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The Way to Over-indebtedness— Intensive Marketing, Easy Access to Loans, and Insufficient Legislation (Denmark)

Consumer credit is increasingly offered, for various purposes and in various ways. In particular, electronic Web and SMS loans have been growing considerably over the last few years, and they attract attention owing to their high costs. The easy access to credit, in combination with intensive marketing, contributes to increased private borrowing, thus creating a debtor culture. The fact that easy access to credit is not only to the benefit of the consumer is reflected in the main register for default on private debt in Denmark. Here more than one in 20 adult Danes are registered with a bad credit history, and the defaulted debt has doubled in the last six years. The focus of this article, therefore, is on the legal problems related to easy access to non-secured consumer credit as illustrated by Danish legislation. It will be suggested that the legislation is not functioning effectively and that more well-proportioned solutions are needed. A modern approach should recognise that consumer credit differs from other consumer arrangements, because consumers run a special risk of becoming over-indebted—not only to their own detriment but ultimately also to that of society. One of the possible solutions is to limit marketing and introduce responsible lending standards.

1. Introduction

Consumer credit is increasingly offered, for various purposes and in various ways. In Denmark, Web-based and Short Message Service (SMS) loans have been growing dramatically since 2007, and they particularly illustrate the problems associated with lending and, especially, borrowing. The focus of this article will, therefore, be on these loans. The facts outlined below accentuate the problems.

The marketing of consumer loans is intensive, and it does look tempting when it says this:

You can use the money for whatever you want—forget everything about reporting and follow-up by your banking consultant! Recapture your freedom and control your own finances—it is only reasonable!^{*1}

Generally, the marketing sends out the signal that it is okay to borrow and contributes to the creation of a debtor culture with messages such as “Why wait when you can get what you want now?” (without having to do something so apparently old-fashioned as saving up first). Through this, the traditional social condemnation of being indebted is becoming erased.

Web and SMS loans are not only marketed intensively. They are also easier to obtain than ordinary loans. The Internet and SMS media facilitate borrowing. Accordingly, a loan can be obtained at home, by computer or phone, without a physical meeting with the creditor. The not overly stringent assessment of creditworthiness, furthermore, increases the chances of getting a loan. The assessment is done “without budgeting and boring questions”, and frequently the one and only requirement is that the borrower not be in a debt default register.^{*2} The answer is provided within a few minutes, after which the amount of the loan is transferred to the borrower’s account.

However easy it is to borrow, it is equally expensive. The Web and SMS loans address the (typically) young part of the population, which is accustomed to using electronic media. Especially the SMS loans seem to appeal to very young borrowers and involve particularly high costs. Thereby, part of a generation is risking starting adult life indebted—with debt that could follow this part of the generation for many years to come, as debt relief is only rarely granted to young people and only in rare cases includes consumer loans.

Furthermore, with their assessment of creditworthiness not being the strictest, the Web and SMS loans are addressed to individuals who are already indebted and who would have difficulty in getting a less cost-intensive loan (e.g., from a bank). The short maturity of the loans and advertisements stating that one can borrow when short of money for things such as a holiday trip also illustrate that the loans are directed at individuals with temporary financial difficulties or with few savings. If you compare Web and SMS loans with other loans, the following seems to apply as a rough rule of thumb: the shorter the maturity, the higher the costs. The fact that the formula for calculating the APR depends on the maturity only partly explains this relationship.^{*3}

That the high costs of the loans are due to the creditor’s increased risk in connection with these types of loans seems to be only a qualified truth. The costs related to the loan mean that the amount of the loan will often be far more than repaid; accordingly, a debtor who is not paying the last instalments is not necessarily a bad piece of business. The loans consist of small amounts, and the risk that a debtor cannot repay the entire amount of the loan will be spread over the majority of paying debtors. Interest on default enters in if the loan is not paid back on time and there is assistance of the bailiff’s court in collecting the debt, including seizure of any property of the debtor.

The focus of this article is on the legal problems related to easy access to non-secured consumer loans as illustrated by Danish legislation.^{*4} Since these types of loans are often taken up via electronic means, this will be used as an example throughout the article. The question is whether the legislation is functioning effectively and provides well-proportioned solutions. If not, which would be the more appropriate solutions?

¹ See www.SMSlaane.dk. All Web sites referred to in this article were visited on 15 January 2014 and are in Danish.

² Links to a series of providers can be found at www.laane-siden.dk/lan-penge. See also the site referred to in Note 1.

³ See the calculations from Mybanker.dk A/S in L.L. Andersen, V. Greve. *Åger* [‘Usury’]. Copenhagen: Thomson Reuters 2010, p. 161 ff. (NB: all books and articles cited in this paper are in Danish unless otherwise is stated).

⁴ The electronic means particularly include the Internet (specifically the World Wide Web) and SMS, but other means, among them the Wireless Application Protocol (WAP), are gaining ground in greater numbers. Typically, a computer, which today also might be a tablet computer or mobile phone, is used as a communication tool in this connection.

2. The market situation

2.1. Products

So-called instant loans obtained on the Web or by SMS consist, basically, of two types of loans: SMS loans are for small amounts, ranging from 500 to 5,000 Danish kroner (DKK) (67 to 670 euros (EUR), typically borrowed for 15 or 30 days, and the APR is often 1,500–4,500%.⁵ Web-based loans are of a somewhat larger size, up to DKK 100,000 (EUR 13,400), repayable within a longer period of time than SMS loans, and the APR is typically 35–50%.

Even though the cost-intensive SMS loans in particular may give rise to worry, a complete list of the loan providers involved does not exist. Information from the three major loan providers that the Danish Consumer Ombudsman has obtained and relayed to the press shows that loans have increased from less than 40 million DKK (EUR 5.36M) in 2010 to more than DKK 91M (EUR 12.2M) in 2012 and that in 2013 more than 19,000 individuals took out SMS loans. In overall terms, the number of electronic loans has quadrupled since the financial crisis took shape in 2008.⁶

Consumer credit granted by companies who do not take deposits amounted to 21 billion DKK (EUR 2.81B) by the end of 2013. Of these loans, 41.2% were unsecured loans, 40.9% charge-account cards and credit cards, and 17.9% secured loans. These loans amounted to ‘only’ DKK 14B (EUR 1.88B) 10 years ago. The cost-intensive SMS and Web loans fall under the category of unsecured debts, which have also increased in the last decade, from DKK 5.1B to 8.7B (EUR 0.68B to 1.17B).

However, the loans are easily overlooked when one considers the total Danish lending market. Here one will find far more extensive financing through banks and mortgage-credit institutions, which, however, also contributes to the total debt of Danes and, consequently, their ability to repay unsecured debts, among other debt. In comparison, at the end of 2013, loans to households amounted to DKK 435B (EUR 58.31B) for the banks and DKK 1,319B (EUR 176.8B) for the mortgage-credit institutions.⁷ In overall terms, the loans of banks to households have doubled within the last 10 years.

2.2. Consumers

As far as can be ascertained, there are no statistics on whether SMS and Web loans actually cause an increase in over-indebtedness among consumers. The figures from the two private (negative) credit registers, wherein individuals with a bad credit history are registered, therefore having difficulty in taking out further loans, do not mention which types of loans specifically cause the defaulted debt. The electronic loans probably account for a share of the total, given that more than one in 20 Danes are registered as having a bad credit history, that defaulted debt has doubled in the last six years, and that those registered represent particularly heavily the young part of the population, and when one considers the facts that loans are easily accessible via electronic means and that these loans have been increasing over the last few years and are directed specifically at the mentioned section of the population.

The main register for defaulted private debt—Experian (formerly known as RKI, Ribers)—in January 2014 included 5.24% of the adult population (232,804 persons), and the average debt is approx. DKK 72,000 (EUR 9,651). The 31 to 40 age group makes up the largest share, with 7.59% being registered (61,855 individuals). Defaulted debt has increased from DKK 8.5B (EUR 1.14B) in 2008 to DKK 17.0B (EUR 2.28B) in 2014.⁸ By comparison, 147,650 individuals were registered in Denmark’s second register—Debitor Registret—as of 1 February 2014.⁹

⁵ EUR 1 was DKK 7.46 on 19 April 2014.

⁶ Unknown. Forbrugerrådet: Regeringens plan om indgreb mod kviklån er ikke nok [‘The Danish Consumer Council: The government’s plan of action on instant loans is not enough’]. – *Information* (newspaper), 6 February 2013; E. Ingvorsen. 2300 fanget i gældsælde med sms-lån [‘2,300 caught in the debt trap with SMS loans’]. – *Ekstra Bladet* (newspaper), 18 January 2014. It has not been possible to obtain the data in question from the Danish Consumer Ombudsman.

⁷ Statistics Denmark. Forbrugerkredit 4. kvartal 2013, NYT fra Danmarks Statistik nr. 55 [‘Consumer credit, 4th quarter of 2013, NEW from Statistics Denmark, No. 55’], 6 February 2014.

⁸ See www.experian.dk/presse/rki-rapporten-2013-de-unge-er-lyspunktet-i-dystert-billede-af-danskernes-gæld.html.

⁹ See www.registret.dk/presse/talogfakta.html.

2.3. Creditors

Web and SMS loans are to a certain extent granted by finance companies. Finance companies are subject to consumer law but not necessarily to the same public regulation as that governing Danish banks. Of course, banks are, as finance institutions, subject to financial regulation if they operate in the market for instant loans, as GE Money Bank and Ekspres Bank (formerly known as HandelsFinans) do, or if their loans are granted through a private intermediary, an example being LånLet granting private loans from Basisbank.

It is true that, in principle, finance companies are subject to the Danish Financial Business Act, as they fall under the designation of finance institutions—cf. Clause 5 (1) (6) of said act—but they are not qualified as finance institutions (see Clause 5 (1) (1)) and are not subject to the supervision, capital requirements, limits of engagements, etc. of the Danish Financial Supervisory Authority.^{*10} The provisions pertaining to finance institutions laid down in that act are aimed instead at the ownership of such companies by finance institutions; for instance, the finance company Sparxpres is owned by Spar Bank. Accordingly, in cases of such ownership, the finance company can be subject to more provisions of the Financial Business Act.

The reason that finance companies, apart from in these cases, are not themselves subject to the same control and restrictions as financial undertakings is that they base their activity on equity capital and borrowing; accordingly, they differ particularly from banks, which can accept deposits and other means subject to repayment. The providers of SMS loans fall within this category of finance companies. They are typically small undertakings without any affiliation with banks—examples are Folkia ApS, Mobillån Danmark ApS, and Kvik Automaten ApS (which is part of the Finnish undertaking Ferratum) and TrustBuddy AB (which is registered in Sweden). As one can see, the undertakings often have a Nordic and Baltic field of operation. An illustration of the fact that providers work across borders is Vivus. It is owned by 4finance ApS and part of the 4finance Group, which has branches in Latvia, the UK, Spain, Sweden, Finland, Poland, Lithuania, Russia, Canada, Georgia, the Czech Republic, and Estonia.

The Association of Danish Finance Companies (Finans og Leasing) is the professional interest group for Danish-registered companies that operate in the field of financing.

3. Legal and institutional overview

The basis for the Danish legislation is the traditional tort and contract law, including ‘the Contract Act’.^{*11} The main act of relevance is the Consumer Credit Act,^{*12} which includes a verbatim implementation of the main parts of the second Consumer Credit Directive (2008/48/EC) and, implemented also, the first Consumer Credit Directive (87/102/EEC) with amendments, hereinafter the CCD 2008 and the CCD 1987, respectively.^{*13} Other relevant legislation is the Act on Financial Advisers; the Bankruptcy Act; the Civil Justice Act; the Consumer Agreement Act; the Electronic Commerce Act; the Financial Business Act; the Interest Rate Act; the Marketing Practices Act; the Penal Code; the Executive Order on Good Business Practice for Financial Advisers; the Executive Order on Good Business Practice for Financial Undertakings, Investment Associations Etc.; the Executive Order on information to consumers about prices etc. in banks; the Executive Order on information to consumers about prices of loans/credit offered and rates of exchange; and the Executive Order on unfair marketing in consumer relations.^{*14}

While finance institutions are subject to the Financial Business Act and its licensing regime, other lenders are, as mentioned, not subject to a licensing scheme. The Financial Authority (Finanstilsynet) supervises

¹⁰ Lov om finansiel virksomhed – Consolidated Act No. 948, of 2 February 2013.

