points that must be offered,¹⁰⁶ but the parties to the agreement are not restricted to using these price points alone. Price points may be offered up to DKK 75, excluding charitable appeals, for which the maximum price point is DKK 150. Price points may be offered in excess of DKK 75, provided the Network Operator institutes such additional operational, technical, security and/or other measures as may be necessary in order to ensure that the payment system continues to be secure and well-functioning, or as may otherwise be necessary in order to ensure continued compliance with the statutory requirements.

Charitable appeals are defined in accordance with Category VI of the Code 900 Services,¹⁰⁷ mentioned above. For charitable appeals, a mobile terminated message or a WAP page must be sent to the End User to confirm the donation, and the Network Operator is required to ensure that the service is designed so that the User may only participate in the same appeal once per subscriber number per day.

103 Rammeaftale for mobile indholdstjenester (SMS brancheaftale). Currently version 3.1 (May 2005).

104 TDC Mobil A/S, SONOFON A/S, Telia Mobile, Tele2 A/S, and HI3G Denmark Aps.

105 Phone conversation with Jacob Lind, TDC, 24 January 2006.

106 DKK 0.5, 1, 1.5, 2, 2.5, 3, 3.5, 4, 4.5, 5, 5.5, 6, 6.5, 7, 7.5, 8, 8.5, 9, 9.5, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 35, 39, 40, 45, 49, 50, 55, 59, 60, 65, 69, 70, 75. In the case of charitable appeals, the following price points must also be provided: 79, 80, 85, 89, 90, 95, 99, 100, 110, 120, 130, 140, 150.

107 Appeals for religious communities or churches, funds, associations, foundations and institutions, etc. authorised under the Danish Tax Assessment Act (lov om påligningen af indkomstskat til staten).

Premium Rate Services provided in the series 12cd, 13cd, 14cd, 17cd, 18cd and 19cd¹⁰⁸ must not be unsuitable for children under 16 years of age, and may not contain: 1) descriptions of sexual or erotic matters, 2) contact and dating services with a view to sexual activities or other related elements, 3) references to other services or numbers with sexual or erotic content, 4) descriptions of violence, 5), games, prize competitions and similar services conflicting with the applicable legislation, or 6) access codes, passwords or similar elements providing access to services with the above content.

When providing Premium Rate Services that can be characterised as a **competition**, the parties are required to ensure that Content Providers design the service so that the User may participate by sending up to 25 SMS messages or 5 MMS messages per mobile telephone number per day per service.¹⁰⁹ In addition, the competition must not bring about a total premium charging exceeding DKK 12 per mobile telephone number per day per service. Irrespective of the number of days the competition lasts, the total premium charging may not exceed DKK 75 for the User. A User's participation in the relevant competition must thereby be ended when this amount is reached at the latest. At the start of the competition, the cost of participation in the competition must be made clear, including details of the premium charging that will be applied and the number of messages required in order to complete the competition.

When providing premium rate services that can be characterised as **chat**, the Network Operator is required to ensure that the Content Provider does not subject the User to premium charging for chat messages received by the User. The service must cease when the total payment for premium charging for the End User reaches DKK 75.

When providing Premium Rate Services requiring the sending or receiving of a number of premium rate messages, including subscriptions, chat, games and competitions, the parties are required to ensure that Content Provider design the service so that the User has constant control over usage as follows:¹¹⁰

1. When the service is ordered, the cost of using it must be made clear, including details of the premium charging that will be applied and the number of messages required in order to use the service.
2. In the case of services in which premium charging is applied entirely or partly separately for each message, the relevant price must be clear from the notice text in each individual premium rate message terminated at the handset.
3. The unsubscription code or details of the unsubscription procedure must be clear from the notice text in each individual premium rate and mobile terminated message.¹¹¹ The User must not be subject to further premium charging for receiving this information.
4. The service must cease when the total payment for premium charging for the User reaches DKK 75. The User must be able to unsubscribe to the service using the same medium and the same method as when subscribing, including reordering.

¹⁰⁸ All but 16cd, which is reserved for adult content.

¹⁰⁹ Where a combination of mobile originated messages is used, the ratio of SMS messages to MMS messages shall be (5:1) – i.e. 5 SMS messages may be used for each MMS.

¹¹⁰ Section 8(4) of the Framework Agreement.

¹¹¹ E.g. using a message like 'afmeld: Send "STOP SPORT" til 1202' ('To unsubscribe: Send "STOP SPORT" to 1202')

The fourth point may be departed from, provided the Network Operator institutes such additional operational, technical, security and/or other measures as may be necessary in order to ensure that the payment system continues to be secure and well-functioning, or as may otherwise be necessary in order to ensure continued compliance with the statutory requirements. The possible extension of the maximum amounts for premium charging does not apply competitions and chat.¹¹²

3.4.1. Adult Content

Adult content may only be provided in the 16cd series, which is the only series to allow this type of content. The parties are free to establish a code of practise relating to the nature of the adult content provided in the context of charging and certain forms of payment switching via SMS and MMS. The Framework Agreement does not require the parties to provide adult content.

If a Network Operator chooses to allow access to adult content, it is required to provide its Users with the option of blocking the 16cd series. Access may be blocked in advance, meaning that access to the 16cd series may only be provided at the request of an adult User. The Network Operator is required to satisfy itself that the User is an adult. New Users must be informed of the option to access the 16cd series when they enter into the contract, for example by checking an option to access adult content on the application form.

A Network Operator can alternatively choose not to block the 16cd series initially where the Network Operator is satisfied that the User is an adult. This means that all existing Users must be personally informed of the possibility of adult content and of how they can set up a block.¹¹³ The User must be given a reasonable length of time of at least two weeks to set up the block before the sale of adult content is started. New Users must be informed when they enter into the contract, and must also be given the option of blocking access to the series.¹¹⁴

The application code 1699 is allocated solely to allow Users to send an SMS message containing the keyword 'STOP' in order to block general access to content in the 16cd series of that User's Network Operator. The Network Operator must block access to content in the 16cd series as soon as the User's SMS is received.¹¹⁵ This provisions applies also where adult content is provided using a charging medium other than SMS and MMS.

3.4.1.1. Content of an Erotic, Sexual or Pornographic Nature

In connection to the Framework Agreement, an annexed code of practice on the provision of content and material of an erotic, sexual and pornographic nature has been drawn up.¹¹⁶ The code of practice sets out how Content Providers should interpret the limits for content that falls within or outside the 16cd series, and whether it may be considered 'erotic and sexual content' or 'pornographic content/material'. The

112 Section 8 of the Framework Agreement.

113 For example in information material enclosed with the bill.

114 For example by checking an option to block adult content on the application form.

115 Section 8(5) of the Framework Agreement.

116 Version 11 (29 November 2004).

distinctions are drawn up as follows:

<p><i>12cd, 14cd, 18cd and 19cd (No age restriction)</i></p>	<p><i>16cd (Adults only)</i></p>	
<p>The content/material in series 12cd, 14cd, 18cd and 19cd does not include content/material associated with sexual or erotic content.</p> <p>However, it does include caricatured sexual organs/bottom pictures in a humorous context. Otherwise concentrating on the vagina, penis, anus and exposed sexual organs is not permitted in this category.</p> <p>Persons must have their sexual organs covered, and women must also have their breasts covered.</p>	<p>Erotic and sexual content</p> <p>In this category, erotic/sexual relations between persons may be shown/indicated. It includes content/material intended to have an erotic effect and content/material of a sexual nature.</p> <p>Erotic content/material ranges from naked pictures/photographs of men/women, the naked model in Danish 'Se & Hør' magazine or the Page 9 Girl in the tabloid 'Ekstra Bladet', to one or more persons touching themselves and one or more persons who must be characterised as being naked (including wearing a g-string/transparent clothing), and one or more persons in positions intended to have an erotic effect.</p> <p>Content/material of a sexual nature includes scenes of sexual relations/intercourse in which the sexual organs are not shown directly. In terms of content/material, threesomes are as 'alternative' as it is possible to get. The images are generally filmed/photographed in a soft light, and it is</p>	<p>Pornographic content</p> <p>The individual Network Operator may choose to provide full or partial access, or no access at all, to this type of content/material. The content/material may only be provided if it is legal.</p> <p>Pornographic content/material is defined as explicit sexual activity, close-ups of sexual organs and intercourse, frequently with a strongly sexual soundtrack. This category includes all types of sexual activity, with a highly variable number of participants. Distinctions may be drawn between different genres, for example: sadomasochism, bondage, domination, rubber, latex homosexuality, transvestism group sex.</p>

<i>12cd, 14cd, 18cd and 19cd (No age restriction)</i>	<i>16cd (Adults only)</i>
	<p>important that the scenes/images should have a beautiful and natural feel. The story of the film/content is often so thin that there is no doubt that it has been produced solely to show sex.</p> <p>When the content/material is evaluated, importance will be placed on the overall impression, i.e. the combination of image, sound and animation.</p>

3.4.2. The Agreement Between the Content Provider and the Network Operator

When marketing and selling Premium Rate Services, the Content Provider must adhere to the applicable legislation, including the Danish Marketing Practises Act¹¹⁷ and the Certain Consumer Contracts Act,¹¹⁸ in particular the obligations arising out of the provisions on distance selling in the Certain Consumer Contracts Act.

The Network Operator is, according to the Framework Agreement required to ensure that Content Providers with which the Network Operator enters into agreements, are aware of the requirements arising out of the currently applicable sector agreement and that the Content Providers have received the code of practice. It is emphasised in the Framework Agreement that when marketing services or engaging in any other form of communication relating to the services, the Content Provider must quote the price for using the service (premium charging), and must specify that the User must also pay the Network Operator's general price for the mobile message/usage charge (for WAP) when using the service.

