

Benchmarking of existing national legal e-business practices

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Table of Contents

Denmark	1
1. General information on the national legal system	1
2. Electronic signatures	3
2.1 National legislation and administrative practices	3
2.2 Cross border regulatory issues	5
3. General elements of electronic contract law	6
3.1 National legal and administrative practices	7
3.1.1 Electronic invitation to make an offer and submission of an offer	8
3.1.2 Electronic acceptance	10
3.1.2.1 Information obligations in relation to electronic contract conclusion	10
3.1.2.2 Standard terms and unfair clauses	11
3.1.3 Choice of law and forum	13
3.2 Cross border regulatory issues	14
4. Electronic invoicing, payment and other matters related to execution of electronic contracts	15
4.1 National legislation and administrative practices	15
4.1.1 Electronic invoices	15
4.1.2 Payment	16
4.1.3 Delivery of the good or provision of services ordered electronically and withdrawal period	18
4.1.3.1 Non-performance of the obligation to deliver and late delivery	18
4.1.3.2 Right of withdrawal from the contract in B2C transactions and return of the good	19
4.1.3.3 Delivery of a good not in conformity with the contract	19
4.2 Cross border regulatory issues	20
5. General assessment of national legislation and administrative practices in the fields of e-signatures, e-contracts and e-invoicing	20
5.1 Main legal and administrative barriers to e-business	20
5.2 Awareness about national authorities in charge of solving legal problems in e-business	22
5.3 Legal and administrative best practices in e-business	22
ANNEX 1: Interviews performed	23
ANNEX 2: E-business national legislation	23

Denmark

1. General information on the national legal system

Denmark is a constitutional monarchy, consisting of Denmark, Greenland and the Faroe Islands. There is no single unified judicial system, and only Denmark proper is a Member of the European Union¹.

The usual way to implement an EU Directive in Denmark, regulating a new legislative field, is to make a specific law containing all regulatory provisions. However if a Directive concerns an already regulated field, the regulatory provisions are most often implemented through changes in the existing legislation.

The Danish legal system adheres to the civil law tradition. Legal principles are organised into a number of codes – many of which were created as a collaborative Scandinavian effort. This is the case, for instance, for much of the commercial legislation².

According to the Danish tradition of civil law, written legislation is the most important legal source. Court decisions are also considered important sources of law, but courts are not required to follow previous precedence even if it originates from a court placed higher in the judiciary system. The Danish court system is inspired by the traditions of continental Europe, and especially Germany.

The administration of justice in Denmark is mainly regulated by the Administration of Justice Act³. There is a one-instance appeal system in Denmark, i.e., decisions from the county courts may be appealed to the high courts, and decisions from the high courts may be appealed to the Supreme Court. Since a decision, normally, may be appealed only once County court cases rarely reach Supreme Court level, though this may be the case if the independent Board of Appeals grants a leave of appeal.

Commercial disputes are typically dealt with by the county courts for matters with a financial value of DKK 1,000,000 (about EUR 135,000) or less. For matters of a greater financial value, the cases are brought to the high court or the Maritime and Commercial Court.

In Civil Law court cases, there are two basic principles for dealing with evidence: 1) The parties of the dispute choose the evidence they wish to bring before the court, and 2) The court's assessment of the evidence is free in the sense that it is not bound by law and that the purpose of the assessment is to find the material correct result.

¹ Denmark has been a member of the European Community since 1 January 1973.

² Nordic Council, www.norden.org

³ Bekendtgørelse nr 910 af 27/09/2005 af lov om rettens pleje, http://www.retsinfo.dk/LINK_0/0&ACCN/A20050091029

The courts in Denmark have the power to re-balance the contractual rights and obligations of the parties.

The parties of a contract are also free to choose arbitration for settlement of a dispute.

Consumers may, however, choose to bring disputes concerning delivery of goods and services, including disputes pertaining to e-commerce, before the Consumer Complaints Board⁴ instead of the courts. Most consumer complaints are brought before the Consumer Complaints Board, as the cost of court proceedings is quite high (court fees and salaries for the lawyer).

Though the decisions of the Consumer Complaint Board are neither binding nor enforceable, they are nonetheless usually followed by businesses. If a decision of the board is not followed, the Board has the right to bring the matter to the courts as a representative of the consumer.

It should be noted that cases pertaining to marketing practices can also be addressed by the Danish Consumer Ombudsman who supervises and enforces the Danish Marketing Practices Act⁵. The rulings by the Ombudsman are not legally binding, but have certain significance because of the powers vested in the institution. The Ombudsman may issue injunctions to invoke the Act by bringing civil cases before the Maritime and Commercial Court in Copenhagen. Further, the Ombudsman has the authority to issue an interim injunction in situations where it is crucial to sustain a case against a trader, where the alternative of awaiting a court order could otherwise lead to failure for the whole purpose of bringing an action for injunction.

Denmark has a solid Trustmark ("e-mærket") supported by a number of business associations that also play an important role on a soft law level⁶.

⁴ Lov nr. 1118 af 12 December 2003 om forbrugerklager, http://147.29.40.90/_SHOWF_B733661454/1865&A20030045630REGL&0014&000001

⁵ Lov om markedsføring, Law no. 1389 of 21 December 2005. www.retsinfo.dk

⁶ <http://www.e-maerket.dk/>

2. Electronic signatures

2.1 National legislation and administrative practices

Denmark has implemented Directive 1999/93/EC on a Community framework for electronic signatures by the Electronic Signature Act (Law no. 417 of 31 May 2000). The law entered into force as of 1 October 2000.

The Electronic Signature Act is supplemented by two executive orders that both became effective as of 16 October 2000, namely Executive Order no. 923/2000 on "Security Requirements etc. for Certification Authorities" and Executive Order no. 922/2000 on "Reporting of Information to the National IT and Telecom Agency by CAs and System Auditors".

Denmark has carried out a very strict implementation of Directive 1999/93/EC. Like the Directive, Denmark has, however, no regulation concerning the contractual relationship between the parties who use digital signatures⁷.

The Danish Acts describes 3 types of signatures: 1) An electronic signature, 2) An advanced electronic signature, 3) An advanced signature based on a qualified certificate⁸. Only advanced signatures based on qualified certificates are regulated by the Act.