¹¹ Aftaleloven – Consolidated Act No. 781, of 26 August 1996.

¹² Kreditaftaleloven – Consolidated Act No. 761, of 11 June 2011.

¹³ The Residential Property Credit Agreements Directive (2014/17/EU) falls outside the scope of this article.

¹⁴ In the order mentioned: Lov om finansiel rådgivning – Act No. 599, of 12 June 2013; Konkursloven – Consolidated Act No. 11, of 6 January 2014; Retsplejeloven – Consolidated Act No. 1139, of 24 September 2013; Forbrugerftaleloven – Act No. 1457, of 17 December 2013; E-handelsloven – Act No. 227, of 22 April 2002; Renteloven – Act No. 743, of 4 September 2002; Markedsføringsloven – Consolidated Act No. 1216, of 29 September 2013; Straffeloven – Consolidated Code No. 1028, of 22 August 2013; Bekendtgørelse om god skik for finansielle rådgivere – Order No. 1582, of 18 December 2013; God skik-bekendtgørelsen – Order No. 928, of 28 June 2013; Prisoplysningsbekendtgørelsen – Order No. 1210, of 24 October 2010; Skiltning-bekendtgørelsen – Order No. 1203, of 28 September 2010; Bekendtgørelse om urimelig markedsføring i forbrugerforhold – Executive Order No. 1084, of 14 September 2007.

finance institutions and related lenders. The Consumer Ombudsman institution covers all types of lenders, though its powers specifically related to finance institutions are restricted. Its field of responsibility is laid down mainly in the Marketing Practices Act.

Specifically for the domain of this article, the guidelines of the Danish Consumer Ombudsman for the marketing of short-term or small loans on the basis of distance selling agreements (Retningslinjer for markedsføring af kortfristede eller mindre lån indgået som fjernsalgsaftaler af 4. februar 2009) furthermore apply. The guidelines are directed particularly at SMS loans. The guidelines have been issued by the Consumer Ombudsman pursuant to Subsection 24 (1) of the Marketing Practices Act after negotiations with representatives of consumers and relevant commercial groups. In this way, the Consumer Ombudsman tries to affect the behaviour of the business community. As legal source the guidelines have the character of legally non-binding ‘soft law’ rules, but they may be a good source of inspiration for the determination of fair marketing practices. Accordingly, the guidelines only imply a legal obligation for the providers of these loans to the extent that the guidelines are considered to specify fair marketing practices; the guidelines are an expression of the general opinion of the Consumer Ombudsman in this respect. Financial undertakings are subject to specific rules on fair practices. The Consumer Ombudsman has entered into co-operation with the Nordic and Baltic countries, where many of the loan providers are found.

Whereas specific appeal boards exist for banks and mortgage-credit institutions (for instance, the Danish Complaint Board of Banking Services (Pengeinstitutankenævnet) will cover the banks in the market for instant loans), there is no such appeal board for other credit providers. Apart from having the option of taking legal action before the courts, consumers can also choose to file a complaint with the general independent complaints board, the Consumer Complaint Board (Forbrugerklagenævnet). The Consumer Complaint Board considers consumer complaints related to goods and services purchased from traders. The main rule is that the price of the goods or services at issue must be at least DKK 800 (EUR 107) but not exceed DKK 100,000 (EUR 13,404). The minimum amounts may cut off complaints on loans of very small amounts, such as SMS loans. Also, the board will consider a complaint only if the consumer has already attempted in vain to solve the problem with the business. It considers complaints in writing, and it is difficult for the consumer to have cases addressed in this venue that require further evidence.

4. Scope—*de minimis*

The efforts to establish an internal European market for consumer credit by way of the Consumer Credit Directive (CCD) and achieve the consumer protection linked with this objective are rarely extended to SMS loans.^{*15} Beyond the scope of the CCD 1987 and the CCD 2008 fall, among other types of credit, credit in small amounts, short-term loans, and credit free of interest; cf. Article 2, Subsections 2 (c) and 2 (f). Such an exception also applied within the scope of application of Section 3 of the Danish Consumer Credit Act as in force before 2010. Today’s version of that act does not apply to credit agreements under which the credit is granted free of interest and without any other charges, or where the credit has to be repaid within three months and has insignificant charges; see Section 3 (1).

The Latin expression ‘*de minimis non curat lex*’ (meaning ‘the law does not concern itself with trifles’) seems to be the rationale behind the lower threshold limits for application of the law. Apparently they safeguard a certain proportionality of the protection offered by the law. Lenders and consumers should not give or read more information than necessary, and it could be feared that the obligations of the lender will imply that credit of limited amount and/or duration will not be offered; for instance, the obligations can be considered particularly onerous for small-business-owners.^{*16}

Lower threshold limits seem inappropriate in the context of lending, and the expensive SMS loans illustrate this. Short-term loans can be just as worthy of the borrower’s protection as loans having a longer maturity period. Similarly, many small loans, often with a high APR, can be at least equally burdening financially and justify protection as much as one large loan. Accordingly, many loans—even free credit—may be

¹⁵ The Directive on Financial Distance Selling (2002/65/EC), however, can be applied to, for example, SMS loans. If this is done, such a loan falls within the scope of efforts to integrate an internal European market as referred to therein.

¹⁶ Bet. 1509/2009 om gennemførelse af forbrugerkreditdirektivet [‘Danish Report No. 1509/2009, about the CCD’], p. 51, read together with FT (*Folketingstidende*, the official journal of the Danish Parliament) 1989–90, Appendix A, column 2062.

the straw that breaks the camel's back. The limited amount of the loan may imply that the consumer will not reflect much on the incurring of debts.

The inexpediency of lower threshold limits is accentuated by the easy access to expensive Web or SMS loans. In Denmark, for instance, the SMS loans were the reason for the lower threshold limit of the former Consumer Credit Act being abolished when the CCD 2008 was implemented in 2010.^{*17} With removal of the loophole in the law, the lenders would be subject to the exhaustive obligations of the Consumer Credit Act, including the duty to inform.

5. Measures

5.1 Marketing restrictions

The prohibition of particularly aggressive marketing (for instance, of unsolicited offers) is specifically stipulated in the Danish Marketing Practices Act. However, such bans do not prevent marketing of credit being brought into the private living room of the consumer through commercials, the Internet, etc., which may be instrumental in the consumer's taking out of credit. The general requirements are the following:

In his market behaviour, the lender must observe the bans that are laid down by the Marketing Practices Act and that generally are reflected in Section 1, about fair marketing practices. The expression 'marketing' with respect to the notion of **fair marketing practices** is used in the 1973 preparatory work on the Marketing Practices Act, Section 1, dealing with actions undertaken for the purpose of carrying on business.^{*18} The broad construction has been adopted by more recent case law.^{*19} According to the preparatory work, the wording of the general provision also makes protection against **unfair terms in consumer contracts** possible.^{*20} In connection with the implementation of the EU Directive from 1993 on unfair terms in consumer contracts, it was found that there was no need to change the broad construction of Section 1 of the Danish Marketing Practices Act and that it should continue to be construed in the same way.^{*21} Today, the provision could be regarded rather as a supplement to the general provisions in terms of private law that are found in both the Contract Act and the Consumer Credit Act, and it facilitates public intervention with regard to the contract terms of businesses.^{*22} For instance, both Section 36 of the Contract Act and Section 1 of the Marketing Practices Act regulate unfair terms of contract. Anyway, the provision in Section 1 of the Marketing Practices Act is not limited to cases wherein a contract term is unfair because it results in an imbalance in the rights and duties of the parties. Section 1 is also applied to contract terms that are unfair from a public interest point of view because they counteract transparency in the market or unfairly affect buying decisions.^{*23}

The special bans of the Marketing Practices Act exemplify the general norm of Section 1 of that act,^{*24} especially Section 3, on misleading or unfair marketing, and Section 6, on unsolicited offers, which are particularly interesting in the context of lending. However, regardless of the fact that the marketing of Web and SMS loans is intensive, such unfair influence is rarely at issue, and Web sites offering instant loans or television commercials for SMS loans are not to be regarded as unsolicited offers. If the lender, when granting the credit, has received an electronic address from the borrower, the lender may market credit; cf. Section 6 (2). For instance, a bank may, by e-mail or SMS, offer a more favourable consumer-credit agreement.

Instead of Section 3 of the Marketing Practices Act, financial undertakings are governed by a similar provision in Section 4 of the Executive Order on Good Business Practice for Financial Undertakings.

¹⁷ Bet. 1509/2009 (see Note 16), p. 52.

¹⁸ FT 1973–74, Appendix A, column 2256.

¹⁹ Accordingly, the threat of debt collection was in violation of Section 1 of the Marketing Practices Act. See U (*Ugeskrift for Retsvæsen* judicial journal, cited by year and page) 1976.810 SH (for 'Sø- og Handelsretten', the Maritime and Commercial Court). See also U 1982.973 SH, with respect to unsanctioned debt-collection costs.

²⁰ Bet. II 681/1973 om markedsføring, forbrugerombudsmand og forbrugerklagenævn [Danish Report II No. 861/1973, on marketing, the consumer ombudsman, and the consumer complaint board], p. 18; FT 1973–74 (see Note 18), column 2256.

²¹ FT 1993–94, Appendix A, column 7257.

²² In U 1999.633 SH with regard to a bank's change of conditions. Here the Maritime and Commercial Court referred to the Marketing Practices Act.

²³ FT 1993–94 (see Note 21), column 7258.

²⁴ Bet. II 681/1973 (see Note 20), p. 19.

Section 6 of the Marketing Practices Act also applies to financial undertakings; cf. Section 2 (*e contrario*). For consumers, it is supplemented by Section 4, on unsolicited offers, under the Consumer Agreement Act.

Through the implementation of parts of the Directive on Unfair Trading Practices (2005/29/EC), the general ban on unfair trading practice in Article 5 (1) of said directive is reflected in both the Marketing Practices Act and the Executive Order on Good Business Practice for Financial Undertakings. The types of marketing that would under any circumstances be considered unfair—blacklisted actions—are in Danish legislation listed in an appendix to the Executive Order on unfair marketing in consumer relations.

For providers of short-term or small loans taken out in the form of distance selling agreements (SMS loans), the requirements stipulated under points 2 and 3 of the guidelines of the Consumer Ombudsman for marketing of such loans largely reflect the requirements applying to marketing in general and the specific duty to display information when marketing consumer credit, which applies to other businessmen. In this context, the guidelines do not lay down further requirements for this group of providers. The only specific duty to provide information is that the lender in his marketing material inform of the procedures for the paying out of the loan and about when the borrower may dispose of the amount; cf. point 8.

5.2. Information

Even though Web and SMS loans, because of the *de minimis* rule in the CCD 2008, will typically fall outside the scope of the fully harmonised duty to inform set forth in that Directive, these are now subject to the CCD-2008-identical provisions of, especially, the Danish Credit Agreement Act and the Danish Marketing Practices Act.

If a credit agreement is entered into through the Internet or by SMS, WAP, etc., the lender must, furthermore, meet the requirements of the Electronic Commerce Act implementing the Directive on Electronic Commerce (2000/31/EC), which basically reflects total harmonisation.