According to the Framework Agreement, the Content Provider is responsible for ensuring that the correct charging data is transferred to the Network Operator. The Network Operator is to be responsible for ensuring that the User is correctly charged on the basis of the charging data provided by the Content Provider to the Network Operator.

According to the Framework Agreement, the Network Operator is entitled, ex officio or following an approach by Users or others, to review, a Premium Rate Service in order to investigate whether the Content Provider is complying with the conditions governing

¹¹⁷ See 4.1.

¹¹⁸ See 4.5.

provision of the service free of charge. Any disregard of the conditions in the Framework Agreement or any breach of the applicable legislation by the Content Provider in providing Premium Rate Services is to be regarded as a material breach, entitling the Network Operator to cancel the agreement without further notice and to terminate access to the Content Provider's services.¹¹⁹

3.4.3. Customer Service

The User's Network Operator is required to handle customer enquiries, including enquiries relating to registration and billing for Premium Rate Services.¹²⁰ Enquiries relating to the marketing, contract issues, the delivery and the actual content of the Premium Rate Service may be referred by the Network Operator directly to the Content Provider. A Network Operator must in its agreement with the Content Provider require the Content Provider to handle such customer enquiries. The Content Provider must be equipped to handle customer enquiries via telephone customer service using a Danish telephone number, of which the User must be informed when the service is ordered. Such customer service is to be available and staffed for at least eight hours per day on weekdays.

The Content Provider must make the necessary data and resources available to the Network Operator. The Network Operator is required to suspend collection of a disputed amount in the period from receipt by the Network Operator of a written complaint until the Network Operator has notified the customer of its decision in writing. This applies regardless of whether the complaint relates to deliverables provided by the Network Operator or the Content Provider.

The Network Operator is required to enter into agreements with relevant parties in order to implement the mentioned customer service. This includes agreements with other Network Operators, where the mobile operator is not the User's mobile company. The User may file a complaint over a mobile Premium Rate Service with the Consumer Complaints Board.

3.5. Certain Payment Instruments Act

This Act¹²¹ regulates certain payment instruments available for use in Denmark.¹²² Payment instruments are certain means that can be used to acquire goods or services, arrange for the transfer of funds, withdraw cash or make other payment transactions.¹²³ A telephone and its Subscriber Identity Module (SIM card) is a payment instrument covered by the Certain Payment Instruments Act. This counts for both prepaid phone cards and normal subscription-based telephony. The Act is administered by the Danish Consumer Ombudsman, and the mentioned provisions may not be derogated to the detriment of the holder by any prior agreement.

The purpose of the Act is to ensure that the covered payment instruments are safe and well-working. A payment system must be designed and operated in such a way that

119 Section 9(3) of the Framework Agreement.

120 Billing and account issues on which the mobile company may be assumed to have an influence.

121 Lov om visse betalingsmidler. Consolidated Act No. 1501 (20 December 2004) as amended by Act No. 603 (24 June 2005).

122 See also Proposal for a Directive on payment services in the internal market and amending Directives 97/7/EC, 2000/12/EC and 2002/65/EC, COM(2005) 603 final (1 December 2005).

123 Section 1 of Consolidated Act No. 1501 (20 December 2004) as amended by Act No. 603 (24 June 2005).

users are assured of transparency, voluntariness, protection against abuse, and secrecy about their use of the payment instrument.¹²⁴ Payment instruments may not be issued before the issuer has been notified to the Danish Consumer Ombudsman.¹²⁵

The consumer Ombudsman has emphasised¹²⁶ that services which are ordered from and delivered to a mobile phone via an application code and the SIM card (Premium Rate Services) is a payment system under this act. The payment system is provided to the User by the Network Operator, and it is thus the Network Operator's obligation to ensure that the system is safe and well-working in accordance with this act. The consumer ombudsman referred to the the industry's Framework Agreement,¹²⁷ which provides that Danish law must be complied with. The case came about on the basis of the collection of a premium charging where Users were wrongly charged for receiving SMS messages. The industry took immediate action to refund the wrongfully charged premiums.

When concluding an agreement with the User, on his access to use a payment instrument, the issuer must supply the User with a set of information material. The material must be drafted in simple and easily understandable language, and must enable the holder to use the payment instrument in a safe and expedient way and give information about typical costs charged for the use of the payment instrument. The information must in particular call attention to the safety requirements to be met by the holder and the liability which may be incurred by the holder in case the payment instrument is abused by a third party.¹²⁸

The holder is entitled to receive a receipt for any transaction made using the payment instrument unless the holder has easy access otherwise to information stating whether and when the transaction in question has been completed.¹²⁹ Holders of payment instruments are entitled to terminate the agreement with the issuer without any notice.¹³⁰ For prepaid payment instruments, the holder may terminate the agreement after the expiry of its period of validity, and if making a claim within one year after the expiry the holder is entitled to receive any residual value. The issuer may charge a fee, which may not exceed the amount which is reasonable taking account of the issuer's costs of the refund and the circumstances in other respects.¹³¹

3.5.1. Liability for Unauthorised Use

The act contains rules on liability in connection to unauthorised use. The issuer is liable to compensate the User for any loss caused by unauthorised use of a payment instrument

124 General clause in section 3.

125 Section 6. In a judgment of the Danish High Court (Eastern Division, 17 June 2003 [Østre Landsret]), an issuer of payment instrument was fined DKK 15,000 for failure to notify the Danish Consumer Ombudsman. The issuer had bought a number of telephone cards for distance calls from an American supplier. Forbrugerombudsmanden j. 2003-1170/8-52. Source: www.forbrug.dk.

126 The Danish Consumer Ombudsman, Case 2005-1110/5-227.

127 See 3.4.

128 Section 7 of Consolidated Act No. 1501 (20 December 2004) as amended by Act No. 603 (24 June 2005).

129 Section 8 of Consolidated Act No. 1501 (20 December 2004) as amended by Act No. 603 (24 June 2005).

130 Section 9 of Consolidated Act No. 1501 (20 December 2004) as amended by Act No. 603 (24 June 2005), which is the Danish implementation of article 8 of the 1997 Distance Selling Directive: Member States shall ensure that appropriate measures exist to allow a consumer: 1) to request cancellation of a payment where fraudulent use has been made of his payment card in connection with distance contracts covered by this Directive, and 2) in the event of fraudulent use, to be recredited with the sums paid or have them returned.

131 Section 9(2) of Consolidated Act No. 1501 (20 December 2004) as amended by Act No. 603 (24 June 2005).

unless otherwise provided in the Act.¹³² The holder is liable up to DKK 1,200 for losses caused by unauthorised use of the payment instrument by another person in case the secret Personal Identification Number (PIN code) has been used.

The User may, however, be liable for an amount up to DKK 8,000 for such losses if the issuer proves that 1) the User has failed to inform the issuer as soon as possible that the code has become known to an unauthorised person, 2) the User has disclosed the code to the person, or 3) the User, by grossly irresponsible conduct, has made the unauthorised use possible. In these situations, the holder is liable for losses without limitation if the issuer is able to prove that the User has disclosed the PIN code to the person behind the unauthorised use, and the holder realised or should have realised the existence of a risk of abuse.

After the holder has requested a stop on the payment instrument, the issuer is liable for unauthorised use. The same counts for situations where the payee knew or should have known that the payment instrument had been subject to unauthorised use.

The Consumer Complaints Board has dealt with the situation of unauthorised usage of a mobile phone. A consumer realised that her mobile phone was not in her purse as usual, but thought it was mislaid. After three days, she had reported the telephone missing. The Network Operator had already blocked the phone on the day of the theft due to an unusual large use. The board found the SIM card to be covered by the Certain Payment Instruments Act.

Since the phone was activated by the PIN code, the consumer was responsible for up to DKK 1,200 of the unauthorised use. The consumer's duty to inform the issuer runs from the moment where the consumer have knowledge of the fact that the telephone is lost, and since the consumer is only liable for losses that could have been avoided by notification in due time, the consumer was not liable under the own risk rule of up to DKK 8,000.¹³³

The issuer is liable for losses sustained by a holder due to errors in registration or accounting procedures, even if such an error may be accidental.¹³⁴ Where the User has been informed that a payment transaction has been acknowledged, the issuer is also liable for losses sustained by the holder due to non-completion or inadequate completion of the payment transaction in question. The issuer bear the onus of proof to show that a loss has not been caused by errors in registration or accounting procedures.

3.5.2. Issuers of SIM-Based Payment Instruments

There is a custom of issuing exemptions for issuers of payment instruments based on SIM cards used in GSM (Global System for Mobile Communication) systems.¹³⁵ This is based on the limited use of those systems, and that the mobile telephone operators are registered with another public authority. The exemption includes only voice-telephony and data transmission via the mobile network. It does not include Premium Rate Services. The exemption concerns all sections of the Act but sections 9(2), 11 and 12 concerning return of funds concerning prepaid payment instrument, liability in

¹³² Section 11. According to section 2, does section 11 not concern prepaid payment instruments unless the value of the payment instrument may exceed DKK 3,000 or if there is a possibility for automatically "recharging" of the payment instrument at the holders expense.

¹³³ Forbrugerklagenævnet, j. 2002-4054/7-295. Consumer Complaints Board, Case 2002-4054/7-295.

¹³⁴ Section 12 of Consolidated Act No. 1501 (20 December 2004) as amended by Act No. 603 (24 June 2005).

¹³⁵ Forbrugerombudsmanden j. 2003-1171/1-1. The Danish Consumer Ombudsman, Case 2003-1171/1-1 (31 December 2003).

connection to unauthorised use, and liability in connection to errors in registration and accounting procedures, respectively.