The Electronic Signature Act has an exact transposition of Article 5.1, letter a) of Directive 1999/93/EC. It is ensured that a qualified signature satisfies the requirements of a signature in electronic form, in the same manner as a traditionally written signature satisfies these same requirements in relation to paper-based data.

Article 5.1 letter b) and Article 5.2 (concerning legal effectiveness and recognition in legal proceedings) have not been implemented in Denmark.

This is due to the general rule in the Danish Administration of Justice Act (described in Section 1 above) which stipulates that Danish courts are free in their assessment of evidence.

Transposition of the provisions of the directive was therefore not deemed necessary or appropriate. As there have not yet been any cases for the high court or the Supreme Court, it is still remains to be seen how courts will rule in this field.

One of the interesting facts in the Danish implementation is that Denmark has chosen to interpret the Annex II section d. concerning requirements for verification of identity, based on the principle of

7 Henrik Udsen, 2002: Den digitale Signatur – ansvarspørgsmål, Forlaget Thomson, København

⁸ This signature can also be created with a secure signature creation device.

direct face-to-face identification (see below). This strict requirement is considered to be one of the main reasons for the very limited numbers of issued qualified certificates after the Digital Signature Act became effective⁹. At the moment (spring 2006), no Certification Authorities issue qualified certificates in Denmark.

The Danish government has established a Temporary¹⁰ Committee on the Legal Aspects of Electronic Signatures¹¹. The focus of the Committee has been to make recommendations to the government on possible needs for adjusting Danish law, so that any legal barriers for use of electronic signatures may be removed.

One of the major accomplishments of the Committee has been a review of all Danish acts, for the purpose of removing any formal requirements that directly or indirectly hinder electronic communication, such as a requirement for use of paper forms. All ministries have been obliged to make changes in their laws if any such barriers were found. The Committee concluded in its report from December 2004 that Danish legislation is sufficient in dealing with problems concerning the use and misuse of electronic signatures¹².

The Ministry of Science, Technology and Innovation has not experienced concrete legal problems concerning use of electronic signatures. This might be due to a very limited use of electronic signatures in business so far.

The reason for the very limited use of e-signatures in businesses might be the well functioning legal framework in the commercial area, thus resulting in low incentive for investment in signature technology. Furthermore, the courts are free to ascertain if a contract in a business relationship has been concluded and electronic signature is not a precondition for the validity or authenticity of a contract¹³ making it less required by business.

Typically, a cost benefit analysis has to show a gain before a new technology is widely adopted. Well known technologies, e.g. EDI, are still effective and prevalent among businesses. This minimises the requirement and demand for electronic signatures.

In contrast to the very modest use of electronic signatures in business relationships, electronic signatures are frequently used as an identification mechanism in e-government services. All e-government services that support electronic signatures are based on

⁹ Interview with Senior Consultant Glenn Leervard Bjørn, Danish Ministry of Science, Technology and Innovation

¹⁰ The Committee has been working for five consecutive years, and it seems probably that it will continue its work in the foreseeable future.

¹¹ The name of the Committee is "Justitsministeriets udvalg om retsvirkninger af digital signature mv."

¹² Betænkning 1456, December 2004,
<http://www.jm.dk/imageblob/image.asp?objno=73184>

¹³ See Section 3.1 below

OCES certificates¹⁴. OCES is a national standard of advanced electronic signatures defined by the National IT and Telecom Agency. OCES is not regulated by the Law on Electronic signatures.

The Danish government has called for more widespread use of electronic signatures in both business-to-business and business-to-government relations. Seen from a government perspective, it is a question of whether to use the carrot or the stick to enforce such a further use of electronic signatures. A driver for use in businesses may be a mandatory government requirement for use of signatures when communicating with the public sector or when providing services to the public sector. This procedure has been used for electronic invoices as described below. Such government requirements have not been introduced with regard to electronic signatures.

All Danish citizens have a national social security card. The Danish government and the Danish regions have established a steering group to analyse the possibilities of issuing social security cards with electronic signatures. A final report is expected in 2006¹⁵.

2.2 Cross border regulatory issues

Qualified certificates have the same validity and legal recognition, regardless of their country of origin. In principle, qualified signatures from other membership countries are therefore treated in the same way as qualified signatures originating from Denmark.

On a more practical level, e-services only accept the use of specifically approved types of signatures. This is due to both technological and financial issues. To accept a specific type of signature and to correctly read and interpret the content of the certificate, the receiving system has to be specifically configured. When accepting an electronic signature, validity must be checked with the issuing CA. This may involve financial and contractual issues that have to be dealt with, if a clearing arrangement is not in place.

A number of Danish acts, addressing the use of electronic signatures when communicating with the public sector, require a security level that as a minimum corresponds to the national certification standard OCES¹⁶. This means that advanced signatures based on an OCES certificate have become the most widely used standard.

While OCES on a technical level fulfils the directive's requirements of a qualified certificate, this is a national standard and therefore not qualified in the meaning of the directive. As the OCES is a national standard, it is likely that it will be neither adopted by other countries, nor technically interoperable with electronic signature systems from

¹⁴ OCES is short for Public Certificates for Electronic Services. In contrary to qualified certificates, an OCES certificate only demands for an indirect identification when being issued.

¹⁵ http://e.gov.dk/uploads/media/Elektronisk_identitetskort.pdf

¹⁶ Qualified signatures are of course accepted.

other countries without particular efforts aiming at international interoperability.

Technical interoperability depends mainly on semantic requirements to the certificate fields. An important factor of interoperability is also a question of general trust between and liability for certification service providers.

For an enterprise to obtain an advanced signature based on an OCES certificate, a Danish company registration number is needed. It is therefore at present not possible to obtain an OCES certificate for an enterprise not registered in Denmark.

3. General elements of electronic contract law

Directive 1997/7/EC on the Protection of Consumers in Respect of Distance Contracts has been implemented through the Consumer Contracts Act (Law no. 451 of 9 June 2004).

Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees has been implemented in national law through Law no. 28 of 21 January 1980 on buying, as later amended. The national law provides protection in line with the requirements of Article 2 of the Directive. The national law contains a 2-year limitation period in which the seller can be held liable for the non-conformity. Denmark has transposed Article 5, section 2 of the Directive which stipulates that the buyer must inform the seller of the lack of conformity within a period of two months from the date on which he detected such a lack of conformity.

Directive 1998/6/EC on Price Indications has been implemented through Law no. 209 of 28 March 2000 on pricing¹⁷. The Directive's obligations concerning correct and complete indicating of the selling price have been correctly implemented into a new specific law containing all the regulatory provisions. The Minister of Trade and Industry is authorised to lay down rules regarding the maximum number of prices to be indicated¹⁸.

Directive 2000/31/EC on information society services, in particular electronic commerce has been implemented into national Law no. 227 of 22 April 2002 on information society services including certain

¹⁷ Lovbekendtgørelse nr. 209 af 28. marts 2000 om mærkning og skiltning med pris m.v. (Prismærkningsloven); http://www.forbrug.dk/fileadmin/fs-images/jura/lovereagl/pml/l_pml.pdf

¹⁸ A number of guidelines have been issued by the Monopoltilsyn that originally administered the law, and later Forbrugerklagenævnet that took over the administration of the law in 1997.

aspects of electronic commerce¹⁹. Art. 5 and 6 concerning information to be given prior to the completion of a contract is implemented correctly in specific provisions in the Danish law containing the regulatory provisions from the Directive.

3.1 National legal and administrative practices

The regulatory framework for all contracts including electronic ones is - based on the Danish Act on Contracts and Other Legal Acts Pertaining to Property of 8 September 1986 as later amended (the Contract Law), which contains the basic principles of the Danish contract law.

It can be derived from the contract law that conclusion of contracts is not subject to formal requirements unless directly stated in a specific law. This principle has been recognised and accepted in numerous court decisions. A written document is not required, as such, to form a contract, which also means that electronic contracts are considered to be just as valid as a traditional paper contract.

There are no formal definitions of the concepts of offer/acceptance and contracts in the Danish contract law. *Both* offers and acceptances are considered valid and binding for the submitting party if they "manifest" a will to be bound in accordance with the content of the manifestation and the manifestation creates an expectation by the receiver of the manifestation that the obligation is established²⁰. The requirement to the certainty of the manifested will varies according a number of factors including, for instance, the content of the expressed will (a promise of a gift of 1.000.000 € requires greater certainty than a promise to enter into a contract between regular business partners), the customs in the area, the status of the parties (consumer/business), etc.

A contractual obligation will, however, only be enforced by the courts, if the party claiming the existence of the obligation can prove before the courts that the parties have actually entered into a valid contract. The practical question of documentation (evidence) of what really is agreed is consequently very important. The normal signature on a piece of paper is in Danish jurisprudence considered a "seal" of the agreement reached between the contracting parties during previous negotiations. As such, the signed contract is "proof" of the contractual obligation.

If it can be demonstrated before the court that a contract exists between the parties, it should be noted that the courts are free to interpret the contract and that the courts may "fill" in obligations if the area of the dispute is unregulated in the contract.

¹⁹ Lov nr. 227 af 22/04/2002 om tjenester i informationssamfundet, herunder visse aspekter af elektronisk handel;
http://www.retsinfo.dk/_GETDOC_/ACCN/A20020022730REGL

²⁰ The fact that offers are considered binding, means that offers cannot be revoked by the party submitting the offer before the end of the acceptance period, if the offer has been noticed by the party receiving the offer.

As it may be clear from the above, a contractual obligation may arise, when the will thereto has been expressed, even though the parties to the contract have only agreed orally on the most essential elements of the contractual obligations. The same applies for if the contract is in an electronic format that carries the will to a contractual obligation.

There has been no specific transposition of Art 9 (2) of Directive 2000/31/EC that excludes specific types of contracts to be concluded electronically. However, several existing Danish laws within the field covered by Article 9 (2) require the use of written documents. Examples can be found in the Danish Inheritance Law²¹ that stipulates that wills must be written and the Danish Registration of Property Law that requires written documents for the registration of transactions pertaining to property²²

3.1.1 *Electronic invitation to make an offer and submission of an offer*

As there are no formal requirements needed for the assumption of a contractual obligation, there is, of course, similarly no legal requirement to use electronic signatures in the conclusion of contracts. Some service providers use electronic signatures, however, as an extra security mechanism to prove that the contract has been accepted and entered into by the customer.

One of the core elements of the Danish contract law is, as described above, that contractual obligations arise from the manifestation of a will to be bound. This means, however, that it is difficult to determine if the goods and services that are offered by an enterprise (or private person) to the public through a homepage actually represent the necessary will to constitute binding offers.

Some legal authors have submitted that offers contained on web-pages are not expressing a will to be bound by the owner of the homepage to "one" or "more" individuals and that such information therefore merely constitutes a non-legally binding suggestion to make an offer. The Danish Consumer Ombudsman has on the other hand claimed that advertising on the internet constitutes a binding offer, and that this is – at least – clearly the case for businesses that have a "sales function" on their web-page²³.

The High Court of Jutland was in 2003²⁴ presented with the question of whether advertising on web-page for a used car from a second-hand car dealer should be considered a legally binding offer or non-binding invitation to make an offer.

²¹ Arveloven, Law no. 727 of 14 August 2001 (www.retsinfo.dk)
<http://www.themis.dk/synopsis/index.asp?hovedramme=/synopsis/docs/lovsamling/arveloven.html>

²² Tinglysningsloven, law no. 158 of 9 March 2006. (www.retsinfo.dk)

²³ The majority of the Danish legal theory agrees with the Consumer Ombudsman

²⁴ The judgment has been published in the weekly journal of the judicial system with the publication reference U2003.907V.

The used car dealer had mistakenly advertised a used Audi for sale for a price of DKK 119,900. The correct price was DKK 349,900. A consumer contacted the used car dealer on the phone and proclaimed that he wanted to buy the car for 119,900. He was informed during the telephone conversation that the price of 119,900 was incorrect and that the correct price was much higher. Later the same day, the consumer sent a confirmation of the agreement to the used car dealer by e-mail.