With regard to providers of short-term or small loans taken out under distance selling agreements (SMS loans), the requirements pursuant to point 7 of the guidelines of the Consumer Ombudsman for marketing of such loans can be observed in the special wording stating that the terms of a loan agreement entered into by means of a Web site, SMS, or other means of distance communication are accepted only to the extent that it can be documented that the consumer received information about and accepted the terms before entering into the agreement. It is especially important to provide clear information about procedures for payment of the loan, about when the borrower may dispose of the amount, and about compensation in the event of exercise of the right of withdrawal; cf. points 8 and 9. Notwithstanding this, the guidelines to a large extent reflect what already applies in Danish law. They refer to provisions of both the Consumer Agreement Act and the Electronic Commerce Act; see, for example, the comment in point 3 of the guidelines.

5.3. Rights of withdrawal and early repayment

The contract terms normally decide the payment procedure. However, the Credit Agreement Act's Section 25 simplifies the procedure, since payment to a bank in Denmark is timely if it occurs before the payment deadline imposed by the credit agreement.

As already mentioned, even though Web and SMS loans are typically not within the scope of the protection of the CCD 2008, because of the *de minimis* rule of the Directive, Danish law does provide such protection of consumers through the enlarged scope of application of the Danish Credit Agreement Act. Accordingly, the provider of a Web or SMS loan is subject to the rights of withdrawal and early repayment set forth in Sections 19 and 26 of the Credit Agreement Act (Articles 14 and 16 of the CCD 2008). The right of withdrawal stipulated in the Credit Agreement Act's Section 19(6) takes precedence over Part 4 of the Consumer Contract Act, which covers distance selling agreements or agreements entered into outside the lender's permanent establishment.

5.4. Adequate explanations

While there are provisions for advice that target financial undertakings, other creditors are not covered by such provisions. Section 7a (8) of the Consumer Credit Act is connected with the provisions about information and seems to address a duty to explain the credit agreement. It seems a step too far to consider Subsection 7a (8) to stipulate a duty for the creditor to advise the debtor about, for instance, more suitable products offered by other creditors. According to Subsection 7a (8), creditors and, where applicable, credit intermediaries shall provide explanations to the consumer that are adequate for placing the consumer in a position enabling him to assess whether the proposed credit agreement is suited to his needs and to his financial situation—where appropriate, by explaining the pre-contractual information to be provided in accordance with Subsections 7a (1) and (2); the essential characteristics of the products proposed; and the specific effects they may have on the consumer, including the consequences of default on payment by the consumer. Subsection 7a (8) implements Article 5 (6) of the CCD 2008. Member States may adapt the manner by which and the extent to which such assistance is given, as well as by whom it is given, to the particular circumstances of the situation in which the credit agreement is offered, the person to whom it is offered, and the type of credit offered. Denmark has not done so.

5.5. The obligation to assess creditworthiness and check credit registers

Credit assessment can be described as a professional lender's examination and assessment of the financial standing of a prospective borrower, including the borrower's ability to repay the credit.^{*25} Often lenders will make a credit assessment of their own accord, but, as something new, the almost word-for-word implementation of Article 8 of the CCD 2008 means that Section 7c of the Danish Credit Agreement Act stipulates an explicit duty to conduct a credit assessment of consumers applying for loans. Especially as regards short-term or small loans taken out via distance selling agreements, a similar duty has existed since 2009 in the guidelines of the Consumer Ombudsman, point 5, for which reason any businessman must make a proper credit assessment and secure sufficient documentation of the financial standing of the consumer. With the implementation of the credit-assessment duty in Section 7c of the Consumer Credit Agreement in 2010, it is, however, this duty that should be emphasised.

Pursuant to the Consumer Credit Act's Subsection 7c (1), the lender must, before the conclusion of the credit agreement, assess the consumer's creditworthiness on the basis of sufficient information—where appropriate, obtained from the consumer and, where necessary, on the basis of consultation of the relevant database.

The question as to when information is considered to be sufficient is not further specified in that Act or in the Directive. This applies to both quantity and quality. The question pertains in part to the minimal information a lender 'must' obtain to ensure a sufficient basis for assessing whether a consumer can repay a loan, partly to how much information the lender 'may' obtain without this being at the expense of the personal protection laid down in the Act on the Processing of Data and Chapter 9 of the Financial Business Act on disclosure of confidential information. The interest of the consumer is protected in both cases. On the one hand, it is ensured that no loans are granted that the consumer cannot repay; on the other hand, privacy is protected. In contrast to the second case, the first case safeguards the traditional considerations associated with credit assessment, including also the interest of the lender.^{*26}

Which information the lender has the right and duty to obtain will depend on a specific assessment of whether there is a factual need for the information in view of the purpose of the retrieval.^{*27} The amount of credit requested and any previous borrowing must be presumed to influence this assessment.

²⁵ L.L. Andersen, H. Juul. *Introduktion til kreditretten* ['Introduction to the Credit Law'], 2nd ed. Copenhagen: Thomson 2006, p. 115.

²⁶ T. Jørgensen. *Forbrugerkredit – retligt og retspolitik* ['Consumer Credit – Law and Legal Policy']. Copenhagen: Thomson Reuters 2010, p. 298 ff.

²⁷ NOU 2009: 11. Kredittavtaler. Gjennomføring i norsk rett av forbrukerkreditt direktivet (2008/48/EF) m.m., ['Norges Offentlige Utredninger, Official Norwegian Reports 2009/11: Credit agreements – implementation in Norwegian law of the Consumer Credit Directive (2008/48/EC) and more'], p. 58 ff. (in Norwegian).

The lender must, when doing so is relevant, obtain information from **the consumer**. Thus the lender's duty to obtain information is counterbalanced by what can be regarded as the consumer's duty to provide the information needed, as the loan is granted on the basis of this information. The consumer's obligation to provide information does not include facts that are of no importance for the credit assessment.

Whether, and to what extent, it is necessary to seek information in a relevant **database** must be weighed against the legal and factual circumstances.^{*28} If the lender has received sufficient information from the consumer, often it will not be necessary also to seek information in a database. As noted above, in Denmark, there are two private (negative) credit registers—Experian and Debitor Registret—where bad payers are registered.

It appears from the Credit Agreement Act's Subsection 7c (3) that if the credit application is declined on the basis of a database search, the lender must immediately and at no charge inform the consumer of the result of the search and provide further information about the database in question. Conversely, the lender has no duty to inform the consumer of why the application is declined if it is declined on the basis of other circumstances than a database search—e.g., on the basis of the information provided by the consumer. A situation wherein the lender grants credit even though the consumer has not been found creditworthy is not covered by the duty to report either; granting a loan in this situation is not explicitly prohibited. The legal consequences are to be found in the general tort law. This applies regardless of whether the basis on which the credit assessment is made derives from a database or elsewhere. It could be stated that it usually would be precisely in such situations that a consumer would benefit the most from information of this nature.^{*29}

It does not seem obvious that Web and SMS loans meet the requirements of the credit-assessment duty in both the Credit Agreement Act, Section 7a and point 5 of the Consumer Ombudsman's guidelines when, for example, the following advertising statement is made: 'Creditworthiness at Vivus.dk means that the customer must not be registered in one of the following credit registers: Experian and Debitor Registret.' This seems to be the main condition for obtaining a loan with most of the suppliers, where the credit assessment, besides being limited, also seems to be automated. Further conditions are often a demand for a Danish residence and an age demand (TrustBuddy and Vivus: 20 years, Kvik Automaten and Ferratum: 23 years).

5.6. Responsible lending

Responsible lending is parallel to the concept of responsible borrowing, which is often expressed as the consumer's accountability for borrowing or as making the consumer accountable through financial education.

Responsible lending is an independent legal measure. However, it is often associated with other protective measures. It is linked especially to the obligations to assess creditworthiness and to dissuade. It also is related to advisory services. These measures often express considerations not found within the statute book, such as good practice, due diligence, and loyalty.

Responsible lending as an independent measure is the only measure that directly can prevent irresponsible lending, since it in its essence prohibits granting an irresponsible loan. The associated measures are not suitable. An analysis of these measures reveals a number of ambiguities, resulting in legal uncertainty.^{*30} An obligation to assess creditworthiness does not prevent the creditor from granting irresponsible credit; this is only the case if, besides the credit-assessment duty, a ban is applied to granting of loans in cases of, for instance, a negative credit assessment (a principle of responsible lending). Rather, the measures can be counterproductive by protecting creditors – for example, where the consumer, despite the creditor's advice, decides to apply for credit anyway. The associated measures will only in certain situations prevent irresponsible lending and borrowing. This is the case when the creditor, proceeding from the assessment of creditworthiness, actually refrains from granting a loan or when the consumer, acting on the basis of the creditor's dissuasion, actually refrains from borrowing.

Danish law is largely an expression of responsible borrowing. The creditworthiness obligation set forth in Article 7c does not seem to change the fact that the demands in Denmark for the assessment of creditworthiness are low. The consumer still bears the risk for repayment of the loan; see U 1997.522 Ø (Østre Landsret, Eastern High Court), dealing with an 18-year-old man who bought a 10-year-old car (a BMW) for

²⁸ Compare with comment 28 in the preamble to the CCD 2008, which is not, however, formulated without ambiguity.

²⁹ NOU 2009: 11 (see Note 27), p. 57.

³⁰ T. Jørgensen (see Note 26), pp. 281 ff., 474 ff.

DKK 220,000 (EUR 29,489). Even when damages (the economic loss) are granted to the consumer on the basis of the general tort law in the case of irresponsible lending, the amount is often reduced on account of the borrower's participation in the loan agreement.^{*31}

5.7. The unconscionability doctrine

Parts of the unconscionability doctrine can be found scattered across several general laws. The provisions have mainly a Danish (or Nordic) origin and can be sought in contract law dealing with unfair contracts or expressed in considerations such as due diligence, good practice, and loyalty that are not in the statute book. However, general prohibitions addressing unfair commercial practices have an EU origin. Some sections of civil law even contain a criminal-law counterpart. This applies to the Contract Act's Section 31, on exploitation, which is originally from 1917 and has an almost identical sister provision in the Penal Code's Section 282, on usury.

Section 31 of the Contract Act and Section 282 of the Penal Code saw its most recent Danish formulation in 1975 on the basis of the Danish usury committee's recommendation from 1971.^{*32} In order to make it easier to fight white-collar crime, the formulation of the two sections was changed such that the demands were reduced with regard to exploitation, and when it could be claimed to have taken place.^{*33} On the same occasion, Section 36 of the Contract Act was inserted, and, among other portions, Section 300b, regarding other exploitation, was inserted in the Penal Code. Besides handling the same considerations as Section 31, it was stressed, as a motivation, that Section 36 relies on 'considerations for the general protection of consumers and others against an economically stronger and more experienced party'.^{*34}

According to Subsection 36 (1) a 'contract may be modified or set aside, in whole or in part, if it would be unreasonable or at variance with the principles of good faith to enforce it'. The same applies to other legal acts. In making of a decision thereunder, the 'circumstances existing at the time the contract was concluded, the terms of the contract and subsequent circumstances' shall be considered; see Subsection 2. Section 36 constitutes a clean-up provision when compared to the more specific rules in the Contract Act (e.g., Section 31) and bears resemblance to the omnibus clauses in Section 22 of the Credit Agreement Act (on reduction of unfair costs) and the Contract Act's Section 33 (to enforce a declaration against the principles of good faith). As will become apparent from the discussion below, it is not unusual for the provisions to be applied simultaneously. Generally, it is the injured party (the consumer) who has the burden of proof.

The civil-law parts of the Directive on Unfair Contract Terms (93/13/EEC)^{*35} were implemented in 1994 in Chapter IV of the Contract Act, but the public-law parts of the Directive are presumed to be implemented via the Marketing Practices Act.^{*36} In connection with this, Section 38c was inserted. In certain situations, the provision places the consumer in a better position than does Section 36. For example, Subsection 36 (2) applies to consumer contracts with the modification that subsequent circumstances to the detriment of the consumer shall not be considered.