The exemptions are granted for a limited time and may be revoked by the Danish Consumer Ombudsman. The exemptions are given under the condition that 1) section 11 and 12 appear in the terms of use, 2) the terms of use includes a clear description of the SIM card's functions and scope of use, including guidance on the use of PUK (PIN Unlock Code) and PIN, and under which circumstances the SIM card may be used without typing the PIN code, 3) the terms of use contains clear information on where to report loss or abuse of the SIM card and codes, and 4) that the exemptions only covers voice telephony and data transmission via the mobile network.

3.6. Electronic Money and the Financial Business Act

The 2000 E-Money Directive¹³⁶ is implemented in the Financial Business Act.¹³⁷ It follows from section 308(1) that undertakings that carry out activities comprising issuing means of payment in the form of electronic money must be licensed as electronic money institutions. Electronic money means a monetary value, as represented by a claim against the electronic money institution, which is stored on an electronic medium. Electronic money may not be issued at a premium and must be recognised as means of payment by undertakings other than the electronic money institution.

Apart from issuing electronic money, electronic money institutions may only carry out activities associated with 1) delivery of closely linked financial and non-financial services, and 2) storage on the electronic medium on behalf of other companies or public institutions.¹³⁸ Electronic money institutions and banks have exclusive right to issue electronic money.¹³⁹ An undertaking seeking to be licensed as an electronic money institution must have a share capital of an amount corresponding to no less than EUR 1 million.¹⁴⁰

The provisions does not apply to undertakings issuing electronic money if the maximum amount stored on the electronic medium cannot exceed EUR 150 and one of the following conditions is met:¹⁴¹

1. the undertaking's total financial liabilities in respect of outstanding electronic amounts¹⁴² may never exceed EUR 6 million. The outstanding electronic amounts may not, on average,¹⁴³ exceed EUR 5 million,
2. the electronic money issued by the undertaking is only recognised as a means of

136 Directive 2000/46/EC (18 September 2000) on the taking up, pursuit of and prudential supervision of the business of electronic money institutions.

137 Lov om finansiel virksomhed. Consolidated Act, No. 613 (21 June 2005) as amended by Act No. 1428 (21 December 2005). See also Executive Order No. 1184 (6 December 2004) concerning issuers of electronic money (bekendtgørelse om udstedere af elektroniske penge).

138 Section 308(2) of Consolidated Act, No. 613 (21 June 2005) as amended by Act No. 1428 (21 December 2005).

139 Section 308(3) of Consolidated Act, No. 613 (21 June 2005) as amended by Act No. 1428 (21 December 2005).

140 Section 308(4) of Consolidated Act, No. 613 (21 June 2005) as amended by Act No. 1428 (21 December 2005).

141 Section 308(5) of Consolidated Act, No. 613 (21 June 2005) as amended by Act No. 1428 (21 December 2005).

142 When calculating the outstanding electronic amounts, outstanding electronic amounts which the issuer itself receives as a means of payment is not to be included in the calculation of the amounts.

143 The average is to be calculated as the weighted average of the last 6 months' outstanding electronic amounts at the end of the month. The sum of the previous month's electronic payments to undertakings other than the electronic money institution divided by the sum of the previous month's total use of the prepaid funds as a means of payment shall be applied as weights.

- payment by companies within a single group, or
3. the electronic money issued by the undertaking is only recognised as a means of payment by a limited number of companies that can be clearly identified by virtue of their location at a single site or within another limited area, or by virtue of their close financial or business relationships with the undertaking.

Undertakings which do not fall within the scope of this part of the Act must submit annual statements detailing their activities, including details on the size of the total financial liabilities in respect of outstanding electronic amounts.¹⁴⁴

On 24 May 2004, the Danish Financial Business Council¹⁴⁵ concluded that telecommunication operators' use of prepaid air-time in some instances is to be considered as e-money. Four conditions must be met: 1) the card must represent a monetary value, 2) there must be a claim against the issuer, 3) the claim must be stored on an electronic medium, and 4) the money must be recognised as means of payment by undertakings other than the electronic money institution. Criteria 1 to 3 were found to be satisfied, whereas the fourth criteria would depend on a specific decision. It was noted that the fourth criteria is not satisfied when the telecommunication operator provides a service and when the provider is a sub-supplier to the Network Operator.

To the extent a prepaid card may be used as means of payment for Premium Rate Services where the Network Operator is not the Content Provider, the prepaid card will be considered electronic money. However, the Network Operator, which is the issuer of the prepaid card, will usually fall under the exemptions mentioned above. The Network Operator must still comply with the obligation to submit annual statements. If the Network Operator does not fall under one of the exemptions, it becomes subject to the requirements above which will render it inexpedient to issue prepaid cards.

144 Section 308 (7) of Consolidated Act, No. 613 (21 June 2005) as amended by Act No. 1428 (21 December 2005). This statement shall be received by the Danish Financial Supervisory Authority no later than 1 April.

145 *Finanstilsynet*. www.finanstilsynet.dk.

4. Regulation Concerning Content Providers

The Content Provider is subject to both regulation concerning distance selling and regulation concerning the service in question and the marketing hereof. The service-related regulation may for example involve regulation concerning intellectual property rights, broadcast, financial services etc. The focus in this context is on the general regulation of consumer protection in relation to distance selling and marketing.

The Premium Rate Services dealt with in this context qualifies as both a consumer purchases and distance selling. This means that the services fall under the general legislation, which to some extent is the result of the transposition of EU secondary legislation. The Premium Rate Service is sold by the Content Provider to the User. The Network Operator is solely assisting in the exchange of messages and in the charging/billing of the User.

In connection to the Telecommunication Industries Association in Denmark's Framework Agreement for Mobile Content Services,¹⁴⁶ a code of practice on statutory information requirements for the sale of premium rate mobile services via SMS, MMS, WAP or other charging medium has been drawn up.¹⁴⁷ The code of practice is enclosed as an appendix to agreements between the Network Operator and the Content Provider. The code of practice is dealt with below, but does not have recognised validity as a source of law.

4.1. The Marketing Practises Act and Misleading Advertising

A new act on marketing practises was adopted on 21 December 2005,¹⁴⁸ and it enters into force on 1 July 2006. Unless otherwise noted, the following presentation deals with the law applicable today, and where noted, the future law under the new act. The Marketing Practises Act¹⁴⁹ applies to private business activity and comparable public activity. Businesses, which are subject to this act, must act in accordance with good marketing practice with regard to consumers, businesses and general societal interests.¹⁵⁰

The Danish Minister of culture has in accordance with the Radio and Television Act¹⁵¹ issued an executive order on commercials and sponsoring in radio and television.¹⁵² It follows from section 8(2) of the Executive Order that commercials must comply with the Marketing Practises Act and respect generally accepted norms concerning ethical marketing.

The act is administered by the Danish Consumer Ombudsman, who is also entitled to issue guidelines concerning good marketing practice. The guidelines does not provide binding guidance to the Judiciary's interpretation of the Act. In the interpretation of good marketing practises, the courts may take into account industry guidelines such as

¹⁴⁶ See 3.4.

¹⁴⁷ Appendix 3 to the Framework Agreement.

¹⁴⁸ Lov om markedsføring. Act No. 1389 (21 December 2005).

¹⁴⁹ Consolidated Act No. 699 (17 July 2000) as amended by Act No. 428 (6 June 2002), Act No. 450 (10 June 2003), and Act No. 352 (19 May 2004).

¹⁵⁰ Section 1 of Consolidated Act No. 699 (17 July 2000) as amended by Act No. 428 (6 June 2002), Act No. 450 (10 June 2003), and Act No. 352 (19 May 2004).

¹⁵¹ Lov om radio- og fjernsynsvirksomhed. Act No. 1052 (17 December 2002).

¹⁵² Bekendtgørelse om reklame og sponsorering i radio og fjernsyn. Executive Order No. 194 (20 March 2003).

in particular the 1997 ICC International Code of Advertising Practice.¹⁵³ For that reason, the guidelines, in particular those agreed on with the industry, is of importance when interpreting the Danish Marketing Practises Act.

Beside the general clause on good marketing practises, the Act includes provisions on incorrect, misleading or unreasonably perfunctory statements,¹⁵⁴ which comprise the Danish implementation of the 1984 Misleading Advertisement Directive.¹⁵⁵ The cases concerning the marketing of Premium Rate Services in Denmark has been focused on compliance with the regulation concerning distance selling, and the right of withdrawal in particular.¹⁵⁶ There are no publicly available information about any actions taken by the Danish Consumer Ombudsman in connection to misleading information in the marketing of Premium Rate Services.¹⁵⁷

By 1 July 2006 a new section 4 provides that advertising should appear in a way that it clearly will be perceived as such, whatever their form and whatever the medium used.¹⁵⁸ Section 3¹⁵⁹ comprises regulation of guidance. It follows that when an offer is made, on entering into an agreement or (depending on the circumstances) at the time of delivery, appropriate guidance must be given in accordance with the nature of the product or service, where this is of importance for the assessment of the character or properties of the product or service, including in particular its functional properties, durability, hazardous nature and maintainability.

This section corresponds to the civil regulation found in section 76(1)(iii) of the Sale of Goods Act.¹⁶⁰ It provides that goods are not in conformity with the contract *inter alia* if the seller has failed to give the buyer notice of circumstances that influenced the buyer's assessment of the goods and which were known or ought to have been known by the seller. This section implements parts of the 1999 Directive on Consumer Sales.¹⁶¹ Even though the Act only relates to the sale of goods, the provisions of the Act is normally, and as far as possible, applied similarly to services.