During the proceedings it was maintained by the consumer that the car had been advertised and that the lack of any reservations for mistakes on the web-page of the used car dealer meant that the car was legally offered at DKK 119,900 and that he thus could accept that offer.

The High Court of Jutland resolved the matter ruling in favour of the used car dealer. It is expressly stated in the grounds for the result (the ratio decidendi) that advertising on the internet *under the present circumstances* was to be considered an invitation to submit an offer.

The Danish Consumer Complaint Board has decided on a case where a consumer bought a hard disk drive on an on-line shop. The seller cancelled the order in the confirmation sent to the consumer, as the price shown on the homepage was too low²⁵²⁶

The Consumer Complaint Board noted that advertising of goods on a web-page was usually to be considered an offer.

In the present case, the web-page of the seller was designed in such a way that the consumer, prior to the sale, was asked to confirm that he/she had read the standard terms of the seller, by ticking a box to indicate that the standard terms had been read and accepted. The relevant clause of the terms stipulated: *"Our order terms: Our computer will now send an e-mail to you, so that you can determine if the registered order is similar to your requests. We have to request your confirmation that you perceive the e-mail as non-binding. We do not accept that we can cancel your order if the item is out-of-stock or shown with great mistake in the price."*

The majority of the members of the Complaint Board (4 out of 5) decided that the information on the web-page, under the present circumstances, only represented a non-legally binding invitation to submit an offer.

²⁵[Irrelevant comment].

²⁶ The case is referred in "Forbrugerrettegørelsen 2002-2003", p. 162.

3.1.2 *Electronic acceptance*

Acceptances are binding in Danish law when they are 1) received by the legal person who has made an offer within the acceptance period²⁷ and 2) are in compliance with the offer²⁸.

The main problem pertaining to electronic acceptances in Danish law has been the question of when (at what point in time?) electronic contracts are actually entered. This problem has been quite often debated in the Danish Jurisprudence²⁹, but it has now been solved with the implementation of Article 11 (2) of Directive 2000/31/EC in the Danish Information Society Law³⁰. The acceptance is considered to have reached the offeror, when he or she has access to the acceptance.

3.1.2.1 Information obligations in relation to electronic contract conclusion

The legislation in Denmark complies with the requirements laid down in Article 5 of Directive 2000/31/EC on electronic commerce, Articles 4 and 5 of Directive 97/7/EC on distance contracts, and Arts. 3, 4 and 5 of Directive 2002/65/EC on distance marketing of consumer financial services, regarding the information that must be given to the consumer before and after the order is placed. The Danish legislation does not specify stricter rules.

It is a general impression among the interviewed persons that enterprises are having problems with compliance with the information requirements. It is reported that the huge requirement for information to be given blurs the overall view of the service providers, which results in a lack of compliance with the Directives (Lars Schmidt, The Danish e-commerce Foundation). The information detailed information requirements are on the other hand also seen as good guidance tool for business. (Morten Kamper, The Danish e-business Association).

²⁷ If the offer is made by letter or telegram and no period for acceptance has been fixed, the acceptance must reach the offeror within the period as could be anticipated by him to pass when making the offer. In calculating this period, unless otherwise indicated by the circumstances, it shall be presumed that the offer is received in due time and that the acceptance is sent without delay after the person to whom it is addressed has had reasonable time to consider it and that it is not delayed in transmission. If the offer is made by telegram, the acceptance shall be communicated by telegram unless it can reach the offeror in due time by another method equally fast. A reply purporting to accept an offer but because of additions, restrictions or reservations does not correspond with the terms of the offer is regarded as a rejection combined with a counter-offer.

²⁹ See for instance Mads Bryde Andersen IT-retten 2nd edition, the first edition of the book also being available at <http://www.it-retten.dk/>

³⁰ E-handelsloven, Law no 227 of 22 April 2002 (www.retsinfo.dk)

A recent examination of 15 web-pages³¹ conducted by the Danish Consumer Ombudsman published 23 March 2006 has shown that there were significant problems in relation to the companies' compliance with the legislation. The Consumer Ombudsman found that 14 out of the 15 web-pages violated the rules. The Consumer Ombudsman noted that lack of knowledge of the legal framework seemed to be the reason for the widespread violation of the rules. All the companies exposed to the criticism have promised to rectify the problems.

Another examination from 2006 by the Danish Consumer Ombudsman showed a number of problems with internet auctions³². Seven major internet auctions sites were examined.

Following the national legislation transposing Directive 97/7/EC on distance contracts, sites are required to inform online bidders of their cooling-off rights. Particularly lack of information about statutory cooling-off rights seemed to be a problem and the examination concluded that "*sites' compliance with the rules in the Danish Sale of Goods Act leaves in many cases a lot to be desired*"³³.

The examination also caused the Consumer Ombudsman to criticise terms and conditions regarding payment, delivery and compensation as well as unsolicited distribution of e-mails.

The Consumer Ombudsman informed the owners of the sites that breaches that are deemed criminal or otherwise unambiguous will be subject to legal action.

The Information Society Act transposes the country of origin principle in Article 3 (1) of Directive 2000/31/EC. The Act specifically states that Danish suppliers must comply with Danish legislation regardless of whether the services of the supplier are aimed towards Denmark or other Member States.

The seller is obliged to provide the consumer with information about the language offered for the conclusion of the contract under the Danish Information Society Act.

3.1.2.2 Standard terms and unfair clauses

The uses of standard terms have given rise to different important questions in Denmark. Firstly, on what conditions standard terms can be considered an agreed part of the contract, and secondly, whether individual clauses of an unfair or otherwise burdensome nature in the standard terms are valid.

³¹ The 15 chosen webpages were all Danish. They have been chosen so that they represent 1) a large customer base, 2) different industries, and 3) so that they represent both on-line business and business with a physical presence

³² Consumer Ombudsman, 2006: Lowest Bid: Danish Internet Auctions Fail to Observe Marketing Law, <http://www.forbrug.dk/english/dco/dcopressreleases/internetauctions/>

³³ Consumer Ombudsman, 2006: Lowest Bid: Danish Internet Auctions Fail to Observe Marketing Law, <http://www.forbrug.dk/english/dco/dcopressreleases/internetauctions/>

Standard terms are only considered a part of the contractual agreement, when the party accepting the standard term has had a chance to read the terms prior to the conclusion of the contract.