5.8. Addressing usury (exploitation)

From an economic point of view, usury can be regarded as an interest rate that is 'out of line with the market rate' and, accordingly, higher than is necessary for paying for the risks that the creditor bears in consideration of the market risk.^{*37} From a legal point of view, a usurious rate is an unusually high rate, either compared to a maximum rate established by law, which objectively can be controlled by an authority, or compared to a higher behavioural norm, which will be an object of subjective control—i.e., it will depend on

³¹ *Ibid.*, p. 308.

³² The mentioned provisions of the Contract Act and the Penal Code were changed by law 250, of 12 June 1975. The relevant act came into force on 1 July 1975 and relies on Bet. 604/1971 om åger ['Danish Report No. 604/1971, on usury'].

³³ FT 1974–75, Appendix A, column 781.

³⁴ *Ibid.*, column 791.

³⁵ Amended by the Consumer Rights Directive (2011/83/EU).

³⁶ Act No. 1098, of 21 December 1994.

³⁷ Com(1995) 117, item 273.

the circumstances, such as the borrower's weaker position or ignorance.^{*38} Denmark—and many other EU member states—have chosen the latter solution.

Both Section 31 of the Contract Act and Section 282 of the Penal Code deal with exploitation of another person's inferiority—i.e., 'another person's financial or personal distress, lack of knowledge, thoughtlessness or an existing dependency relationship to obtain or contract for a benefit that is substantially disproportionate to the consideration or for which no consideration is to be given'. The person so exploited is not bound by his declaration of intention. The same applies if the exploitation is a result of acts by a third party and the person to whom the declaration of intention was made realised or ought to have realised this.

Section 282 of the Penal Code begins with the wording 'Punishment for usury...' and indicates that both provisions are meant to deal with usury and are addressed to lenders. The borrowers' counterpart is stated in Section 30 of the Contract Act, regarding fraud, and Section 279 of the Penal Code, dealing with embezzlement.

Criminal- and civil-law sanctions are not directly connected. This must be the case even though the legislative power has striven toward achieving an identity between Section 282 of the Penal Code and Section 31 of the Contract Act. The relation between the two identical 'sister provisions' seems to function in such a way that if usury is punished according to Section 282 of the Penal Code, then the agreement can also be rendered void in accordance with Section 31 of the Contract Act; in relation to this, also see U 1978.596/2 Ø, where the borrowers, after the lender was fined for usury, were awarded a repayment on the basis of the fact that the credit agreements were void. The opposite does not seem to be the case: civil-law invalidity does not necessarily imply that the act is punishable. The enumeration in the Penal Code is exhaustive, unlike the enumeration of reasons for invalidity in Chapter III of the Contract Act. However, even though no requirement for applying Section 282 exists, a person who enters an agreement in an indecent way—i.e., by exploiting the other party's economic difficulties or any other inferior position—is fined or sentenced to up to six months in prison according to Section 300b. Handling yield from usury (fencing) is punished in the same way under Section 300c. Furthermore, a matter can be associated with some of the other provisions in the Penal Code, typically those on the other financial crimes in Chapter 28 of the Code—e.g., embezzlement according to Section 279 or blackmail according to Section 281. Sections 285–287 of the Penal Code frame the sentencing set forth in Section 282.

In the following discussion, the focus is on the civil-law provision in Section 31 of the Contract Act. Even though the APR often is extremely high for credit agreements made via long-distance communication, including Web and SMS loans, this does not necessarily indicate any kind of exploitation. An essential mismatch in the *quid pro quo* (here, the credit costs being extremely high)^{*39} is only one of the conditions for applying Section 31 of the Contract Act. The mismatch is assessed according to the conditions at the time of entry into the agreement. It is not only the mutual services' economic value that should be taken into account but also the economic risk that the creditor bears, such as whether the borrower gives security for the loan.

Besides the content of the agreement, Section 31 of the Contract Act is related to a certain behaviour. Thus invalidity requires that the promisee by acquiring or stipulating a service that is significantly disproportionate to the *quid pro quo* (the content of the agreement) unjustifiably has used the promisor's inferior position. The promise must be caused by this condition. In connection with granting of credit, the inferior position is typically caused by economic difficulties. These difficulties can also be related to another person, whom the promisor (the borrower), for example, wants to help. It is not a requirement that the promise be made on the promisee's (the creditor's) initiative. Invalidity is not ruled out either if the borrower received expert advice before making the promise. These factors can, however, be considered in a court's assessment of whether exploitation has taken place or not.

According to Section 31 of the Contract Act, the creditor must finally have been aware of the borrower's inferior position. This can be difficult to prove in connection with loans obtained via distance communication. Here it is doubtful whether there has been such close contact between the two parties that the creditor has concrete knowledge of the borrower's position. It is not an obvious conclusion that everybody who

³⁸ *Ibid.*, item 274.

³⁹ However, one can hold that the content of the agreement is used in practice as circumstantial evidence of fulfilment of the requirement; cf. L.L. Andersen, P.B. Madsen. *Aftaler og mellemmænd* ['Contracts and Intermediaries'], 6th ed. Copenhagen: Karnov Group 2012, p. 164's footnote with reference to U 1945.617 Ø.

obtains extremely cost-intensive credit is in an inferior position—e.g., thoughtless or lacking in insight.^{*40} However, such a conclusion is indicated in U 1980.340 H with respect to punishment for usury and illegal lending activities. If the creditor is acting in good faith in relation to the condition, then the agreement is valid.

If a creditor has taken advantage of a borrower's lack of money to demand extremely high costs ('usury interest') for the credit granted, it can be difficult for the borrower to pay back the credit by, for example, borrowing the amount elsewhere. While invalidity according to the wording in Section 31 affects the entire promise, the courts have often changed the agreed fee, taking Section 31 as a legal basis.^{*41} At least this applied in practice before Section 36 of the Contract Act was added.

The limited (printed) legal and appeals-board practice related to Section 31 of the Contract Act illustrates that the provision has not had the increased impact that was the intention behind extension of the field of application in 1975. Before the amendment of Section 31 of the Contract Act in 1975, the provision was seldom appealed to (and usury as addressed in Section 282 of the Penal code was seldom reported).^{*42}

Situations that were regarded as exploitation (usury) in case law before 1975 would also be usury after 1975. Situations that were not regarded as exploitation (usury) before 1975 might be regarded as usury after 1975.

Before the amendment of Section 31 of the Contract Act in 1975, it gave rise to 14 printed judgements about credit. In six of them, the court found that exploitation had taken place. These cases are U 1924.841 Ø, U 1930.932 Ø, U 1930.957 H, U 1938.540 H, U 1945.617 Ø, and U 1960.613 H. Specifically with respect to reduction, it can be noticed that in U 1930.932 Ø the interest rate of 24% was not disproportionately high under the given circumstances. On the other hand, there was disproportion between the collection fee of DKK 4,589 (EUR 615) and the debt-collection work, and the fee was reduced to DKK 2,000 (EUR 268). In U 1945.617 H, it was decided that the creditor should repay DKK 300 (EUR 40) of the interest paid, DKK 680 (EUR 91) in total. In U 1960.613 H, the interest rate of 33% per annum was cut to 25% *per annum*. Interest rates on loans with other finance companies were at that time 15–20% *per annum*, but, because of the borrower's voluntary composition with his trade creditors, the creditor ran a larger risk.

Since 1975, just one judgement in which the court only used Section 31 with regard to credit has been printed. In U 1978.596/2 Ø, a lending company had influenced a number of borrowers to issue index-linked mortgage bonds with content that was burdensome and difficult to foresee. The actual yields were not under 29% per annum. After the creditor was sentenced for usury, the borrowers were awarded recovery, which was debited to the borrowers on the basis of interest of 15% per annum from the yields received, such that they did not experience an unfounded enrichment at the lending company's expense.

Before its amendment in 1975, Section 282 of the Penal Code gave rise to two printed judgements regarding credit, U 1936.169 Ø, considering a loan for the purchase of furniture, and U 1936.351 H, dealing with a business-owner in an emergency situation. As for cases after the change, see U 1978.596/2 Ø, regarding the handling of yield from usury (fencing), and both U 1978.962 V and U 1980.340 H, dealing with the same kind of usurious business.

The usury-related provision in the field of civil law must be considered to have lost its practical importance relative to the omnibus clauses, through which one can avoid the 'usury judgement' specified in Section 31 of the Contract Act. The fact that the receiver knows or ought to know that somebody has used, for instance, the promisor's carelessness implies that it is both dishonest and unfair to maintain a claim in line with the promise; compare with Sections 33 and 36 of the Contract Act. The content of the omnibus clause in Section 22 of the Credit Agreement Act can be included in Section 36 of the Contract Act (in consumer relations, Section 38c; cf. Section 36).

Both case law and appeals-board practice to a minor extent reflect that omnibus clauses have the characteristics of clean-up provisions and, therefore, should be used only if no other relevant provisions apply. After the amendment of Section 36 of the Contract Act, it has not been unusual that Sections 31 and 36 of

⁴⁰ T. Ingvarsson. Lån i telefon – dags att reglera? ['Loans on the phone—time to regulate?']. – *Juridisk Tidskrift (JT)* 2009–10, p. 388 (in Swedish).

⁴¹ M.B. Andersen. *Grundlæggende aftaleret* ['Fundamental Contract Law], 4th ed. Copenhagen: Gjøellerup 2013, p. 385; L.L. Andersen. *Aftaleloven med kommentarer* ['The Contract Act with Comments'], 5th ed. Copenhagen: Jurist- og Økonomforbundets Forlag 2008, p. 207, with reference to U 1924.841 Ø, U 1930.932 Ø, U 1945.617 Ø, and U 1960.613 H (for 'Højesteret', the Supreme Court) and U 1978.596/2 Ø.

⁴² Bet. 604/1971 (see Note 32), pp. 8 ff. and 11. The printed judgements related to this until 1971 are found in appendices 1 and 2.

the Contract Act apply at the same time, or that Sections 31, 33, and 36—as a safe bet—apply at the same time; see, for example, the Contract Act as considered in U 1990.65 H, regarding an unsuccessful speculation business. The Danish Competition and Consumer Authority seldom deals with usury-related cases, and the Danish Complaint Board of Banking Services has not decided in favour of any claims that finance institutions' interest rates, fees, or charges have been usurious.^{*43} The latter board seems to place emphasis rather on the amount, considering matters related to Section 36, instead of making a concrete judgement of whether exploitation has taken place according to Section 31.

5.9. A maximum cost?

In 1855, the ordinary interest maximum was abolished in Danish law, and in 1924 it was abolished specifically for loans secured with property.

When the private-law provision originally was established in Section 31 of the Contract Act from 1917, there was a request for a comprehensive and flexible provision rather than a more 'rigid and old-fashioned' interest maximum. This is related especially to a certain behaviour (the exploitation) and not only the content of the agreement (the high costs). In case law, there will—in principle—be established a certain maximum cost for credit. This is a result of the fact that a reduction can take place especially according to Sections 31 and 36 of the Contract Act (in consumer matters, Section 38 c; cf. Section 36) and the omnibus clause in Section 22 of the Credit Agreement Act, along with the limit to reasonable costs—see, for example, U 1987.699/2 V, about reduction of a student loan under Section 36 of the Contract Act, and U 1985.986 Ø, about agreed litigation interest of 33% per annum, which violated (the present) Section 22 of the Credit Agreement Act or Section 36 of the Contract Act.