Section 9,¹⁶² concerning draws and prize competitions, provides that no attempt may be made to promote the sale of goods or services by means of possible winnings through participation in a draw, prize competition or other form of arrangement whose outcome depends wholly or partly on chance, if participation depends on a purchase.¹⁶³

153 April 1997. www.iccwbo.org.

154 Section 2 (section 3 after 1 July 2005) of Consolidated Act No. 699 (17 July 2000) as amended by Act No. 428 (6 June 2002), Act No. 450 (10 June 2003), and Act No. 352 (19 May 2004).

155 Directive 84/450/EEC (10 September 1984) relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising as amended by directive 97/55/EC (6 October 1997) concerning misleading advertising so as to include comparative advertising.

156 See 4.5. The Consumer Ombudsman has in 2003 informed the industry about its obligations in that context. See Forbrugerombudsmanden, j. 11730/8-2. The Danish Consumer Ombudsman, case 11730/8-2.

157 In connection to the elaboration of this article, a number of print and online advertisements for ringtones, wallpapers, games etc., has been studied. Generally, the advertisements are rather complex, taking into account that they are directed at young people. The print advertisements use a relatively small font, but for the most the same font size for both price and other information. Only one provider, Jamba, offers subscription based services, but those services has a limited duration (2 months) and concerns a small amount. See also 1.2.1.

158 See also 1997 ICC International Code of Advertising Practice, article 12 and the 2000 E-Commerce Directive, article 6(1)(a).

159 Section 7 as of 1 July 2006.

160 Lov om køb. Consolidation Act No. 237 (28 March 2003).

161 Directive 1999/44/EC (25 May 1999) on certain aspects of the sale of consumer goods and associated guarantees.

162 Section 11 as of 1 July 2006.

163 Subsection 2 and 3 provides certain exemptions for draws if the amount of the individual prize and the overall winnings value is within limits laid down by the Minister of Economic and Business Affairs, and for publishers of a periodicals.

The Danish Consumer Ombudsman has stated that a particular Premium Rate Service (Code 900 Service) is not covered by this section if participation is not depending on a purchase.¹⁶⁴ The Danish Consumer Ombudsman's decision was made on the basis that the premium was finally paid to the Content Provider and the normal rate was paid to the Network Operator. The consumer ombudsman would not exclude that if the Network Operator acted as Content Provider, the competition would be depending on purchase of the tele-service and thus covered by the section.

Under Danish Law, there is a general prohibition of gambling in the Danish Criminal Code.¹⁶⁵ Section 203 provides that any person who makes his living by gambling or betting of a similar nature not permitted under special regulations, or by promoting such gambling, is liable to a fine or imprisonment for any term not exceeding one year. The profit gained may be confiscated or repaid at the discretion of the criminal court. In its administration, the Ministry of Justice focusses on the requirement of both a payment by the User and an element of chance. Competitions based on the User's performance fall outside the general ban.¹⁶⁶

Pursuant to section 2 of the Lotteries Act,¹⁶⁷ the Ministry of Justice has issued a circular on lotteries.¹⁶⁸ The right to make lotteries may, according to the Circular be granted by the Chief of Police. Such grant may only be issued to the benefit of public utility, and may not pursuant to the Circular be granted to lotteries based on machines or electronic terminals. The Justice Department has found lotteries offered by phones to be machines or electronic terminals.¹⁶⁹

4.1.1. Guidelines on Best Practise in the Telecommunications Industry

The Danish Consumer Ombudsman has in 2004 (effective 1 April 2005) drawn up guidelines on 'Good Marketing Practises in the Telecommunications Market'.¹⁷⁰ The guidelines are a result of negotiations between the Danish Consumer Ombudsman, the Danish Consumer Council, the Telecommunication Industries Association in Denmark, Danish Commerce and Services, the Confederation of Danish Industries, the Danish IT Industry Association and the Umbrella Organisation for Consumer Electronics in Denmark. The National IT and Telecom Agency and the Danish Competition Authority also took part as observers.

This guideline expresses the Danish Consumer Ombudsman's opinion of what constitutes good marketing practises in the telecommunications industry, and it is incumbent on all players in the market to observe it. The guideline deals with marketing, terms of contract and customer service in relation to consumer sales, hire and lease of telecommunication equipment and services. The guideline does, however, not deal with sales and marketing of information and content services (Premium Rate Services).

164 Forbrugerombudsmanden j. 1996-4051/5-51 (1996). The Danish Consumer Ombudsman, Case 1996-4051/5-51 (1996).

165 Consolidated Act No. 909 (27 September 2005) as amended by Acts Nos. 1389 and 1400 (21 December 2005).

166 Phone conversation with Karen Grønbaek, the Danish Ministry of Justice (30 January 2006).

167 Lov om Classelotteriets Ordning og Forbud mod andet Lottospil m.m. Act No 18027 (6 March 1869 – Eighteen hundred sixty nine).

168 Cirkulære om bortlodning (Til politidirektøren i København og politimestrene). Circular 147 (1 August 1994).

169 Phone conversation with Karen Grønbaek, the Danish Ministry of Justice (30 January 2006).

170 Retningslinier om god markedsføringsskik på teleområdet.

4.1.2. Position Statement on E-commerce and Marketing on the Internet

In October 2002, the Nordic Consumer Ombudsmen¹⁷¹ issued a Position Statement on E-commerce and Marketing on the Internet.¹⁷² The Position Statement covers e-commerce and marketing in the Nordic market via the Internet and corresponding communications systems in relevant respects. By corresponding systems is also understood SMS, MMS and WAP. The guidelines are, however, in its content focusing on the Internet, and WAP to the extent it resembles traditional Internet (Hyper Text Transmission Protocol, HTTP).

It has a particular section on SMS, E-mail and the like. It deals with unsolicited messages and how consent should be obtained. Of particular interest for mobile messages, it is stated that the circumvention of the requirement of consent may be unreasonable, for example by the consumer being urged by the business to forward advertising, or 'tip' other consumers about the business's activities, and the person forwarding or tipping receiving a direct reward in the form of a premium, participation in a competition or the like. It is also provided that all e-mail advertising should contain easily understandable guidance about how to decline, by simple means, future advertising. The system for declination should be arranged so that the party that makes such a declination receives a confirmation of this.

The Position Statement comprises a section concerning marketing directed at children and young people. According to the statement, marketing must be designed so that it is obvious for the targeted age group, that it involves marketing. Children and young people should not be urged to buy products or conclude other contracts via the Internet. Minors cannot conclude contracts with binding effect for sales or order of products/services that involve a debt obligation. In such cases, the guardian/parents must be the contractual party and assume the payment obligation. In those cases where marketing is directed at children, businesses have an extended liability to ensure that all necessary information, e.g. concerning price, nature of the product and that children cannot conclude a contract, are indicated in a sufficiently clear way by marketing and contract terms.

4.1.3. Children, Young People and Marketing Practises

The Danish Radio and Television Board¹⁷³ deals with commercials in Danish television. The board dealt with a case¹⁷⁴ where a commercial directed to children encouraged children to call a particular (non premium rate) phone number in order to participate in a competition. The board found that because extra care should be taken when commercials are directed to children, the particular commercial was found to be in contravention of good marketing practice, and thus a breach of the Danish Marketing Practises Act.

Premium Rate Services attract children and young people. In 2002, the Danish Consumer Ombudsman issued guidelines on Children, Young People and Marketing

171 The consumer ombudsmen in Denmark, Finland, Norway and Sweden.

172 De nordiske forbrugerombudsmænds standpunkt til handel og markedsføring på internettet.

173 Radio- og TV-Nævnet. www.mediesekretariatet.dk.

174 Radio- og TV-Nævnet j. 1998.7264-57. The Danish Radio and Television Board, Case 1998.7264-57 (2 November 1998).

Practises.¹⁷⁵ Special provisions on marketing directed at children is introduced into the Danish Marketing Practises Act in December 2005 (takes effect 1 July 2006). It follows that marketing directed at children and young people must be elaborated with due respect for children and young people's unsuspecting nature and lack of experience and critical sense. Such marketing may not directly or indirectly encourage violence, use of drugs, including alcohol, or other dangerous or inconsiderate behaviour, or in any improper way use violence, fear or superstition.¹⁷⁶

The Danish Consumer Ombudsman has issued guidelines expressing his idea of how the existing rules in this area should be interpreted, i.e. in particular the general clause on good marketing practises. No absolute age limits have been defined for the terms of 'children' and 'young people' in relation to marketing practises, but it is stated that as a first rule the upper age limit should be 18 years of age.

It is the general rule that advertising in all media should be easy to identify as such regardless of form. It is noted that the development in general and the media convergence in particular have engendered new methods of communicating commercial messages. The use of visual representation and sound has resulted in a more interactive way of deploying communication to which children and young people are highly exposed. Likewise the borderland between commercials and information on the one hand, and entertainment and games on the other hand has become less transparent. As children and young people make frequent use of new media for both work and fun, advertisers and marketers should make sure that commercial messages appearing in the new media are easy to distinguish. A clear distinction between commercials/marketing vis-à-vis entertainment, games, play activities etc. must also be ensured.¹⁷⁷

According to the guidelines, marketing should not be designed in a way so that it exploits children and young people's natural credulity, lack of experience or the fact that children and young people are susceptible to influence. Marketing should not exploit children and young people's loyalty.¹⁷⁸

Marketing should not undermine social values by for instance suggesting that the possession, use or consumption of a product will give the child or the young person physical, social or psychological advantages over other children or young people of similar age. Nor should it suggest that the failure to own, use or consume such a product might have the opposite effect. Marketing should not be designed to give children and young people the impression that their failure to own, use or consume the relevant product will in any way make them less privileged than other children and young people, or expose them to contempt or ridicule. Marketing should not undermine the authority, responsibility, judgement or tastes of parents and others. Marketing should not directly encourage children and young people to persuade parents or others to buy the advertised product for them.¹⁷⁹

Business and trade should be specifically careful with regard to product presentations directed at children and young people, as it is easier to mislead children and young people due to their lack of experience. Business and trade should ensure that their

175 Børn, unge og markedsføring. Children, Young People and Marketing Practises (April 2002).

176 When deciding what good marketing practises constitute in relation to children and young people, article 14 of the 1997 ICC International Code of Advertising Practice should also be considered.