Standard terms sent with an invoice or order confirmation or just made generally available on the web-page of the seller with direct connection to the actual sale will, as a general rule, not be considered part of the contractual agreement regardless of whether the contract is a business or a consumer contract. If the party being bound by the standard terms, knows that the terms will be applied (for instance from previous contracts) it is, however, likely that such previously agreed standard terms will be considered agreed. This would be true at least for B2B contracts³⁴.

Standard terms accepted by a point-and-click acceptance are generally considered agreed between the parties³⁵. It is, however, the opinion of the Danish Consumer Ombudsman that for a business to be in compliance with good marketing practices, the technical steps linked to concluding the contract must be clearly separated from other functions on the service provider's homepage.

The technical solution shall be such that the recipient must work through the terms of the contract in order to proceed on the conclusion of the contract. This can be done by the consumer "passing" and "confirming" a page with contract terms before the contract is concluded, possible by the terms appearing in full text on the page and the consumer confirming that he/she has seen it by scrolling down over the page and clicking on a confirmation button.

The question of whether individual clauses of the standard terms are valid depends on whether the clauses have been accepted. The more burdensome a clause is, the more highlighting of the clause is required for it to be considered a part of the agreement. However, other factors would be important too, namely any gap in the relative strengths of the parties. If a term of a standard contract is very unfavourable for the consumer in a consumer agreement, it seems likely that the clause would only be valid if the clause has been specifically accepted by the consumer.

Under Danish law, unfair contracts are covered by the general clause in section 36 of the Contracts Act. Under this section, the courts can amend or override a contract or other legal act, either fully or in part, if its application would be unfair or incompatible with good practice.

Sections 38a – 38d of the Contracts Act contain special rules applicable to consumer contracts. These clauses are implementing Directive 93/13/EEC on unfair terms in consumer contracts.

³⁴ See for instance Mads Bryde Andersen in "Grundlæggende aftaleret" p. 272

³⁵ See the Consumer Complaint Board on the hard disk referred to previously

As a consequence of this, consumers in Denmark are not bound by unfair clauses that are not highlighted even though they have clicked on the confirmation button. Unclear clauses are as interpreted against the author.

A survey from February 2006 carried out by the Danish Consumer Ombudsman (www.fs.dk) showed that 45% of the online vendors combined the right to cancel the contract with unfair terms. A typical unfair term is that the customer only gets a refund for the price of the purchased item, but not the vendor's expenses for transportation.

3.1.3 *Choice of law and forum*

Denmark has on 19 June 1980 ratified the Rome Convention on the law applicable to contractual obligations³⁶.

Denmark has ratified the Brussels³⁷ and Lugano Conventions³⁸ on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, but Council Regulation (EC) No 44/2001³⁹ that replaces the Brussels and Lugano Conventions in the other Member States countries is not applicable to Denmark.

Denmark has on 26 May 1981 ratified the United Nations Convention on the International Sale of Goods (CISG)⁴⁰⁴¹. Denmark has made however a reservation declaring that it will not be bound by Part II on the formation of the contract, as permitted by Article 92(1) of the CISG. This is important when a contract is governed by Danish law, as in such cases, the provisions of the Danish Contracts Act apply. If a contract is governed by the law of another country, the provisions of Part II of the CISG apply provided the other country has ratified the CISG in its entirety.

Upon ratifying the Convention, Denmark, has further declared, pursuant to article 94(1) and 94(2), that the Convention would not apply to contracts of sale where the parties have their places of business in Denmark, Finland, Sweden, Iceland or Norway⁴².

36 80/934/EEC: Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980

37 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters

38 16 September 1988 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters

39 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁴⁰ The Convention was implemented through Act no. 733 of 7 December 1988 on international sale of goods. The Act entered into force on 1 March 1990.

⁴¹ Denmark has also ratified The Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods, which remains effective between states which are not party to the CISG Convention.

⁴² Similar reservations has been made by the other Nordic countries

Choice-of-law/forum selection is not considered as being a specific barrier for e-business in B2B transactions in Denmark. The challenge for e-business in this area is the same as for traditional business relations.

Danish legislation provides that consumers may sue enterprises from other Member States at their own forum using Danish law. Enterprises from other Member States may equally only sue Danish consumers at Danish courts.

Directive 2000/31/EC on electronic commerce is based on a country of origin principle, which provides that information society services are only required to comply with the requirements of the Member State in which the service provider is located.

The connections between Recital 23 and Article 1(4) of the directive have given rise to some doubts in the Danish legal theory. It has been argued that it is difficult to see how the provisions interact in an example where a Danish enterprise sells services in another Member State and is sued for lack of compliance with the marketing rules. Here, the Danish enterprise should, according to the rules of the directive, comply with the Danish rules. The abuse of the marketing rules constitutes, however, an offence that should normally be settled under the national law, where the offence was committed (the *lex loci* principle), and further an offence that can be addressed by both the public and the offended individuals under private law.

3.2 Cross border regulatory issues

During the research, no specific court rulings on the use of electronic contracts in cross-border trade between enterprises have been identified. However, it seems reasonable to assume that especially small and medium-sized enterprises are unaware of the specific legal status of electronic contracts agreed with trade partners from another Member State. This could be an obstacle to cross-border use of electronic contracts.

4. Electronic invoicing, payment and other matters related to execution of electronic contracts

4.1 National legislation and administrative practices

The national legislation in the field of electronic invoicing, payment and delivery is basically centred on one main law in each of the three areas, namely the Electronic Invoicing Act, the Act on Certain Payment Instruments (in the field of electronic payment) and finally the Danish Sale of Goods Act (in the area of delivery).

4.1.1 Electronic invoices

In order to implement Directive 2001/115/EC on the conditions laid down for invoicing in respect of value added tax, the Value Added Tax Act⁴³ and the Executive Order on Value Added Tax⁴⁴ were amended. Both amended texts entered into force on 1 January 2004. The national text is, however, not literally identical to the text of the directive.