It is not an objective maximum. What may be considered 'usury interest' or to be unreasonable depends on the concrete circumstances. How great a reduction can be achieved will in each case depend on, apart from the content of the agreement, especially the general competitive situation and the risk that the creditor bears relative to the specific borrower. However, a certain kind of objectivisation takes place when legal practice is investigated with a view to finding out whether any given APR is usual for the type of loan in question. Accordingly, it seems difficult to reduce an unusually high APR for a concrete loan agreement when the market itself determines the norm for this.

Danish Complaint Board of Banking Services special practice related to reduction of front-end fees from the beginning of the 20th century was ignored by the Eastern High Court's ruling of 24 May 2006. The High Court did not find that the APR of 12.75% for the concrete loan at issue (in case 185/2004) differed from the credit costs under comparable loan agreements. This was decided on the grounds that the law does not establish provisions that directly regulate the size of formation fees or which items are ascribable to this. The formation fees may be ignored only if the costs under the present circumstances can be regarded as unreasonably high; cf. Sections 36 and 38 of the Contract Act and Section 22 of the Credit Agreement Act. The ruling has been used in the Complaint Board's later practice, which refers to the judgement. See cases 157/2005, 178/2005, 201/2005, 23/2006, 319/2006, and 61/2009.

Without taking the concrete circumstances into account in assessment of whether exploitation has taken place or not, it is thought-provoking that the numerical quantities that were regarded as usurious interest within civil law before 1975 (an interest rate of 30–60% per annum) are not a rare sight in connection with the consumer loans that many finance companies offer today, not least in connection with Web and SMS loans. The loans do not seem to have become less cost-intensive within the last four years:

As for **consumer loans taken out via the Internet**, the 'price' (the costs) for borrowing DKK 10,000 (EUR 1,340) for a period of one year were, for example, the following on 15 March 2010:^{*44}

APR of 34.4% (www.gemoneybank.dk, from GE Money Bank)

APR of 37.3% (www.onkelbob.dk, from Sparxpres, which is owned by Spar Bank)

APR of 39.3% (www.extracash.dk, from ExtraCash A/S)

APR of 46.3% (www.ekspresbank.dk, from Ekspres Bank (the former Handelsfinans))

⁴³ T. Jørgensen (see Note 26), p. 371 ff.

⁴⁴ *Ibid.*, p. 373 ff.

The APR is stated for a loan of DKK 5,000 (EUR 670) for a period of two years. It was not possible to find the price for a loan of DKK 10,000 (EUR 1,340) for a period of one year.

APR of 50.5% (www.pengeautomaten.dk, from IKANO Finans A/S)

With rather different operators, the price on 15 January 2014 seems to show an increase:⁴⁵

APR of 42.0% (www.onkelbob.dk, from Sparxpres, which is owned by Spar Bank)

APR of 48.5% (www.extracash.dk, from ExtraCash A/S in co-operation with Ekspres Bank A/S)

APR of 50.4% (www.laanlet.dk, from LånLet in co-operation with Basisbank)

APR of 46.1% (www.pengeautomaten.dk, from IKANO Finans A/S)

APR of 46.3% (www.selenefinans.dk, from Selene Finans A/S in co-operation with Basisbank)

As for the so-called **SMS loans** and **micro loans**, these can also be taken out via the Internet. For example, on 15 March 2010 the prices for borrowing DKK 1,000 (EUR 134) were these:

APR of 2,230% (www.ssl.folkia.dk, from Folkia ApS)

APR of 2,969% (www.mobillan.dk, from Mobillån Danmark ApS)

APR of 2,334% (www.SMSkviklan.dk, from SMS-Kviklån A/S)

APR of 1,355% (www.ferratum.dk, from the Finnish company Ferratum)

At Mobillån and SMSkviklån, there is an application fee of DKK 25 (EUR 3.35).

In 2014, more operators had changed. To a much larger extent, they only seem to offer loans with a loan period of 30 days. At Ferratum, the APR was 7,850% for a 14-day loan.

The prices for a 30-day loan on 15 January 2014 were these:⁴⁶

APR of 1,410% (www.folkia.dk, from Folkia ApS)

APR of 2,828% (www.mobillan.dk, from Mobillån Danmark ApS)

APR of 2,230% (www.ferratum.dk, from the Finnish company Ferratum)

APR of 4,467% (www.trustbuddy.com/dk, owned by TrustBuddy AB, which is registered in Sweden)

APR of 2,230% (www.kvikautomaten.dk, from Kvik Automaten ApS, which is part of Ferratum)

The previous operator SMS-Kviklån A/S (using www.SMSkviklan.dk) was known for its high costs. One of the highest APR indications was seen on 15 July 2008: the APR was 1,122,000% for a loan of DKK 500 (EUR 67) for 15 days.

5.10. Restrictions to interest for late payment and damages claims

The Interest Rate Act's terms on interest before and after the correct time of payment apply, including default (penalty) interest, unless otherwise is agreed or follows from the business practices.

In the case of a consumer's default, the interest is normally fixed. There is also a limit to the costs for which a creditor can claim compensation in connection with violation. Preceptive maximum limits follow from Section 9a, which establishes that the creditor may demand that the borrower pay the creditor's reasonable and relevant costs in connection with extrajudicial collection of the debt, unless the delay in payment is not due to the borrower's conditions, and Section 9b, respectively, which states that three charges added to a reminder of DKK 100 (EUR 13.4) each and a debt-recovery fee of DKK 100 can be claimed.

It is possible to lower unreasonably high contractual interest rates according to Section 36 of the Contract Act, which also deals with overdraft interest on accounts and default interest; see, for example, U 1991.202 Ø, regarding outstanding balances due according to the credit agreement; U 2004.1268 H, regarding liability in connection with the use of company payment cards; and the Danish Complaint Board of Banking Services cases 290/1993 and 94/1993, regarding reduction of overdraft interest on deposit accounts from 25 to 21.75 per cent per annum and from 32 to 21.5 per cent per annum, respectively.

⁴⁵ For www.ekspresbank.dk, a precise number was not presented on the homepage. The site www.gemoneybank.dk now only grants loans of DKK 50–100,000 for a period of 12–120 months, with the APR being 10.2% for borrowing DKK 100,000 for a term of 12 months.

⁴⁶ The function for indication of the APR did not work at the Vivus site (www.vivus.dk), which is why Vivus is not included in the outline.

5.11. The debt-settlement system and debt-counselling

After payment problems have occurred (post-contract), the main focus is on getting the consumer out of debt. Here debt-counselling plays an important role. A few other ways in which over-indebted persons are helped should be mentioned, though.

The private sector

No law states that the creditor shall help a debtor in default. Instead, the legal system's focus is on helping creditors to enforce their claims. However, if the creditor agrees, the debtor and the creditor can make a deed of arrangement. An arrangement may feature a reduction of the debt and extension of the payment, or it can be a new credit agreement, on other terms. An arrangement can be made out of court as well as in court. An arrangement does not have to be with just one creditor; an out-of-court arrangement can be made with the other creditors. A few creditors voluntarily offer debt-counselling, often combined with an arrangement. Since 2009, the Danish mortgage bank BRFkredit's Team Dwelling Help (Team Bolighjælp) has sought out and helped customers with delayed payments.

In 2010, the Danish consumer interest organisation the Danish Consumer Council (Forbrugerrådet) estimated that there were 20 to 50 independent financial counsellors, hereunder 'money advisers', in Denmark. The advisers were not subject to minimum requirements of education, branch standards, and supervision. Examples of bad advice were seen, where counselling of indebted persons took the form of exploitation and left the persons involved more indebted afterwards.

The Act on Financial Advisers, which came into force on 1 January 2014, places special focus on companies offering independent advice about financial products but can also cover independent debt-counselling. The term 'independent' or similar terms will mainly be used for such advisers—see Section 9—and a licensing regime is introduced. To give financial counselling will hereafter demand an authorisation from the Financial Services Authority, which will be the supervisory body. The Financial Services Authority lays down more detailed rules on qualification requirements for employees of a financial adviser (see Section 6) and has, pursuant to Section 7(2) and Section 26(4), established the Executive Order on Good Business Practice for Financial Advisers. Before this act came into force, the more general provisions in Section 1 and Section 3 of the Marketing Act, and Section 7a(8) of the Credit Agreement Act could be applied to other financial advisers than financial undertakings.

Attempts to establish a branch organisation have been made by the association of independent financial advisers (INFIA—Sammenslutningen af uvildige økonomiske rådgivere). A single independent adviser (Uvildige.dk) has developed its own ethics guidelines, stated in general, vague terms.

The social economic organisation the Debt Company (Gældskompaniet) is associated with both the private sector and the semi-public sector. It offers advice and help to citizens with creditor negotiations. For this group as a not-for-profit organisation with voluntary advisers, the payment depends upon the citizen's income. From 2012, the Debt Company has been part of the voluntary organisation the Social Legal Help (Den Sociale Retshjælp).

The semi-public sector

Free Legal Help (Retshjælpen in Denmark and Fri retshjælp in Norway) is publicly financed and was established in 1885 in Denmark. The help depends upon the income of the household and encompasses most of the legal matters of daily life including advice about debt settlement and other legal aspects of debt. The advisers include, among others, law students.

In the early 1980s, the Danish Bar and Law Society (Advokatsamfundet) established the Lawyers Guard (Advokatvagten), where people in many cities, independent of income, can talk to a lawyer or an assistant attorney and receive verbal legal advice for free. Other voluntary organisations in this field are the Social Legal Help as already mentioned and the Mother Help (Mødrehjælpen), which offer free social, economic, and legal advice to targeted socially disadvantaged mothers. In a quite new phenomenon, a few voluntary organisations offer debt-counselling. Since 2008, there has been an appropriation of DKK 16M (EUR 2.14M) over a period of four years to establish debt-counselling, through which volunteers can help the

most vulnerable citizens. In 2012, the funding for free debt advice, delivered by voluntary organizations, was extended for another four years with the amount of DKK 38M (EUR 5.10M).

The public-supported offices of the Free Legal Help and Lawyers Guard are regulated in the Civil Justice Act, Chapter 31; Executive Order on Legal Aid by Attorneys; and Executive Order on Grants to Legal Aid Offices and Attorneys Guards. The other voluntary organisations that offer debt advice are not regulated.

The public sector

A few municipalities offer citizens with debt problems free advice. For instance, in 2010 København's Kommune established a debt-counselling centre in connection with Valby Borgerservice.

In court, the judge has a limited duty to provide guidance. According to the Civil Justice Act's Subsection 500 (1), the bailiff's court, in the necessary extent, guides a party who is not represented by a lawyer with regard to his legal rights. More than getting the debtor out of debt, this duty is related to the court's other duties to provide guidance according to said act (e.g., to witnesses), securing a fair trial. When a hire-purchase agreement is defaulted on, the bailiff's court has a more explicit role than that with Web and SMS loans. In conditional sale (retention of ownership of the sold item until payment is made), the creditor shall, as a general rule, take back the item sold and cancel the debt; see the Consumer Credit Act's Chapter 10.

Another way to help natural persons out of debt is debt relief. The conditions for this are rather tight. According to Section 197 of the Bankruptcy Act, it should firstly be beyond hope that the debtor will get out of the debt. In practice, this means that the debtor most likely will not be able to fulfil his obligations to the creditors for the next few years (about five years). This assessment is based on, among other elements, the total amount of the debt, the age of the debtor, income, a prognosis (in light of the person's age, education, and job), and disposable income. Another condition is that the debt relief will lead to permanent improvement of the debtor's economic situation. If debt relief is granted, the debt is either reduced or cancelled; see Section 198. Debt relief will normally not be granted if the debtor is unworthy. The Bankruptcy Act explicates the situations in question in Section 197. Two of these situations are the debtor not having paid off the debt when he had a reasonable possibility of doing so and him having acted irresponsibly in relation to economic matters—for example, if the debt is from luxury consumption goods or the debt is systematically built up to the public. The Danish Tax and Customs Administration (SKAT) can cancel debt to the public. The conditions for this, in the Public Collection Act⁴⁷, Section 13, match Section 197 of the Bankruptcy Act.