177 Section 4 of Children, Young People and Marketing Practises.

178 Section 5.1 of Children, Young People and Marketing Practises.

179 Section 5.4 of Children, Young People and Marketing Practises.

marketing in no way mislead children and young people as to the true size, value, nature, durability, performance and price of the advertised product. This means that:¹⁸⁰

- it should be made clear if extra items (e.g. batteries or paint) are needed to use the product or to produce the result shown or described;
- it should be clearly indicated if the product forms part of a whole series including the method of acquiring the series and the total price. This applies e.g. if the individual parts form a coherent whole so that the individual parts are of very limited use and have limited utility value for the children and young people if they do not get the whole series or more parts of it;
- that price indications should not be of such as to give children and young people an unrealistic perception of the true value of the product, for instance by using the word 'only';
- marketing should not imply that the advertised product is immediately within reach of every family budget;
- if the product is not intended for all children and young people the advertising should state the age range for which the product is intended;
- where results of product use are shown or described, the advertising should represent that which is reasonably attainable by the average child or young person in the age range for which the product is intended.

Businesses and trades should not encourage children to ring a stated telephone number with a view to obtain product information and conduct similar marketing. A telephone call will in general be more persuasive and powerful than ordinary marketing designed for e.g. written media, and therefore it assumes the status of direct marketing.¹⁸¹

Children and young people should not be able to join clubs or take out subscriptions without their parents' written consent. It should be stated in the marketing material if the clubs and subscriptions in question particularly appeal to children and young people, and when it concerns agreements that entail rights and obligations for which minors cannot take responsibility.¹⁸²

It should not be possible for children and young people to shop by mail order or any other form of distance selling without parental consent. Offers in connection with distance selling directed at children and young people should only be put forward if it is clearly indicated that the young people need their parents' consent to accept.¹⁸³

It should be a minimum requirement that businesses and trades follow the following principles in addition to the other principles in these guidelines:¹⁸⁴

- there should be a clear distinction between advertising and entertainment,
- further, there should be a clear distinction between marketing directed at children and young people and marketing of products and services that are

180 Section 5.5 of Children, Young People and Marketing Practises.

181 Section 7.2 of Children, Young People and Marketing Practises.

182 Section 7.3 of Children, Young People and Marketing Practises.

183 Section 7.5 of Children, Young People and Marketing Practises.

184 Section 10 of Children, Young People and Marketing Practises.

- intended only for adults,
- children and young people should not be urged to buy products or enter into other agreements via the Internet,
- appropriate measures ensuring that children and young people do not make purchases and enter into agreements via the Internet should be taken,
- children/young people should not be promised a reward (money, gift or anything else) for staying on a website or participating in one of its activities,
- parents should be encouraged to participate in and/or supervise their children's activities on the Internet,
- marketing should not include links to other websites on the Internet if these do not comply with the rules of these guidelines,
- businesses and trades should use the at any time existing techniques that enable parents to control or limit the amount of material to which their children have access via the Internet.

In accordance with the Danish Radio and Television Act,¹⁸⁵ the Danish Minister of culture has issued an executive order on commercials and sponsoring in radio and television.¹⁸⁶ The executive order contains special rules concerning marketing directed at children under the age of 14. These rules include the use of figures from children's series, product of no interest to this group, the use of children in commercials.

The Minister of Science, Technology and Innovation may lay down rules for the content of information and content services to the extent that the services in question are comparable to radio or television programmes in terms of content. In this connection, the Minister of Science, Technology and Innovation may decide that advertising and sponsoring rules and rules to ensure that consideration is shown for children and young people, as provided in the Radio and Television Broadcasting Act, is to be applied in full or in part to such information and content services.¹⁸⁷ This possibility has not yet been used.

4.2. The Price Marking and Display Act¹⁸⁸

Any trader who offers goods for retail sale must by marking, display or other methods clearly indicate the price including VAT and other taxes for the product or unit of the product offered.¹⁸⁹ In case products are offered for retail sale with an indication of the cost of acquiring them on credit terms, information must be provided on:¹⁹⁰ 1) the cash purchase price, 2) the credit costs stated as an amount, and 3) the annual percentage rate of the credit costs calculated on basis of the provisions in the Credit Agreements Act.¹⁹¹ Where information about the price of products or services is indicated in advertisements or in other advertising material aimed at consumers, such information must also meet

185 Lov om radio- og fjernsynsvirksomhed. Act No. 1052 (17 December 2002).

186 Bekendtgørelse om reklame og sponsorering i radio og fjernsyn. Executive Order No. 194 (20 March 2003).

187 Section 89 of Consolidated Act No. 784 (28 July 2005) on Competitive Conditions and Consumer Interests in the Telecommunications Market, as amended by Act No. 1427 (21 December 2005).

188 Lov om mærkning og skiltning med pris mv. Consolidated Act, No. 209 (28 March 2000).

189 Section 1(1) of Consolidated Act, No. 209 (28 March 2000).

190 Section 2 of Consolidated Act, No. 209 (28 March 2000).

191 Lov om kreditaftaler. Act No. 398 (13 June 1990) with amendments.

these requirement.¹⁹²

As of 1 July 2006, these rules will be included in the Danish Marketing Practises Act (sections 13 and 14). The Danish Consumer Ombudsman has issued guidelines on Marketing and Price Information (2002). These guidelines scrutinise a number of frequently used promotional price statements that are known to cause confusion. The guidelines express the viewpoint that the Danish Consumer Ombudsman uses as a benchmark in his administration of the Danish Marketing Practises Act in relation to marketing and price information. The guidelines are of a general nature and includes rules on price comparisons, promotional expressions ('save', 'offer', 'free' etc.) and other marketing requirements.

The Price Marking and Display Act is enforced by the Danish Consumer Ombudsman. There are no administrative practice or case law on this act. Questions concerning price marking is, by the Danish Consumer Ombudsman, dealt with in relation to misleading advertisement as entailed in the concept of good marketing practices.¹⁹³

4.3. The E-Commerce Act

The Danish E-Commerce Act¹⁹⁴ comprises the Danish implementation of the 2000 E-Commerce Directive¹⁹⁵ and is in its wording kept close to that directive. The Danish act deals with Information Society Services¹⁹⁶ as defined in the directive and with the inherent limitations.¹⁹⁷ It is reasonably assumed that Premium Rate Services fall under the definition of Information Society Services. This does, however, not count for marketing material that is not delivered on-line (via a website or WAP).

Of particular interest in this connection are the requirements concerning general information, commercial communication and electronic contracts.

4.3.1. General Information and Commercial Communication

The act comprises some general information, which must be provided no matter whether the Content Provider is actually selling products. The User and the authorities must have easily available and permanent access to the following information:¹⁹⁸

1. the name of the Content Provider,
2. the geographic address at which the Content Provider is established,
3. an electronic mail address (and if applicable postal address) and other details of

192 Section 5(1) of Consolidated Act, No. 209 (28 March 2000).

193 See 4.1.

194 Lov om tjenester i informationssamfundet, herunder visse aspekter af elektronisk handel. Act No. 227 (22 April 2002) on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce.

195 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

196 Services in the information society (Information Society Services): any service that has a commercial purpose and that is delivered online (electronically over a certain distance) at the individual request of a recipient of the service.

197 The Act does not apply under circumstances relating to: 1) Taxation, 2) Personal data protection, 3) The rules of the Competition Act governing competition-restricting agreements, resolutions and coordinated practice, abuse of dominant position and merger control, 4) The activities of notaries or similar activities linked to the exercise of official authority, 5) The representation of clients in court, and 6) Games that involve wagering a stake with monetary value, including lotteries and betting transactions.

198 Section 7 of Act No. 227 (22 April 2002).

- the service provider which allow him to be contacted and communicated with,
4. the CVR number ('tax number'), if the service provider is registered in the Central Business Register ('CVR'),
 5. affiliation, if any, to authorisation schemes, including the relevant supervisory authority.

The general information to be provided does not give rise to any problems in connection to marketing in print media and on the Internet, where it is no problem to provide this information. It may, however, be argued that when providing Premium Rate Services, the User must have easily available and permanent access to the general information via the handset. The question on how this requirement is satisfied in this context is not dealt with in the Framework Agreement's code of conduct. It is assumed that the provision of an URL or a phone number, which give access to the information, will be sufficient to satisfy the requirement.

Where Information Society Services refer to prices, these are to be indicated clearly and unambiguously, and it must be indicated whether they are inclusive of taxes and delivery costs.¹⁹⁹ All commercial communication that is part of or constitutes an Information Society Service must be framed and presented so that it is clearly identifiable as such. The party on whose behalf the commercial communication is made must be clearly identifiable.²⁰⁰ Where promotional offers such as discounts, premiums and gifts are permitted, the conditions for participation in these arrangements must be easily accessible and presented clearly and unambiguously.²⁰¹

The provisions on price indication and commercial communication applies only to Information Society Services, and do thus not apply to marketing material in print media, but do apply to marketing material on the Internet and other on-line media.