The law has been supplemented with two Executive orders issued pursuant to Law no. 1203 of December 27 2003 on public payments⁴⁵: Executive order no. 991 July 10 2004 Electronic settlement with public authorities⁴⁶ and Executive order no. 1075 November 11 2004 Information in OIOXML electronic invoice for settlement with public authorities⁴⁷.

Electronic invoices are valid under national legislation under the condition that the authenticity of origin and integrity of data are guaranteed through the use of advanced electronic signatures or Electronic Data Interchange (EDI). An advanced electronic signature must at least have a security level corresponding to an OCES certificate (as described above under section 1.2).

Invoices may be conveyed through other electronic means provided that it is agreed between the parties involved in the transaction and that the storage of the invoice complies with the general requirement of integrity and authenticity.

⁴³ Lov nr. 124 af 28. februar 2003 om ændring af momsloven,
<http://www.erhverv.toldskat.dk/display.aspx?oID=167277&vID=200268&mode=2>

⁴⁴ Bekendtgørelse nr. 1152 af 12. december 2003 om merværdiafgiftsloven (momsloven), <http://www.trm.dk/sw1285.asp?docid=bek20031152>

⁴⁵ Lov nr. 1203 af 27/12/2003 om offentlige betalinger m.v.;
http://147.29.40.91/_MAINRF_A458505114/1005

⁴⁶ Bekendtgørelse nr. 991 07/10/2004 om elektronisk afregning med offentlige myndigheder,
http://147.29.40.90/_SHOWF_B733661454/1865&B20040099105REGL&0019&000001

⁴⁷ Bekendtgørelse nr. 1075 11/11/2004 om information i OIOXML elektronisk regning til brug for elektronisk afregning med offentlige myndigheder;
http://www.oio.dk/files/OIOXML_elektronisk_regning_endelig_udgave.pdf

A valid electronic invoice (that meets the requirements described above) has the same legal status as a paper invoice. There is no requirement for traditional physical signature on the invoice.

An electronic invoice issued and dispatched from enterprises in other Member States are valid in Denmark, if they comply with the national requirements to electronic invoices.

There is no case law in Denmark concerning the use of electronic invoices.

The executive order on electronic settlement and the executive order on information in OIOXML (both mentioned above under section 1.4.1. require public institutions to be able to receive electronic invoices in the OIOXML format⁴⁸. The authenticity and integrity of the invoices are secured through the use of private value added networks.

Furthermore, the executive orders oblige enterprises which provide services to public institutions to send invoices electronically in OIOXML format.

Enterprises that are not able to send electronic invoices are required to use a private "read-in service", which scans the traditional paper invoice and transforms it into an OIOXML electronic invoice that can be accepted by the public authority. Enterprises have to pay about 1 Euro for the handling of each paper invoice.

The requirement laid out in the invoice legislation for mandatory use of electronic invoices when providing services to public authorities, is generally regarded as an initiative that will accelerate further private use of electronic invoices in B2B relationships.

4.1.2 *Payment*

The obligation to pay for goods and services in B2B and B2C transactions does not differ from the obligation to pay in traditional off-line business relationships. Article 14 of the Danish Sales of Goods Act, stipulates that if no extension of time has been granted by either party, the seller is not bound to deliver the goods except against the simultaneous payment of the price, and the buyer is not bound to pay the price except against the goods being simultaneously placed at his disposal.

The Nordic Consumer Ombudsmen have issued a joint position statement on e-commerce⁴⁹ in which it is stated, that payment (by consumers) shall normally not be made before the product has been delivered. Standard contract terms for advance payment may be deemed unfair.

⁴⁸ OIOXML is a national format for electronic invoices based on UBLXML. www.oio.dk

⁴⁹ Position statement of the Nordic Consumer Ombudsmen on e-commerce and marketing on the Internet, 2002.

The Position Statement reflects the specific legislation and legal practice that has been developed for e-commerce in the Nordic countries and also provides, in some areas, an indication of what should apply as good marketing practice. It is our assessment that the statement reflects the current law in Denmark.

There has been no transposition of the non-exhaustive list of terms which may be regarded as unfair in the Annex to Directive 93/13/EC. Unfair terms, including unfair terms pertaining to payment, are covered by the general clause on unfair term in section 36 of the Contracts Act⁵⁰. The courts may, as described under Section 1 above, modify or set aside a contract, in whole or in part, if it would be unreasonable or at variance with the principles of good faith to enforce it.

Means of payment and the obligation of the parties regarding the use of certain payment instruments

Law no. 414 of 31 May 2000 on Certain Payment Instruments⁵¹ implements Article 7 of Directive 1997/7/EC on distance contracts and Articles 7 and 8 of Directive 2002/65/EC concerning payment.

Law no. 414 of 31 May 2000 on Certain Payment Instruments gives the consumer a high degree of safety in relation to online payment. The consumer is entitled to a full compensation if his payment card has been misused in an online purchase. This provision is in accordance with Article 8 of Directive 97/7/EC (for B2C contracts on goods) and Articles 7 and 8 of Directive 2002/65/EC (for contracts on financial services)

Other types of physical means of identification which are associated with specific holders and designed for electronic reading are also covered by the legislation. This means that a consumer is protected if he uses his mobile phone⁵² as a payment instrument.

Other types of online payment systems, (e.g. micro payment systems) are covered by the compensation rules in the Law on Means of Payment if they fulfil certain criteria stated in the Act. The regulation only applies to prepaid payment instruments, if the value of the payment instrument may exceed DKK 3,000⁵³ or if the payment instrument may be automatically recharged for the holder's account.

If a consumer uses a traditional bank transfer when ordering goods or services online, the consumer is not entitled to a refund from the

⁵⁰ See section 3.1.2.2 above

⁵¹ Lov nr. 414 af 31/05/2000 om visse betalingsmidler;
http://147.29.40.90/ SHOWF_B733661454/1865&A20000041430REGL&0022&000001

⁵² The SIM Card is the actual means of payment.

⁵³ Approx 400 Euros.

payment issuer if the payee (e.g. the online vendor enterprise) fails to deliver as agreed.

Danish personal data regulation⁵⁴ requires that the transfer of debit card details and other codes concerning payment systems via the Internet are to be encrypted. The same applies for the subsequent storage of payment information on a server that is linked to the Internet.