5.12. Sanctions

Sanctions in civil law for violation of the consumer-credit legislation are found in the traditional tort and contract law, including Sections 31, 33, and 36 of the Contract Act, but also in the special rules, including those in the Credit Agreement Act, where unreasonable costs in connection with a loan can be ignored under Section 22. Violation of certain parts of the obligation to provide information is also specifically regulated in Sections 23 and 24 of the Credit Agreement Act, where Section 23, about lacking and incorrect indication of credit costs, is relevant for Web-based and SMS loans.

Violation of the provisions made in the Marketing Practices Act can be dealt with especially by means of notices, injunctions, and damages, according to Section 20; cf. Section 27. The Consumer Ombudsman can issue a notice if the action is clearly against the rules and cannot be changed by negotiation; cf. Subsection 27 (2). While violation of Subsections 3 (1) and (2), about, among other things, misleading marketing, and Section 6, on non-requested marketing, may lead to a fine under Subsection 30 (3), violation of Section 1, about good marketing practices, cannot be punished. In practice, for example, the Consumer Ombudsman on 3 October 2012 announced that a complaint against Selene Finans Danmark A/S and LånLet A/S had been filed. The complaint was about a claimed violation of Section 14a of the Marketing Practices Act related to lack of credit information in connection with presentation of financing solutions on the companies' homepages.

Violation of the Executive Order on Good Business Practice for Financial Undertakings has not been sanctioned within civil law. The Danish Financial Supervisory Authority can issue an enforcement notice

⁴⁷ Inddrivelsesloven – Act No. 1333, of 19 December 2008.

under Subsection 35 (1) if good practice is violated. Violation of terms of a notice or of, for example, Section 4's terms on misleading marketing can lead to a fine under Section 36.

Violation of the terms of a notice on unsolicited approaches under Subsection 4 (1) of the Consumer Agreement Act is sanctioned in Subsection 34 (1) of the same act. Furthermore, such a promise given by the consumer is invalid under Section 5. The provision can only be appealed to by the consumer. The consumer can choose to demand that the terms in the agreement be met, instead of accepting that the agreement is not binding. There is no time limit in connection with exercise of the provision. The consumer's right to free himself from the agreement is, however, restricted by the general rules about invalidity of agreements and when the consumer has exercised passivity.

In extreme cases, aggressive business practices can violate Section 279 of the Penal Code, regarding fraudulence.^{*48} In addition, criminal sanctions appear from the special legislation, such as Chapter 13 of the Credit Agreement Act. Also, Section 56 of that act allows for the use of fines. Fines are not, however, allowed in connection with all provisions of the act. This applies to, for example, the credit-assessment duty in Section 7c, because the provision is vaguely formulated.^{*49} In contrast, a person, who is found guilty of serious or repeated breach of the obligation to provide information can be fined under Subsection 56 (2).

6. Initiatives

Regardless of the increase in Web loans and especially in SMS loans, the political drive via legislation has been limited, and the topic gains the attention of the media only a few times a year.

In 2008, the Social Democrats (re)submitted a draft resolution about a possible limit on the APR for consumer loans equivalent to the interest for the minimum lending rates plus 15%. Within the Danish parliamentary year, the resolution only managed to get directed to a committee hearing; therefore, it was not adopted.^{*50}

In 2009, the political debate about instant loans ended with the then economy and trade minister, Brian Mikkelsen (of the Conservative party), refusing to intervene. The Consumer Ombudsman, however, made use of his opportunity to formulate some guidelines jointly with the businesses and thereby created the guidelines for the marketing of short-term or small loans on the basis of distance selling agreements. The purpose of the guidelines was to fill the legal gap in which these agreements were placed since they, on account of the *de minimis* limit, were not covered by the previous Credit Agreement Act. They were prompted by 'problems associated with this type of loan' and motivated by a need for 'clarification of what demands can be placed on the operators for such loans'.^{*51}

In 2010, the Social Democrats advanced a parliamentary resolution to force the government to introduce a bill banning SMS loans and to initiate joint Nordic co-operation with the aim of banning SMS loans across the Nordic region. The Social Democrats referred to the heavy increase in the number of SMS loans in Sweden. The ban was motivated by the consideration that taking out a loan is a far-reaching action and, therefore, a personal meeting between the lender and the borrower, where the pros and cons of various types of loans can be discussed, is needed. In the parliamentary resolution, it further came out that the SMS loan operators to a large extent did not follow the Consumer Ombudsman's guidelines for SMS loans. The resolution was rejected by the parties that constituted the parliamentary basis for the then liberal and conservative government.^{*52}

The same year, the CCD 2008 was implemented, mainly in the Credit Agreement Act. On the basis of the report from 2009 on the implementation of the CCD 2008 in Danish law, the *de minimis* limit in the Credit Agreement Act as then in force was removed, such that the costly SMS loans were also covered by the

⁴⁸ See, for example, U 1996.1080 V (for 'Vestre Landsret', the Western High Court) for discussion of fictitious invoices and U 1990.621 H on hidden unpaid debts in cars.

⁴⁹ Compare with the minority (one member) in Bet.1509/2009 (see Note 16), p. 96 ff.

⁵⁰ Proposed resolution B 33 from the 2008–2009 session of the Folketing, which is a revised resubmission of part of proposed resolution B 118 from the previous session of the Folketing, second session.

⁵¹ The Danish Consumer Ombudsman's guidelines for the marketing of short-term or small loans on the basis of distance selling agreements p. 1 ff.

⁵² Proposed resolution B 218 from the 2009–2010 session of the Folketing. The resolution was rejected on 1 June 2009, where 51 voted for it and 57 against.

comprehensive obligations in the amended act, such as the obligation to provide information.^{*53} However, the number of SMS loans has risen since the amendments were made. This may indicate that the amendments do not work or are not complied with in practice.

In 2013, it was discussed whether an appeals board for instant loans should be established in order to reduce the number of cost-intensive loans. The same year, the area of focus of the Consumer Ombudsman was once again credit markets and correct information about loans. He would focus on whether credit and loan providers comply with the provisions of the Marketing Practices Act and the Credit Agreement Act and would in this connection renew the guidelines for SMS loans. No material on this is available yet (January 2014), though. Also in 2013, the debt-collection agency Intrum Justitia, which provides the information on more than 40% of the persons who are registered in the RKI register of bad payers, refused to collect on cost-intensive SMS and Web loans. They regarded these as ‘ethically and morally objectionable’.

7. The sufficiency of the legislation

It is obvious that the easy access to borrowing via electronic means contributes to Danes’ willingness to borrow money and to their financial difficulties. As already indicated, the often cost-intensive consumer credit has increased by DKK 7B (EUR 0.94B) and unsecured loans by DKK 3.6B (EUR 0.48B) in 10 years. The fact that the increasing borrowing is not offset by a corresponding increased ability to pay is illustrated by the fact that more than every 20th adult Dane has a history of bad credit today and that non-performing debt has doubled over the last six years. The borrowing facilities are restricted via the registration of debtors in default, and recovery through the bailiff’s court implies that the reality becomes the opposite of what the advertisements promised—the freedom, welfare, and right of managing one’s own economy are restricted.

Worst affected are the group who have used instant loans to enable paying the instalments of other loans. Their negative spiral of debt seems to be a consequence of **society** not having, at an earlier stage, impeded their indebtedness or provided remedial measures such as debt advice, which is only in its initial stage in Denmark, or a (state-financed) scheme of social loans for financially vulnerable consumers who do not have access to consumer credit from the banks. Neither does a **creditor** have a special obligation to assist a debtor in the event of default. In other words, **the borrower is responsible for his own indebtedness**. In the legislation, this finds expression in the fact that the protection consists in strengthening the individual’s choice by means of the duty to provide information and that the provisions regarding usury in the Danish Contract Act and the Penal Code are seldom used for the benefit of the borrower. Thus, the freedom of contract and the liberal basis in the form of a *caveat emptor* (buyer be aware) ethos prevail.

In Western countries, the access to loans in respect of private individuals has been the principal condition for the economic growth after the war.^{*54} However, credit is not only crucial for growth in society; in terms of over-indebtedness, it also has a downside, in the form especially of personal and socio-economic negative implications. Borrowed money does not in itself imply real wealth; it comprises solely potential for creating wealth.^{*55} Credit differs from other services: what the consumer subsequently pays for through the credit costs is the actual opportunity of usage that the loan amount implies. If the consumer uses the loan amount for, say, education, establishment of a business, or health care, creation of wealth is possible.^{*56} If the amount of the loan is spent on purchases of a dwelling and consumer goods, it can enable the creation of welfare. However, as is indicated above, lending has an embedded risk of loss of welfare if the consumer is not able to repay the credit. It may be characterised by poverty and life-long indebtedness, which, for instance, may entail loss of central goods such as a dwelling, dissolution of marriage, social exclusion, and influence on one’s health and well-being. The implications for the individual (at micro level) may, in turn, have societal implications (at macro level). The personal implications are reflected on a societal basis in, among other things, increased costs for social services, the legal system (the bailiff’s court), and the health-care system.

⁵³ Bet. 1509/2009 (see Note 16), p. 52.

⁵⁴ C. Poppe. *Ansvar for egen gjeld?* [‘Responsibility for one’s own debt?’]. – K. Asdal, E. Jacobsen. *Forbrukerens ansvar* [‘The Consumer’s Responsibility’]. Oslo: Cappelen Akademisk forlag, p. 251 (in Norwegian).

⁵⁵ U. Reifner. *European Coalition for Responsible Credit – Principles of Responsible Credit*. – C. Twigg-Flesner *et al.* (eds). *The Yearbook of Consumer Law 2008*. Hampshire: Ashgate 2007, p. 419 (in English).

⁵⁶ *Ibid.*

Consequently, every society must set the limit between society's and the individual's liability for unmanageable debt. In 2008, Kronofogden (the Swedish bailiff) estimated that Sweden's at least 400,000 over-indebted individuals cost society at least 30–50B Swedish kronor annually, inclusive of reduced production due to over-indebtedness, and a similar Norwegian survey is on the way.⁵⁷ Such figures call for society to play an active role in the handling of debts. Also, the financialisation of the global economy emphasises that there are limits as to how far the individual's responsibility can be extended if anything goes wrong. The considerations supplement the social aim, which also applies to aid to people in the grip of debt. The aim finds its expression in the modern welfare state, which is normally characterised by being a safety net for the citizens. If a citizen must resort to expensive loans in order to cope with the daily necessities and if the state does not take care of the indebted person, the state transfers its protection of welfare and leaves it to the (lacking) ability of the individual.

If one reads the preparatory work for the Credit Contract Act, the word 'over-indebtedness' is not mentioned, and it is only quite briefly mentioned in the preamble to the CCD 2008.⁵⁸ The lack of awareness that consumer credit has the inherent risk of over-indebtedness is due probably to the fact that policy-makers traditionally compare the consumer-credit legislation to other consumer legislation and apply the associated considerations. This applies especially in the European context, in which the desire is to increase welfare through increased competition (the internal market) and thereby an increased range of consumer credit and access to it, instead of to protect consumers against unintended (financial) consequences of their actions. Apart from the consumer's interest, preventing **over-indebtedness** safeguards societal interests far more than does the consideration of consumer protection. Over-indebtedness is not necessarily a matter of the consumer being exploited or being irresponsible at the moment of conclusion of the contract. It may just as well involve a 'reasonable' credit agreement and the consumer simply not being able to afford to pay the amount back. In contrast to this, **consumer protection** traditionally is aimed at preventing the businessman from taking advantage of his stronger position and thereby obtaining an unreasonable agreement.