4.3.2. Electronic Contracts

In addition to other requirements, the provider of Information Society Services must, before an order is placed, clearly, comprehensibly and unambiguously give the recipient of the service information about 1) the different technical steps to follow to conclude the contract, 2) whether or not the concluded contract will be filed by the service provider and whether it will be accessible, 3) the technical means for identifying and correcting input errors and 4) the languages offered for the conclusion of the contract.²⁰² Further, the service provider must indicate any relevant codes of conduct to which he subscribes and how those codes can be consulted electronically.

Before an order is placed, a service provider must make appropriate, efficient and accessible technical means available to the recipient of the service to enable him to identify and correct input errors. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.²⁰³ A service provider must acknowledge the receipt of the recipient's order without

199 Section 8 of Act No. 227 (22 April 2002).

200 Section 9(1) of Act No. 227 (22 April 2002).

201 Section 9(2) of Act No. 227 (22 April 2002).

202 Section 10 of Act No. 227 (22 April 2002).

203 Section 11 of Act No. 227 (22 April 2002).

undue delay.²⁰⁴

There are certain exemptions relating to transactions carried out by electronic mail and inter-business agreements ('parties who are not consumers'). This concerns the technical means to identify and correct input errors (section 11(1)), and the acknowledgement of receiving an order (section 12). Under Danish law, SMS and MMS messages are perceived as 'electronic mail', and does thus fall under this exemption. The provisions in the E-Commerce Act is found to be of a public law nature, which deals with requirements that do not influence on the validity of a contract. Failure to comply with the requirements may be enforced by the Danish Consumer Ombudsman, but may not as such deprive an agreement its validity.

4.4. The Contracts Act

The conclusion of contracts is regulated by the Contracts Act.²⁰⁵ Section 1 states that an offer and a reply to an offer shall be binding on the persons making them. There are no formal requirements under Danish law in connection to contracting, and thus no discussions on whether a binding contract can be entered via a mobile phone. It is of course a prerequisite that the User intends to be bound, which again requires information that makes foreseeable the consequences of an order.

The Consumer Complaints Board has in connection to a Premium Rate Service, consisting of a mobile chat service, established it is not usual that the User must pay for receiving SMS messages. The board did not find that the notification in question ('Remember DKK 3 per message') was sufficient to inform the User that he also had to pay DKK 3 for each received message. The consumer should not pay for receiving any messages.²⁰⁶

As long as the information requirements of the Act on Certain Consumer Contract is complied with, and the marketing material is drafted in accordance with good marketing practises, an order sent by SMS is sufficient to conclude a contract. The same counts for Code 900 Services, where the rules on information and pause before charging is complied with.

4.5. Certain Consumer Contracts Act

The Certain Consumer Contracts Act²⁰⁷ comprises the Danish implementation of the 1997 Distance Selling Directive.²⁰⁸ The act deals with information to be provide before and after concluding a distance selling contract and also the regulation of the right of withdrawal.

4.5.1. Prior Information

It follows from section 11, concerning distance contracts relating to products and non-financial services, that before any distance contract relating to a product or non-financial service is entered into, the Content Provider must provide the consumer with the

204 Section 12 of Act No. 227 (22 April 2002).

205 Lov om aftaler og andre retshandler på formuerettens område. Consolidated Act No. 781 (26 August 1996).

206 Forbrugerklagenævnet, j. 2003-4054/7-383. The Consumer Complaints Board, Case 2003-4054/7-383. See also 4.5.2.

207 Lov om visse forbrugeraftaler. Act 451 (9 June 2004) on Certain Consumer Contracts.

208 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.

following information:

1. the identity, the main business and the geographical address of the company, and in the case of a foreign company with a representative in this country, or if the supplier is otherwise represented by a third party, the relevant details of the company's representative, including its geographical address,
2. the nature and principal characteristics of the product or service,
3. the total price of the product or service, including fees and charges, including any delivery costs, VAT and all other charges, including charges and costs not paid by the company or charged by them or, when an exact price cannot be indicated, the basis for the calculation of the price,
4. conditions of payment, supply or other fulfilment of the agreement, any minimum subscription period, possibly also the means for the parties to terminate the agreement early or unilaterally, including an indication of related conditions,
5. whether there is a right of withdrawal under this Act,
6. any specific additional cost for the consumer of using the particular means of communication, if such additional cost is charged, and
7. how long the information is valid, including how long the product or service will be offered at the price indicated.

The information must be provided in a reasonable time before any agreement is entered into, and the information must be clear, unambiguous and comprehensible. It must be made clear that the information is being provided with a view to entering into an agreement. The information is to be provided in a way that is compatible with the communication technology used and that takes particular account of under-age persons.²⁰⁹

This information is usually provided in the marketing material prior to the ordering of the Premium Rate Service. The information requirements may be satisfied using e.g. billboards, Internet, TV, radio, newspaper adverts, SMS, MMS, WAP.

4.5.2. Order Confirmation

If a distance contract is entered into in respect of a product or non-financial service, the information set out above under 1 to 5 must be notified to the consumer on paper or on another durable medium²¹⁰ to which the consumer has access (order confirmation), unless the consumer has already received the information using this method.²¹¹ In addition, the Content Provider must provide information about 1) the conditions of use of the existing guarantee commitment and the repair and maintenance service, 2) any right of withdrawal under the Act on Certain Consumer Contract and the start date and duration of the cooling off period, and 3) the conditions and procedure for exercising the right of withdrawal, including the address to which the notification of withdrawal is to be sent. The information is to be provided as soon as possible after the contract is

209 Section 11(3) of Act 451 (9 June 2004).

210 In order for a medium to be considered a durable, it is required that the consumer can store the information that he receives on the medium in question, and in such a way that the information is available for future reference and can be reproduced unaltered. Parliaments Bulletin (Folketingstidende) 1999/2000, supplement A, p. 5938.

211 Section 12 of Act 451 (9 June 2004).

entered into.²¹²

One question that has attracted numerous discussions is what constitutes a 'durable medium'. A letter or e-mail is a durable medium. An SMS message, on the other hand, is not found to be a durable medium. A web site will probably satisfy the requirements of a durable medium if the information placed on it cannot be changed for at least a year. The URL must be notified to the User personally. This notification can be given via SMS.

There is an exemption regarding the order confirmation²¹³ in the case of contracts for a service ordered and provided using the same means of distance communication, provided that 1) the total service is supplied all at once, 2) the payment for the service is collected by the provider of the used means of communication, 3) the price of the service does not exceed DKK 75, and 4) the User is aware of the price of the service and the right of withdrawal. The User must, however, be provided on request with details of a geographical address to which the User may apply in the event of any complaints.²¹⁴ This exemption applies to most Premium Rate Services provided in Denmark.

An illustrative case dealt with by the Consumer Complaints Board concerned compliance with the information requirements in the context of Premium Rate Service (mobile chat service). A consumer was charged DKK 3 for each SMS message sent and received in connection with a mobile chat service. The consumer was released from the Network Operators claim concerning that service because the consumer was not correctly informed about the price. The agreement concerning the service was found to be a distance contract within the meaning of the Act on Certain Consumer Contracts. The service was, however, not found to fall under the exemption since the total service was not found to be 'supplied all at once'.

The consumer subscribed to the service on 20 July 2002, but did not receive the necessary information. At a subsequent subscription on 24 July 2002, the consumer received a SMS message stating that 'You are now logged on to the X-chat. To chat, you must send: CHAT T to 1231. Remember DKK 3 per message'. The board did not find that a SMS message was 'another durable medium' which could satisfy the requirements of the Act on Certain Consumer Contracts. And the price information was thus not correctly served. At a new subscription on 25 July 2002, the consumer received the same message, which was confirmed by the consumer by sending back the message 'Remember DKK 3 per message'.

The board laid down that it is not usual that the User must pay for receiving SMS messages. The board did not find that the notification was sufficient to inform the User that he also had to pay DKK 3 for each received message. The board found that not until the confirmation on 25 July 2002, the consumer were assumed to know that he had to pay more than the normal rate charged by the Network Operator. The consumer should not pay for receiving any messages.²¹⁵

4.5.3. Right of Withdrawal²¹⁶

The consumer may withdraw from most distance selling contracts within a period of 14 days. The right of withdrawal does not apply to 1) certain services such as transport and certain service of a 'cultural' nature,²¹⁷ 2) financial services covered by the Danish Act

212 In the case of purchase of products to be surrendered to the consumer, the information shall be provided no later than the time of surrender.

213 Section 12(4) of Act 451 (9 June 2004).

214 Section 12(5) of Act 451 (9 June 2004).

215 Forbrugerklagenævnet j. 2003-4054/7-383. The Consumer Complaints Board, Case 2003-4054/7-383.

216 Sections 17 to 22 of Act 451 (9 June 2004).

217 Section 9(2) of Act 451 (9 June 2004).

on Mortgage-Credit Loans and Mortgage-Credit Bonds, etc., 3) contracts relating to securities or financial services, where the price of the security or service depends on fluctuations in the financial market outside the supplier's control, which may occur during the withdrawal period, and 4) games and lotteries.

The 14 day period is to be calculated from the later of the following dates: 1) the day on which the contract is entered into if the contract relates to a service or a product to be produced or adapted to meet the specific requirements of the consumer, and otherwise on the day on which the purchased item or the first delivery is received by the consumer, or 2) the day on which the consumer receives the information which the Content Provider is required to provide on paper or other durable medium as mentioned above.