No major practical problems in relation to online payment have been reported. In spite of clear legislative protection, some consumers however still feel reluctant to use their payment card online due to fear of misuse.

4.1.3 *Delivery of the good or provision of services ordered electronically and withdrawal period*

4.1.3.1 Non-performance of the obligation to deliver and late delivery

The general non-performance and late delivery rules are contained in the Sale of Goods act. The regulation of B2B and B2C are, however, not identical.

In B2B transactions, the purchaser of goods or of services is granted the following remedies in case of non-delivery, according to the Sales of Goods Act⁵⁵:

The purchaser can demand specific performance or can terminate the contract. If the late delivery was or the seller must have presumed it to be immaterial to the buyer, the buyer may not terminate the contract unless he has made delivery on a specific date a condition of the contract.

In a commercial sale any delay is considered to be material.

If the time for delivery has expired and delivery has not been made and if the purchaser intends to affirm the contract, the buyer must inform the seller of his intention to affirm the contract within a reasonable time and without undue delay on inquiry from the seller. If he fails to do so, the buyer will lose his right to require delivery.

In addition to the above, in B2B transactions, the buyer will in accordance with Articles 23 and 24 in the Sales of Goods Act usually be entitled to damages if the goods are not delivered at the agreed time.

In case of non-delivery, the B2C purchaser of goods or of services is granted the same remedies as the B2B purchaser. However, in the case of non-delivery, the buyer may only declare the contract

⁵⁴ Lov nr. 429 af 31/05/2000 om behandling af personoplysninger (transposition of Directive 1995/46/EEC on the protection of individuals with regard to the processing of personal data and on the free movement of such data)

⁵⁵ Article 21 to 27 of the Act. Købeloven. Law no. 237 of 28 March 2003 (www.retsinfo.dk)

terminated if the delay is material to the buyer and the seller must have assumed this. If the seller offers to deliver the goods, the buyer may not declare the contract terminated. This shall not apply if the seller does not, on demand, deliver the goods within a reasonable period of time fixed by the buyer or, if no such period has been fixed, within a reasonable time.

4.1.3.2 Right of withdrawal from the contract in B2C transactions and return of the good

The right of withdrawal for contracts governed by Directive 97/7/EC on the protection of consumers in respect of distance contracts is 14 calendar days. According to the Consumer Contracts Act⁵⁶, implementing Directive 2002/65/EC, for contracts concerning financial services the cooling-off period is also 14 calendar days.

4.1.3.3 Delivery of a good not in conformity with the contract

In accordance with the Sales of Goods Act that implements Directive 1999/44/EC, the seller must deliver goods to the consumer which are in conformity with the contract of sale.

In case of lack of conformity the consumer shall (by his choice) be entitled to either have the goods brought into conformity free of charge, have the goods replaced (delivery of substitute goods), have an appropriate reduction made in the price or have the contract rescinded.

The consumer's rights as described above must be asserted within a 2-year period.

The Danish Act on Consumer Complaints⁵⁷ approves the establishment of the Consumer Complaints Board.⁵⁸ The Consumer Complaints Board deals with complaints from private consumers concerning goods, labour or services provided by businesses (The cost of the goods or services must be between DKK 500 and DKK 100,000). Complaints may not be lodged by public authorities or public institutions. 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.

The Consumer Complaints Board is empowered to hear only those claims that fall within the purview of the Danish courts. This means that a complaint may be heard, if product or service was bought on the internet, etc. from a business that deliberately targets the Danish market⁵⁹.

If a dispute arises in connection with a cross-border transaction, the consumer is able to contact the Danish contact point of the

⁵⁶ Lov nr. 451 af 09/06/2004 om visse forbrugeraftaler

⁵⁷ Lov nr. 456 af 10. juni 2003 om forbrugerklager

⁵⁸ www.fs.dk

⁵⁹ www.fs.dk

Consumer Europe network⁶⁰. The Consumer Europe has a list of other contact points in Europe and a step-by-step guide on how to complain.

The procedure for complaints in cases of cross-border transactions is considered to be inadequate and ineffective. This is both due to lack of awareness of the possibilities for complaints, and the mental and practical barriers that exist when a consumer has to lodge a complaint to a foreign vendor in an unfamiliar language. There is no report on how the complaining system actually works.

4.2 Cross border regulatory issues

There are no court rulings on electronic invoicing or payment related to execution of cross-border electronic contracts

It is difficult to make an assessment of the awareness in Denmark regarding the possibilities for effecting cross-border payments offered by Regulation 2560/2001, with equal charging to domestic transfers, because although transfers made in euros are covered by this regulation, , transfers in the Danish currency (DKK) are not covered⁶¹. This means that a money transfer in DKK from a Danish bank account to a bank account in another Member State does not benefit from the principle of equal charges for a cross-border transactions and a strictly domestic transaction within the European Union.

5. General assessment of national legislation and administrative practices in the fields of e-signatures, e-contracts and e-invoicing

5.1 Main legal and administrative barriers to e-business

The following main legal and administrative barriers to e-business in Denmark have been identified:

1. Legal uncertainty of legal effectiveness and recognition of e-business documents in national trade relations

The Danish civil law tradition means that written legislation forms the most important source of law. The specific legal effectiveness and recognition of e-business documents in national trade are regulated by a general rule in the Danish Administration of Justice Act which stipulates that Danish Courts are free in their assessment of evidence. Thus, court decisions represent an important source of law

⁶⁰ www.forbrugereuropa.dk/

⁶¹ http://www.europa-kommissionen.dk/presse/europa/december2003/bankkunder_slipper_for_gebyr/

in the field of e-business. However, no court cases from Supreme Court or High Court have been identified in the fields of e-signatures, e-contract conclusion and e-invoicing. This means that administrative bodies and enterprises are left uncertain about the exact legal status of electronic business documents.

2. Legal and administrative barriers to cross-border exchange of electronic signatures, electronic contracts and electronic invoices

Two administrative practices are considered an obstacle to cross-border exchange of electronic signatures. Firstly, the lack of an international standard in the area means that Denmark has implemented the national standard OCES, which is not at the moment technically interoperable with electronic signature systems from other countries. Secondly, for an enterprise to obtain an advanced signature based on an OCES certificate requires a Danish company registration number. Therefore it is not possible to obtain an OCES certificate for an enterprise not registered in Denmark.