By virtue of their high costs and the related debt problems, Web and SMS loans are especially illustrative of the present adjustment not being able to prevent over-indebtedness. Beyond the existence of poor licensing and supervision regarding these consumers, the present protection measures in the legislation seem to be insufficient.

In their capacity as short-term loans and minor loans, SMS loans will be outside the scope of protection of the CCD 2008. However, even though protection is provided in relation to such loans in Denmark's Credit Contract Act, contrary to the hoped effect the said act does not seem to have minimised the cost-intensive loans.

Neither do the Consumer Ombudsman's guidelines for SMS loans, which to a large extent are an expression of current law in the form of good business practice, especially with respect to the marketing, seem to have restrained SMS loans and the high costs they often involve.

The volume of **information** has not been decreased by the CCD 2008 and, accordingly, the Danish Credit Agreement Act. The most important information is at risk of being lost amidst **information overload** when, for example, up to 22 compulsory pieces of information are stated in the agreement, the lender can attach further information, and the consumer receives other information in connection with distance selling or consumer goods bought on credit. Not all consumers read, understand, or know how to use the information. With respect to financial capability, some empirical data indicate that only 21% of young people answer a question on the price of instalment loans correctly.⁵⁹ 'Low' monthly instalments often become the focus of the borrower instead of the APR, and establishment charges etc. are often disregarded when a low interest rate or no interest is offered. An increase in **financial literacy** will be especially beneficial to

⁵⁷ Kronofogden. Alla vill göra rätt för sig. Överskuld sättningens orsaker och konsekvenser ['Everyone wants to do the right thing: Causes and consequences of over-indebtedness']. – KFM Rapport 2008:1, pp. 6, 56 ff. (in Swedish). As part of the research project titled 'Financialisation of Social Welfare', led by C. Poppe, of SIFO, a cost/benefit analysis of the Norwegian municipal debt advice (WP7) is in the course of preparation.

⁵⁸ The **European** purpose of the consumer-credit legislation is related to the internal market for consumer credit. The aim will involve advancing consumer welfare; however, it does not seem to address the detriment of welfare in connection with over-indebtedness. In a **Danish** context, the word 'over-indebtedness' is not mentioned at all in bet. 839/1978 om køb på kredit ['Danish Report No. 839/1978, on credit sale'], which formed the basis for the former, purely Danish-initiated consumer-credit legislation—i.e., the Danish Credit Sale Act (kreditkøbsloven—Act No. 275, of 9 June 1982). The aim was to increase consumer protection, though.

⁵⁹ The Money and Pension Panel. Unges privatøkonomi 2011 ['Young people's economy 2011'], a survey. Copenhagen 2011, p. 6.

the already rational consumers, not so much to irresponsible consumers who may also be under-trained.^{*60} It is, however, the latter group that needs the most financial education. Informational material and budget templates can, for example, be found on the Money and Pension Panel's Web site.^{*61} However, not all consumers have (or can obtain) the same high **financial capability** or will use such material. A Danish study of young people's borrowing shows that 'non-academically-oriented young people' characterise the group of financially weak young people who take out expensive consumer loans.^{*62}

Whether or not the 'electronic lenders' actually provide the compulsory information is a different matter. The Consumer Ombudsman has several times proved a breach of the notification duty. For SMS loans, the information is often provided in advance via statements by the establishments on homepages through which efforts are made to comply with the information duty.^{*63} The volume of the compulsory information is not necessarily suitable for brief text messages, as used by SMS.

As to the **right of withdrawal**, the loan amount is typically used, and the consumer is still bound by, for example, a purchase agreement. On account of the right of withdrawal, the consumer is required to act responsibly subsequently, even though he may have acted irresponsibly in the contract situation. Actually, when the pre-contractual duty to inform about the right of withdrawal is without information on the costs the use of the right incurs a consumer, it may contribute to consumers taking out loans on the basis of the idea that they have a free credit facility within the 14 days for which the right of withdrawal lasts. **Early repayment** seems quite irrelevant in the context of SMS loans, on account of their short maturity period.

As is mentioned above, the provisions related to **usury** are seldom applied in favour of the borrower. Web and SMS loans are often connected with easy access and high costs. These two things are not necessarily an appropriate combination. In the context of distance selling agreements, it is difficult to talk about utilisation in the sense of Section 31 of the Contract Act, or usury in the sense of Section 282 of the Penal Code.

Consideration for preventing over-indebtedness prevails generally with regard to responsible lending. As mentioned above, this protects consumers from borrowing if it is anticipated that they will have difficulties in paying back the credit. However, this means has not been applied in Danish law, in which a principle of **responsible borrowing** still applies. The latter means reduces but does not exclude the discussion of usury and the imposition of a **maximum cost** on SMS and Web loans, in relation to which questions of consumer protection are particularly relevant since the consumer through his need for loans is on less equal footing with a stronger businessman than a consumer in other consumer agreements and, therefore, is more readily subject to exploitation.

8. Solutions

As the legislation seems insufficient, it should be discussed how well-proportioned solutions can be provided. If one looks at the present protective measures, **focused and consumer-friendly information** in combination with **increased financial literacy** via such means as information campaigns or studies in personal economics at school can, of course, further the desired conditions. Since the duty to provide information has its limits, further means will be discussed below that can be introduced into Danish law if one wishes to reduce over-indebtedness and the number of expensive Web and SMS loans.

The EU has not yet shown an interest in those SMS loans that are not covered by the CCD 2008's field of application. The solutions will be left to national law and will often be centred on specific prohibitions as other means; such means as the duty to provide information, which constitutes a minor interference in the parties' freedom of contract, have already been tested (compare with the principle of proportionality set forth in Article 5 (4) of the Treaty on the European Union). Just as they may restrict the parties' freedom of contract, such prohibitions may constitute a restraint to free competition in the EU market. However, this is a contemporary example of an area in which a strong social interest may exist that justifies national

⁶⁰ G. Pearson. Financial literacy and the creation of financial citizens. – M. Kelly-Louw *et al.* (eds). *The Future of Consumer Credit Regulation*. Hampshire: Ashgate 2008, p. 27 (in English).

⁶¹ See www.raadtilpenge.dk.

⁶² The Money and Pension Panel. Unge's forbrugslån og opsparing ['Young people's consumer loans and savings'], a survey. Copenhagen 2008, p. 6.

⁶³ See www.forbrugerombudsmanden.dk.

regulation interfering in the internal market. Whether or not a given prohibition is in accordance with EU law must be decided upon on a concrete basis.

8.1. Authorisation and supervision

In general, **an authorisation** is not required for granting or providing credit in Denmark. All businesses that grant credit to consumers are covered by the regulation in and proceeding from the Danish Consumer Credit Act. However, an authorisation is required if one is to do the kind of business addressed by the law on finance institutions. Yet it is not the finance institutions that are the main players behind easily accessible loans characterised by extremely high costs. It is the other lenders—those without an authorisation.

Introducing a licensing scheme for money-lending businesses under Danish law has been considered. However, the considerations were rejected. In particular, the arguments were that such a scheme would involve considerable administration and that the scheme had to comprise special demands for the lender's qualifications since otherwise it would imply that less reliable lenders may gain access to 'display public authorisation'.⁶⁴ The great social importance of lending and the implications that mainly irresponsible lending may have for not only the individual consumer but also society in general counts heavily in favour of an authorisation scheme for lenders being reconsidered. Such schemes are known of from, for example, the British Consumer Credit Act and the Australian Consumer Credit Protection Act.

On an overall basis, being involved in certain credit activities without having a credit authorisation should be prohibited (it is appropriate that, for example, private individuals who grant credit not be covered in these activities). An authorisation scheme renders it possible to deprive a lender who, for instance, grossly or several times violates the regulations' terms on protective measures of his authorisation. In itself, this possibility will presumably serve as a deterrent, acting in favour of greater compliance with the legislation and the protective measures in this connection.

8.2. Product limitation and access to credit

From political quarters, to what extent Web and SMS loans are deemed desirable is seldom announced. An increased range of products is traditionally considered good, and prohibition of certain products, such as SMS loans, is only rarely discussed. If there are simple, standardised products from among which to choose, a consumer will more easily be able to take care of himself. Conversely, a product ban is also associated with further reflections. It does not seem to be the main issue that a credit agreement is concluded by way of a remote communication tool (a mobile phone or the Internet). Rather, at issue seems to be the fact that these loans are associated with high costs and are easily accessible, often with a possibility of quick payment. Consequently, the consideration should be instead whether **the access to loans and obtaining quick payment** can be rendered more difficult. The temptation of quick payment of a loan amount would be less, and the fact of the loan amount not having been used yet also will make it easier for the consumer to exercise the right of withdrawal. Therefore, by way of such other methods, the question becomes one of product limitations rather than a product ban.

8.3. Marketing

Prohibitions of especially aggressive marketing (e.g., of a non-requested application) are already specified by law. However, these prohibitions do not hinder the consumer's receipt of marketing of credit via advertisements, the Internet, etc., which material may contribute to the consumer seeking credit. Consequently, **a limitation to the marketing of loans** is an obvious step. However, it would be more readily acceptable to prohibit specific elements in the marketing. Displaying of signs, including APR, should not be prohibited.

A marketing ban or at least a limitation should be specified in EU context, since, generally, this area has already been adjusted from European quarters. As to the payment of loans, the CCD 2008 to a certain extent gives access to adjustments in this area on a national basis.

⁶⁴ Bet. 604/1971 (see Note 32), p. 25 ff.

8.4. Maximum cost

Thus, finance companies and other lenders can almost decide for themselves how expensive a loan is going to be. Primarily, the cost-intensive SMS and Web loans raise the question of whether **a limit as to how much a loan may ‘cost’** should be reintroduced.

To answer the purpose, the considerations should be related to **a limitation of costs (cost ceiling)** for credit rather than **an interest maximum (interest-rate ceiling)**. Consequently, **a limitation of costs** will constitute a ‘maximum price’ for loans. However, **an interest maximum** would not necessarily minimise the costs for the credit. Instead of interest, fees can be charged. It is not unusual that the cost-intensive loans are free of interest and that one or several extremely high fees—e.g., related to the taking out of a loan—must be paid instead.

A maximum cost implies a prohibition against granting loans in excess of that maximum. The prohibition is related to the terms of the agreement. Whether a specific legal maximum cost approaches a proper prohibition or is only a limitation will, however, depend on the wording of the potential provision. An interest or maximum cost will typically be related to external circumstances—for instance, be fixed to a certain interest rate, which is adjusted in accordance with the fluctuations of the money market or in relation to the Bank of Denmark’s bank rate or the like.^{*65} If the limitation is related to the parties’ internal affairs, it is not a proper prohibition.

In European respects, there seem to be no obstacles to introduction of a maximum cost or to usury more generally being governed by national law.^{*66} The central aim of both the CCD 1987 and the CCD 2008 is to improve the transparency instead of adjusting the credit costs.

The introduction of a maximum cost in Danish law would not be such a fundamental breach of Danish legal tradition as one might think. In Danish legislation, provisions for maximum prices already exist; for example, Subsection 9b (2) of the Interest Act restricts the size of reminder fees. Certain control of costs, including interest, can already be done pursuant to mainly Section 22 of the Credit Agreement Act and Section 36 of the Contract Act.

The **pros** of introducing a maximum cost are that it is an efficient way of preventing unreasonable credit agreements. It makes the legislation clear, as it is easy to see when a lender has gone above the maximum, which would make it easier to enforce the provision. Thereby, the drawbacks of the present legislation would be eliminated, including the provisions on exploitation (in Section 31 of the Contract Act and Section 282 of the Penal Code) and the general clauses (in Section 22 of the Credit Agreement Act and Section 36 of the Contract Act). The provisions’ vague wording is subject to reluctance to apply these provisions on the part of the courts. They do not necessarily hinder loans having such remarkably high costs that the costs are referred to in public as ‘usury’. A number of circumstances may indicate that excessively high costs are, in fact, being levied in comparison to the risk of loss to which the lender is exposed.^{*67} Indeed, the provisions may act as a safety valve in the event of social force majeure affecting a specific consumer, but the lender can possibly redistribute the costs by further increasing his ‘prices’ for consumers as a whole. In contrast, a maximum cost too would be of benefit to consumers as a whole.