In the case of distance selling of products, the period expire no later than three months following the date on which the consumer receives the product, the first part thereof or the first delivery. In the case of distance selling of non-financial services, the period expire no later than three months following conclusion of the contract.²¹⁸

Where the contract relates to the distance selling of a non-financial service or a product to be produced or adapted to meet the specific requirements of the consumer, the right of withdrawal only applies until the start of performance, production or modification, provided that the User has already given his consent that the business may start performance, etc. before expiration of the cooling-off period.²¹⁹

The Consumer Complaints Board²²⁰ has concluded that sex services delivered via the telephone is covered by the information obligation in the Act on Certain Consumer Contracts. In the particular case, the board found that the business did not prove that a binding agreement was entered. The 73 year old consumer admitted to have called the service, but denied to have ordered a two month subscription. The service was advertised on television tele-text. He did not receive information concerning price, but a recorded voice asked him to type certain numbers, but he chose to quickly hang up. The board found that the consumer did not receive proper information, and that he was not aware that he was making a subscription. The board noted that by objecting to the bill, the consumer was entitled to rely on his right of withdrawal.

Under certain circumstances, it is possible to obtain the User's consent to there being no right of withdrawal. In the case of distance selling of services, the right of withdrawal only exists until the start of performance, production or modification, provided that the User has already given his/her consent that the Content Provider may start performance, etc. before expiry of the cooling-off period.²²¹ This option is used by most Content Providers. In the code of practice, annexed to the Framework Agreement, the following text-example is provided: 'If you reply YES you will pay DKK 25 per ringtone and agree to start receiving the service now. You hereby waive your right of withdrawal as defined in the Certain Consumer Contracts Act'.

If the consumer wishes to exercise his right of withdrawal, the consumer must notify the Content Provider within the period describe above. If the notification is on paper or on another durable medium available and accessible to the recipient, it is sufficient that

218 If the last day for exercising the right of withdrawal falls on a public holiday, a Saturday, Danish Constitution Day, 24 December or 31 December, the period expires on the following working day.

219 Section 18(4) of Act 451 (9 June 2004).

220 Forbrugerklagenævnet j. 2001-4055/7-1702. Case 2001-4055/7-1702.

221 This rule strengthens the consumer protection provided in article 6(3) of the 1997 Distance Selling Directive, where a right of withdrawal (as a minimum) only exists under such circumstances if the parties has agreed upon it.

the notification is dispatched before the deadline expires.

Goods must be returned at the expense of the consumer, unless the company has undertaken to collect it.²²² The right of withdrawal is conditional upon the received items being delivered to the company at its place of business in essentially the same condition and quantity as the time at which the consumer received them. If the goods has been damaged or reduced in number, the consumer retains the right of withdrawal unless such damage or reduction is caused by negligence or a lack of care on the part of the consumer.²²³

Provided the consumer's attention has been expressly drawn to the fact, the right of withdrawal does not apply to 1) goods that have been used, where it is obvious that such use will reduce the sale value of the good, and 2) sealed sound or video recordings or computer programs, if the consumer has broken the seal.²²⁴ None of those exemptions applies to the Premium Rate Services normally provided in Denmark.

222 Section 19 of Act 451 (9 June 2004).

223 Section 20(1-2) of Act 451 (9 June 2004).

224 Section 20(3) of Act 451 (9 June 2004).

5. Telecommunication Services that are not Premium Rate Services

Premium Rate Services are *inter alia* characterised by the premium charging being carried out by the Network Operator and shared with the Content Provider. It is, however, possible for the Content Provider to enter an agreement on payment directly with the User, and thus himself be in charge of the billing of the User. The Content Provider may thus make use of any numbers which are not reserved for Premium Rate Services, this includes free-call numbers in the 80cdefgh series.

The focus on these services has been on phone sex services and dialers. Content Providers must in this context comply with the legislation dealt with above. In addition, such Content Providers may not rely on the exemption concerning the Act on Certain Consumer Contracts and the Certain Payment Instruments Act. This means that an order confirmation must be sent by a durable medium, and that the agreement with the User must comply with the requirements set out in the Certain Payment Instruments Act, including the obligation to register with the Consumer Ombudsman.²²⁵ The latter act only applies if the User is provided with a means of payment, such as a code.

In cases concerning the use of e-mail services, the Telecommunications Complaint Board have had the opportunity to deal with questions on the Network Operator's obligation to guide the User in connection to a telecommunication service offered by the Network Operator.

5.1. Phone Sex Services

In October 2004 the Maritime and Commercial Court of Copenhagen²²⁶ upheld the claim presented by the Danish Consumer Ombudsman that a phone sex service provider, Nordic Media, was not allowed to bill consumers on the basis of caller ID information as there was no guarantee that the adult person who is billed for using the services actually did so.²²⁷ The Court thereby acknowledged a practise established by the Consumer Complaints Board.

The judgment stated that it is beyond dispute that Nordic Media had billed consumers on the basis of caller ID information alone. This, however, was not sufficient to establish the identity and the age of the User of the phone sex services, and that text boxes are little useful when people can easily proceed despite being under age. No prior agreement was made between the Content Provider and the User concerning the use and terms of the services for which Nordic Media had been charging. Nordic Media had thus acted contrary to the principles of good marketing practise, as set forth in section 1 of the Marketing Practises Act, by billing consumers without having the legal right to do so. The Court agreed that an invoice is misleading when it leaves a subscriber with the impression that he or she is obliged to pay even if this is not true. The billing concept was thus also found in breach of section 2 of the Danish Marketing Practises Act concerning misleading advertisement.

225 This was established by the Danish Consumer Ombudsman in connection to a case, where a Content Provider offered the possibility of paying a parking fee via a mobile phone, based on a contract between the User and the Content Provider.

226 SØ- og Handelsretten.

227 SØ- og Handelsretten sag N1/03. Case N 1/03 (20 October 2004).

In October 2003 the Danish Consumer Ombudsman had imposed a temporary injunction on Nordic Media's billing practises while at the same time instituting legal proceedings against the provider in the above-mentioned court. This step was taken after having received more than a hundred complaints regarding Nordic Media and their billing methods relating to services that were never ordered let alone used. The hotline telephone service in the Danish Consumer Agency was also familiar with the problem. In September 2003 alone more than five hundred queries were related to Nordic Media and their business practises.

Nordic Media was also fined DKK 50,000 for having dispatched 28 bills despite the temporary injunction and despite the fact that the Court had made an order to maintain the temporary injunction issued by the Danish Consumer Ombudsman.

After this case all Danish phone sex service providers accepted to abandon the billing concept based on calling number display information. This means that the providers have declared that they will cease to bill people on the basis of caller ID information unless arranged with the subscriber.

There has been no dispute of the Network Operators' right to collect the normal, domestic rate for such calls. The Content Providers in the phone sex cases were all easily identifiable. As elaborated on below concerning dialers, the Network Operator's may be responsible for not providing proper information on scams and possible means for avoiding losses in that context.

5.2. Dialers

The Danish High Court has dealt with the question of the Network Operator's responsibility in connection to dialers.²²⁸ From the User's phone connection, 74 calls to St. Helena were made in the period 14 to 27 July 2000. The Danish phone company TDC claimed DKK 30.969 for the calls. The calls were made by a computer-based dialer, downloaded on the consumer's PC. The consumer did not prove that the calls were unrequested, and the court assumed that the calls were caused, and technically approved, by the consumer's son (while the mother was on vacation) by accepting-commands via the computer's keyboard.

The court noted that while using the Internet, it was not directly visible that the Internet connection was established through a foreign country and thus at a much higher rate. Based on the evidence, the court found that it would not be clear for a normal consumer, without particular knowledge, what consequences the accepting commands would have, and the court found that the User would not be likely to have made the calls if she would have been aware of the consequences.

It was not emphasised, at the conclusion of the Internet-subscription, that the connection could lead to calls at another and much higher rate than the normal rate for the Internet-connection. It was assumed that the Network Operator had earned profits by the calls to the particular sex-service, and that the Network Operator, prior to the particular calls and because of similar complaint, was aware of problems relating to such calls to sex-services in St. Helena in connection to surfing on the Internet.

The court found that the Network Operator should have taken effective measures to solve or at least minimise the problems. On that basis, the High Court found it unfair

and contrary to the requirement of good faith to claim the amount concerning the calls to St. Helena. As legal base, the court used the Danish implementation of the 1993 Directive on Unfair Contract Terms.²²⁹

The Telecommunications Complaint Board has also dealt with a number of cases concerning dialers. In one case, a consumer could not acknowledge to have made a number of calls to Liechtenstein (DKK 3,390) in the period 11 February through 4 March 2004. The consumer noted that no-one in the household had made the calls and that those persons did not download files from the Internet due to the risk of viruses.²³⁰

The board attached importance to the fact that the Network Operator's inspection did not reveal any errors or sign of irregularity. The procedure resembles a number of similar cases where an Internet connection is made via a foreign number which means that the debiting is carried out by the Network Operator of the fixed line and not via the Internet Service Provider (ISP). On this ground the board assumes that the calls were made as a consequences of the downloading of a dialer by someone with access to the consumer's computer.

The board asked the Network Operator to which extent its subscribers were informed of the risk entailed with connecting to the Internet. The Network Operator informed that the problem was known and that it had taken measures to bar calls to certain countries ('adult barring arrangement'). Liechtenstein was put on the 'adult barring arrangement' observation list in the first quarter of 2004, and was fully included on the list as of 16 September 2004. The 'adult barring arrangement' was initially introduced as an offer to the subscribers, but was later made mandatory by the Network Operator from 15 August 2002.

The Network Operator had informed about the problems of dialers in various magazines, papers and own publications and website since 2000. From 19 April 2001, all new Internet customers received a folder about this problem and the possibility of barring foreign calls. In February to April 2002 all customers received such information on the back of their bills. The Network Operator made an announcement to the press each time the list of barred countries under the 'adult barring arrangement' was changed.