As regards electronic contract conclusion, it seems reasonable to assume that especially small and medium-sized enterprises are unaware of the specific legal status of electronic contracts agreed with trade partners from another Member State. This could be an obstacle to cross-border use of electronic contracts.

The executive order on electronic settlement and the executive order on information in OIOXML require public institutions to be able to receive electronic invoices in the OIOXML format, which - in this case - is an early adoption of the UBL 0.71-standard. As with the OCES format, this is a national standard and it is not supported by electronic invoice systems in other countries. Therefore it can be expected that there will be very limited cross-border exchange of OIOXML electronic invoices. However the next generation of OIOXML will be based on a North European subset of UBL 2.0. It enables domestic and cross border trading (B2B and B2C and B2G) in 2007-2008.

To lower the barriers even further the Danish Government has taken initiative to establish a secure, reliable and interoperable exchange of business documents via Internet with open standards. The infrastructure will be in place July 2007.

3. Compliance problems for online shops

Two surveys from 2006 by the Consumer Ombudsman showed significant problems in relation to online shops and online auctions. The surveys revealed problems of enterprises' compliance with especially the requirements of Directive 2000/31/EC on Electronic Commerce and Directive 97/7/EC on Distance Contracts.

In the survey on online shops the Consumer Ombudsman cited a general lack of awareness among enterprises about the rules as a main cause of problems.

4. The legislation offers limited protection for smaller businesses in electronic commerce

While consumers are relatively well protected by the Danish legislation and the Consumer Ombudsman institution, enterprises are offered a very low level of protection by the legislation based on the rationale that commerce between to companies are a transaction between two equal partners. However, in the case of small companies buying online, this can be a barrier to conducting business online.

5.2 Awareness about national authorities in charge of solving legal problems in e-business

The awareness about national authorities in charge of solving legal problems in e-business amongst consumers and businesses has not been subject to a particular study.

However, the examinations conducted by the Danish Consumer Ombudsman⁶² have demonstrated a lack of awareness among business in relation to the general legislation. This implies, in turn, that there could be a lack of awareness about national authorities in charge of solving legal problems in e-business.

In relation to consumer awareness, it could be argued that the fact that many consumers remains reluctant to use their credit card for payment over the Internet despite the safeguards offered to them, could be taken as a sign of lack of awareness about national authorities in charge of solving legal problems in e-business.

5.3 Legal and administrative best practices in e-business

The following legal and administrative best practices in Denmark are:

1. Committee on the legal aspects of electronic signatures

The Danish government has established a temporary Committee on the Legal Aspects of Electronic Signatures. One of the major accomplishments of the Committee has been to review all Danish acts with the purpose of removing any formal requirements that directly or indirectly hinder electronic communication, such as a requirement for use of paper forms. All ministries have been obliged to make changes in their laws if any such barriers were found.

2. The legal and administrative framework for electronic invoices

The executive order on electronic settlement and the executive order on in-formation in OIOXML require public institutions to be able to receive electronic invoices in the OIOXML format. The requirement described in the invoice legislation for mandatory use of electronic invoices when providing services to public authorities are generally regarded as an initiative that will accelerate further private use of electronic invoices in B2B relationships.

⁶² Described above primarily under section 3.1.2.1

ANNEX 1: Interviews performed

- Allan Eksling-Hansen, Finance Director, Gatetrade
- Bjarne Willingshøj, Head of Secretariat, Danish Commerce & Services
- Henrik Udsen, Assistant Professor, Ph.D, Henrik Udsen, The Faculty of Law at the University of Copenhagen
- Jan Trzaskowski, Assistant Professor, Ph.D., Law Department of Copenhagen Business School
- Jane Eis Larsen, The Danish IT Industry Association
- John Sarborg, Senior Consultant. ITEK (of the Confederation of Danish Industries)
- Lars Schmidt, Director, E-commerce Foundation (E-handelsfonden)
- Lars Quistgaard Bay, Lawyer, Danish Commerce & Services
- Morten Kamper, Director, Danish E-business Association
- Peter Fogh Knudsen, Director, Consumer Europe

ANNEX 2: E-business national legislation

The regulatory framework for e-business in Denmark is based on the Sales of Goods Act⁶³ and the Act on Contracts and Other Legal Acts Pertaining to Property⁶⁴. These laws are supplemented by the Consumer Contracts Act⁶⁵, the Marketing Practices Act⁶⁶, the Electronic commerce Act⁶⁷ and the Electronic Signature Act⁶⁸. The Act on Processing of Personal Data⁶⁹ also has an important role in the regulation on e-business.

⁶³ Bekendtgørelse nr. 237 af 28/03/2003 af lov om køb,

http://147.29.40.90/_SHOWF_A725741229/77&A20030023729REGL&0003&000004

⁶⁴ Bekendtgørelse nr. 781 af 26/08/1996 af lov om aftaler og andre retshandler på formuerettens område,

http://147.29.40.90/_SHOWF_A725741229/77&A19960078129REGL&0002&000001

⁶⁵ Lov nr. 451 af 09/06/2004 om visse forbrugeraftaler;

http://147.29.40.91/_MAINRF_B428059268/708

⁶⁶ Lov nr 1389 af 21/12/2005 om markedsføring,

http://147.29.40.90/_SHOWF_B733661454/1865&A20050138930REGL&0002&000010

⁶⁷ Lov nr 227 af 22/04/2002 om tjenester i informationssamfundet, herunder visse aspekter af elektronisk handel,

http://147.29.40.90/_SHOWF_B733661454/1865&A20020022730REGL&0003&000001

⁶⁸ Lov nr. 417 af 31/05/2000 om elektroniske signaturer,

http://147.29.40.90/_SHOWF_B733661454/1865&A20000041730REGL&0004&000001

⁶⁹ Lov nr. 429 af 31/05/2000 om behandling af personoplysninger,

http://147.29.40.90/_SHOWF_B733661454/1865&A20000042930REGL&0006&000001