The **cons** of introducing a maximum cost are that **it is difficult to determine an appropriate maximum cost rate for all the various types of loans**. The risks of loss on lending vary. In particular, there may be a disparity between the borrower’s creditworthiness and the value of the security, if any, for the loan.^{*68} Also, there may be a difference in the administration costs.^{*69} One may claim that these objections do not apply only to a general maximum cost, that they also apply to a specific maximum in certain fields of loans, such as loans against mortgage on real property.^{*70} However, this does not seem evident.

⁶⁵ *Ibid.*, p. 24.

⁶⁶ Com(1995) 117, item 282. However, item 297 in the same work indicates that the Commission finds it desirable that discussion of usury at Community level be conducted. If necessary, it would be logical for suitable provisions on usury at Community level to be determined. Also, in relation to credit secured for real property, usury and maximum cost are a theme. In its Green Paper on credit secured on real property in the EU, the Commission states that it has refrained from interfering in this area, one that has substantial social aspects; see Com(2005) 327, item 26.

⁶⁷ In relation to commercial banks, see H. Juul. *Pris og kvalitet på pengeinstitutområdet* [‘Price and Quality in the Banking Sector’]. Copenhagen: Gads Forlag 2006, p. 202 ff.

⁶⁸ Cf., for example, bet. 604/1971 (see Note 32), pp. 7, 24; bet. 839/1978 (see Note 58), p. 40.

⁶⁹ Bet. 604/1971 (see Note 32), p. 25.

⁷⁰ E.g., bet. 604/197 (i*bid.*).

Indeed, it is inexpedient for the same upper limit to apply to all types of credit. This can be remedied through **differing cost maxima**. In a number of other countries, there is or has been a maximum cost.^{*71} In particular, this is the case in Belgium, France, and to a certain extent also Holland. The legislation in these countries illustrates that, for instance, different maxima can be set in various quarters, determined on the basis of the type of credit, its amount, and the period of credit and/or depending on the average costs of the credit institutions.

Further cons of introducing a maximum cost are that it may be feared that **lenders will completely refrain from granting loans to borrowers that imply a high risk of non-repayment** and that these borrowers will be referred to the black market. In light of the level of cost that certain consumer loans have, the question is whether this consumer group should take out such loans at all to which there is relatively easy access. Obtaining loans on the black market seems to be less accessible, and, on the basis of the present level of costs related to certain consumer loans, one might consider whether the level differs from the prices on the black market.

Furthermore, the argument could be advanced that **a statutory maximum cost against its purpose will render it common to require the maximum allowed credit costs** as well in the less hazardous cases and thereby promote an undesired increase of the costs in practice.^{*72} The argument is confirmed by the fact that the fixing of the maximum price for reminder fees in Subsection 9b (2) of the Interest Act implies that creditors often overlook the words ‘not exceeding DKK 100’ in the wording of the act and charge the maximum amount of DKK 100 (EUR 13.4) for each dunning letter. However, this does not document the fear that everyone will make use of maximum prices upon granting of credit.^{*73} The scenario of competition in reminder fees is not the same as that for borrowing, in which the borrower can opt out of the raising. The argument is contrary to the prerequisite that lenders have a desire to compete for borrowers. It is that prerequisite on which the internal European market for lending rests.

Based on a weighing of the pros and cons of a maximum cost, the conclusion is that a maximum cost is a relevant option for Danish law. Even though it seems less radical, an obligation for financial businesses to document why an interest rate is X% above the bank rate seems a less obvious solution.^{*74} Such documentation does not seem to appeal to the group of borrowers who are interested in financial businesses’ pricing.

However, before introduction of a maximum cost should be considered, it seems appropriate to strengthen the courts’ possibilities of setting aside unfair credit agreements in accordance with the present provisions, especially Section 22 of the Credit Agreement Act and Section 36 of the Contract Act. Also, the introduction of a responsible lending standard as a separate provision would restrict the need for fixing of a maximum cost for credit, even though the two measures do not exclude each other. Responsible lending comprises in itself credit free of charge—i.e., in which the repayment consists solely of the amount of the loan. Such credit can (also) constitute a financial burden to the borrower. A maximum cost does not have this advantage.

8.5. Responsible lending

In itself, none of the three protective measures to which responsible lending is often connected—a duty of credit assessment, a duty to give advice, and a duty of dissuasion—prevents irresponsible lending. Therefore, as a concept, responsible lending should be distinctly connected to irresponsible lending, consequently ensuring that no credit is granted that the consumer is not supposed to be able to repay. Legal norms such as good (lending) practice and loyalty are too vague to ensure this, even though they can possibly influence the assessment that is made in accordance with, for example, Section 36 of the Contract Act. Therefore, a provision on good lending practice such as Section 5 of the Swedish Consumer Credit Act (konsumentkreditlag) is not sufficient.

⁷¹ With respect to maximum cost in other European Union member states, see Com(1995) 117, item 276 *ff.*; the proposal for parliamentary resolution B 33 from the 2008–2009 Danish parliamentary session with respect to a ceiling on the annual costs, on a percentage basis (i.e., in terms of APR) for consumer loans; and the reply to question 3 on the proposal for a parliamentary resolution filed by the Trade and Industry Committee on 24 February 2009.

⁷² See, for example, bet. 604/1971 (see Note 32), p. 25; bet. 839/1978 (see Note 58), p. 40; SOU 1975:63 Konsumentkreditlag m. m. [‘Statens Offentliga Utredningar, Government Official Reports on a consumer credit act etc.’], p. 193 *ff.* (in Swedish).

⁷³ See, *e contrario*, H. Juul (Note 67), p. 204.

⁷⁴ See, *e contrario*, H. Juul (*ibid.*).

There is a lot to be said in favour of the lender under the legislation being assigned a duty to refrain from granting credit in certain situations—i.e., in favour of a prohibition of irresponsible lending: The duty of credit assessment set forth in the CCD 2008 seems to be appropriate only to the extent that also a duty applies to refrain from granting credit in the cases in which the credit assessment has a negative result: when the consumer is considered unworthy of obtaining credit. The vague wording of the duty of credit assessment referred to in the CCD 2008 furthermore implies a need in national law for implementing a measure for the assessment; a ban would contribute to the determination of such a measure.⁷⁵ Indeed, it speaks against the imposition of a ban that the result of a negative credit assessment would presumably already be that the lender refuses the credit application; in general, it is the lender who suffers the loss if the credit is not repaid. However, counting in favour of the imposition of a ban is that in a number of situations the lender may have an interest in the credit being granted regardless of a negative credit assessment. Even though a lender may assess the consumer's ability to repay as being low, such factors as the chance of a profit through high credit costs may eclipse the risk that the lender takes. The directive cannot be considered an objection to conclusion of a credit agreement in this or in other situations. Indeed, it speaks against the imposition of a ban if the consumer on an 'enlightened' basis (e.g., through counselling) has chosen to indebt himself. However, a rationale is lacking for a consumer who objectively should not take out a loan but who subjectively wants one to indebt himself to the detriment of especially himself, a possible guarantor, and eventually society. There is, in fact, quite a heavy objection to a ban in its restriction to the parties' autonomy, and the fact that in relation to the consumer it can be considered paternalism. But the socially, highly weighty (though often overlooked) consideration of prevention of over-indebtedness is in favour of a restriction of the freedom of contract, no matter that the lender or the consumer is willing to assume a further risk upon the lending.

The most expedient thing to do is to impose a ban on irresponsible lending at a European level, which enjoys a greater focus in the Residential Property Credit Agreements Directive (2014/17/EU). An explicit ban in the CCD 2008 would have been able to restrict the legal uncertainty that the duty of credit assessment set forth in Article 8 applies to national law. Instead, specific elaboration of the duty of credit assessment has been left to the Member States. Apparently, EU law does not stand in the way of imposing a ban on irresponsible lending. Accordingly, several Member States have implemented such a duty, among them Finland and Sweden.

The imposition of such a ban should be done in conjunction with introduction of an authorisation scheme for lenders and intermediaries in consideration of the social implications of lending. The idea of credit assessment should still be applied, so the lender can assess whether, on the basis of internal measurements, he wants to grant credit to a specific consumer. However, as to responsible lending, the weight should be on whether the potential credit agreement is 'unsuitable' for that consumer; see, for example, the Australian Consumer Credit Protection Act from 2009, Clauses 115–119, 128–131, 138–142, and 151–154. The latter presupposes that socially an external metric for when a loan is considered irresponsible will be determined.

8.6. An appeal board for instant loans

For consumers, a political proposal for an appeal board for instant loans would mean having the possibility of filing a complaint if they think they have been treated unfairly or are paying unreasonably high interest on a loan. Danish consumers already have the opportunity to have their legal complaints handled by the Complaint Board of Banking Services, by the Consumer Complaint Board, and by the courts. One may still fear that many of those who obtain instant loans will not take the opportunity of complaining at all. A borrower who takes out expensive instant loans without thinking of the consequences will hardly be part of the group likely to complain the most.

An appeal board does not become effective until the 'damage' has occurred, whereas above-mentioned provisions such as a maximum cost could prevent the damage from arising. Consequently, an appeal board helps to treat the symptoms but does not remove the cause. Similarly to all other post-contractual reactive measures, the actions of an appeal board should be tied in with pre-contractual preventive measures.

⁷⁵ C. Herresthal. Die Verpflichtung zur Bewertung der Kreditwürdigkeit und zur angemessenen Erläuterung nach der neuen Verbraucherkreditrichtlinie 2008/48/EG. – *Zeitschrift für Wirtschafts- und Bankrecht (ZWuB)*. 2009, p. 1177 (in German).

9. Conclusions

How to protect consumers and how to prevent over-indebtedness is mainly left to national law where the CCD 2008's field of application does not cover easily accessible minor loans such as SMS loans. Other kinds of consumer credit are mainly EU harmonised, so it is primarily left to the EU to find solutions.

With regard to solutions, the protective measures must be considered in interaction. No measure should stand alone. However, there is variation in the weight that should be accorded to individual measures. From the examination above, this seems an appropriate balance:⁷⁶

There should be an authorisation system for both credit providers and credit intermediaries. These must—but not necessarily to the same extent—respect the protective measures in the legislation. The information should be pared back, easy to understand, and adapted to the rationale behind the information obligation at each stage of a (potential) credit agreement. It is useful to increase the education of consumers (e.g., young people at school). Yet, there are limits to how much the financial literacy of consumers can be improved. The right of early repayment appears to be enough; the introduction of the right of withdrawal in the CCD 2008 seems to be unnecessary. Also, the introduction of the obligation to assess the consumer's creditworthiness seems unnecessary. Assessing creditworthiness should be only for the creditors' own use, not an obligation. Lenders should, wherever possible, not play a dual role. Advice should, therefore, be reserved for independent advisers. Instead, the focus on responsible lending as an independent protection measure should be increased. The other protective measures in themselves are insufficient to prevent over-indebtedness. Accordingly, the law must impose a duty for the creditor not to offer credit in certain situations (i.e., a prohibition of irresponsible lending). Responsible lending as an independent measure lessens but does not exclude considerations for introducing a maximum to how much a loan may cost. Nevertheless, the opportunity currently found in Danish law to alleviate unfair credit agreements should be strengthened. Prohibiting certain forms of credit, such as SMS loans, seems unnecessary. At the EU level, marketing and possibly access to credit should be restricted.

⁷⁶ See also T. Jørgensen (Note 26), p. 530 *ff.*