The board noted that there was no general basis to place the responsibility of downloading dialers on the Network Operator. It was noted that the Network Operators could not prevent this from happening unless it would generally bar access to make foreign calls. On the other hand, it was said that Network Operators, due to the magnitude of the problem and the fact that Users usually are unaware of the increased usage, have a duty to limit the problems as far as possible.

The board appreciated the solution where certain destinations automatically were barred. The board found, however, that the Network Operator should have informed both Internet and fixed line customers of the risk in a more direct and precise way, for example on the back of bills. Information on the Internet was under all circumstances not found to be sufficient. This information should be connected to information about how the customer could obtain further security by using billing control arrangements. The board mentioned that the information that the 'adult barring arrangement' was limited to certain countries could increase focus on the benefits of billing control

229 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. The Danish Contracts Act (aftaleloven) § 38c.

230 Teleankenævnet j. 11.01-0634-04. Telecommunications Complaint Board, Case 11.01-0634-04 (10 December 2004).

arrangements.

Despite the measures taken by the Network Operator, the board found that the Network Operator did not take sufficient steps to inform about the risk and possible precautions. On that basis, it was found unlawful to collect the claimed debts.

In a similar case²³¹ concerning a Network Operator who did not offer Internet access, the board came to the same conclusion. The board emphasised that the information should be provided to both Internet and fixed line customers. In yet another case,²³² the majority of the board found that the obligation to inform was more pronounced in a situation where the Network Operator had waited longer than the other Network Operators before implementing the permanent 'adult barring arrangement'.

When the 'adult barring arrangement' is applied, the User has little possibility to be released from a payment obligation. In a case before the Telecommunication Complaint Board, a User's denial of making calls to a satellites service (two calls amounting to DKK 1,471) was rejected by the board. The consumer argued that the calls must have been made by a dialer. The number in question was on the list of the 'adult barring arrangement' and required the consumer to type two digits before successfully calling the number. The decision was based upon the fact that administrative and technical examinations carried out by the Network Operator showed no signs of errors on the side of the Network Operator.²³³

5.3. E-Mail Service via Mobile Phone

The Telecommunications Complaint Board had the opportunity to deal with the principle question on the Network Operator's obligation to guide the User.²³⁴ The case concerned a User who had set up her mobile phone to check for e-mails every 5 minutes. Due to mistyping, the phone was calling up the WAP (Wireless Application Protocol) server, which was not displayed in the phone's display. After two weeks, the consumer noticed the unusual usage, which made the User contact the Network Operator's shop where she was told to wait for the bill. After receiving the bill, the User was helped to turn off the feature.

The board had received a number of complaints in connection to calls or attempted calls to a WAP-server as a consequence of wrong unintentional setting up of the phone's e-mail function. The board found on this basis that the setting up and managing of this function is complicated and requires both technical insight and great care. The board summed up the situation as follows:

- the technology concerning WAP and the e-mail client is rather complicated,
- the technological development of the handsets continuously includes more features which makes the handsets more complicated,
- the customers have not received a real service by the automatic calls, and
- the debiting is usually substantial since the User seldom realise the magnitude of the usage before receiving the bill.

231 Teleankenævnet j. 11.14-1120-04. Telecommunications Complaint Board, Case 11.14-1120-04 (10 December 2004). See similarly Teleankenævnet j. 11.14-1150-04. Telecommunications Complaint Board, Case 11.14-1150-04 (10 December 2004).

232 Teleankenævnet j. 12.01-0105-03. Telecommunications Complaint Board, Case 12.01-0105-03 (3 May 2004).

233 Teleankenævnet j. 11.01-0570-05. Telecommunications Complaint Board, Case 11.01-0570-05 (13 June 2005).

234 Teleankenævnet j. 10.10-0067-03. Telecommunications Complaint Board, Case 10.10-0067-03 (30 August 2004).

In connection to the particular case, the board mentioned that the User as a starting point, and in accordance with the terms of use, is liable for calls made from the phone. However, the board was of the impression that a combination of the complexity of the mobile phone and the extensive need for typing information contributed to the unintended calls.

The board wondered why producers of handsets did not take the risk of errors into account. It was noted that the phones usually was marketed and sold together with a subscription to the service of a Network Operator. The board found that the lack of instructions on the side of the producers does not deprive the Network Operators of an independent responsibility for the necessary and sufficient guidance. In this light, the board found that the Network Operator should had knowledge of the risk and should have provided information about activation and deactivation of the function, and that the lack hereof was of importance on the question on who is closer to take the loss for the unintended usage.

It was emphasised that the Network Operator did not properly inform about the potential problem, and based on the number of cases, the problem was found to be rather common. The Network Operator should have foreseen these problems and should have provided necessary and sufficient guidance and warnings concerning the possible unintended usage.

The board found that the User should have received proper guidance when buying the handset. Reference was made to the Danish Sales of Goods Acts article 76(1)(3) and the Danish Marketing Practises Act section 3 concerning guidance.²³⁵ The board members representing the consumer's interest noted that the problem did not only relate to guidance, but also that the Network Operator should not market and sell a product (e-mail access) without securing that there is not an obvious risk of unintended usage.

235 See 4.1.

6. Appendix: Acts and Institutions

6.1. Acts

Certain Consumer Contracts Act

Lov om visse forbrugeraftaler.

Act 451 (9 June 2004)

Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce.

Lov om tjenester i informationssamfundet, herunder visse aspekter af elektronisk handel.

Act No. 227 (22 April 2002)

Certain Payment Instruments Act

Lov om visse betalingsmidler.

Consolidated Act No. 1501 (20 December 2004) as amended by Act No. 603 (24 June 2005).

Competitive Conditions and Consumer Interests in the Telecommunications Market

Lov om konkurrence- og forbrugerforhold på telemarkedet

Consolidated Act No. 784 (28 July 2005) as amended by Act No. 1427 (21 December 2005).

Contracts Act

Lov om aftaler og andre retshandler på formuerettens område.

Consolidated Act No. 781 (26 August 1996).

Credit Agreements Act

Lov om kreditaftaler.

Act No. 398 (13 June 1990) with amendments.

Financial Business Act

Lov om finansiel virksomhed. Consolidated

Act, No. 613 (21 June 2005) as amended by Act No. 1428 (21 December 2005).

Lotteries Act

Lov om Classelotteriets Ordning og Forbud mod andet Lottospil m.m.

Act No 18027 (6 March 1869 – Eighteen hundred sixty nine).

Marketing Practises Act

Lov om markedsføring.

Act No. 1389 (21 December 2005).

Price Marking and Display Act

Lov om mærkning og skiltning med pris mv.

Consolidated Act, No. 209 (28 March 2000).

Radio and Television Act

Lov om radio- og fjernsynsvirksomhed.
Act No. 1052 (17 December 2002).

Sale of Goods Act

Lov om køb.
Consolidation Act No. 237 (28 March 2003).

Tax Assessment Act

Lov om påligningen af indkomstskat til staten
Consolidated Act No. 887 (20 September 2005) as amended.

6.1.1. Executive Orders

Commercials and Sponsoring in Radio and Television

Bekendtgørelse om reklame og sponsorering i radio og fjernsyn.
Executive Order No. 194 (20 March 2003).

Information and Content Services with Integrated Charging (Previously Code 900 Services)

Bekendtgørelse om informations- og indholdstjenester med integreret taksering (tidligere service 900-tjenester).
Executive Order No. 991 (6 November 2000) as amended by Executive Orders 1214 (18 December 2000) and 259 (10 April 2003).

Issuers of Electronic Money.

Bekendtgørelse om udstedere af elektroniske penge
Executive Order No. 1184 (6 December 2004)

Overall Danish Numbering Plan

Bekendtgørelse om den samlede danske nummerplan.
Executive Order No. 653 (3 July 2003).

Provision of Communications Networks and Service.

Bekendtgørelse om udbud af elektroniske kommunikationsnet og -tjenester.
Executive Order No. 638 (20 June 2005)

6.1.2. Circulars

Circular on Lotteries

Cirkulære om bortlodning (Til politidirektøren i København og politimestrene).
Circular 147 (1 August 1994).

6.2. Guidelines and Self-Regulation

Children, Young People and Marketing Practises

Børn, unge og markedsføring.
The Danish Consumer Ombudsman, 2002.

Framework Agreement for Mobile Content Services

Rammeaftale for mobile indholdstjenester (SMS brancheaftale).
Telecommunication Industries Association in Denmark, 2004.

Good Marketing Practises in the Telecommunications Market

Retningslinier om god markedsføringsskik på teleområdet.
The Danish Consumer Ombudsman, 2004.

Position Statement on E-commerce and Marketing on the Internet

De nordiske forbrugerombudsmænds standpunkt til handel og markedsføring på internettet.
The Danish Consumer Ombudsman, 2002.

6.3. Institutions and Organisations

Ministry for Science, Technology and Innovation

Ministeriet for Videnskab, Teknologi, og Udvikling

National IT and Telecom Agency

IT- og Telestyrelsen

The Danish Consumer Ombudsman

Forbrugerombudsmanden

The Danish Financial Business Council

Finanstilsynet

Telecommunication Industries Association in Denmark

Telekommunikationsindustrien i Danmark

The Danish Consumer Council

Forbrugerrådet

6.3.1. Courts

Maritime and Commercial Court of Copenhagen

Sø- og Handelsretten

The Danish High Court (Western Division / Eastern Division)

Landsretten (Vestre Landsret / Østre Landsret)

6.3.2. Boards

Consumer Complaints Board

Forbrugerklagenævnet

Telecommunications Complaint Board

Teleankenævnet

Code 900 Board

Service 900-Nævnet

The Danish Radio and Television Board

Radio- og tv-nævnet

Telecommunications Consumer Board

Telebrugernævnet

Telecommunications Complaints Board

Teleklagenævnet