

Liability of the subscriber for contracts of third parties with Premium Rate Service Providers



Candidate number: 9

Author: Bernhard Dornhofer

Supervisor: Olav Torvund

Deadline for submission: 09/01/2009

Number of words: 16,550

28.08.2009

UNIVERSITY OF OSLO

Faculty of Law

Content

| | |
|---|------------------|
| <u>ABBREVIATIONS.....</u> | <u>1</u> |
| <u>1 INTRODUCTION.....</u> | <u>2</u> |
| 1.1 Problem | 2 |
| 1.2 Delimitation | 3 |
| 1.3 Way of approaching the problem | 3 |
| 1.4 Sources..... | 3 |
| 1.5 Definitions..... | 4 |
| 1.5.1 Persons fully capable of contracting under Austrian Law | 4 |
| 1.5.2 Persons incapable of contracting under Austrian Law..... | 4 |
| 1.5.3 Persons fully capable of contracting under Norwegian Law | 6 |
| 1.5.4 Persons incapable of contracting under Norwegian Law..... | 6 |
| 1.5.5 Premium rate services..... | 9 |
| 1.5.6 Involved parties and contractual relations of a premium rate service..... | 9 |
| 1.5.6.1 Involved parties..... | 10 |
| 1.5.6.2 Contractual relations when using a premium rate telephone service | 10 |
| 1.5.7 Legal instruments..... | 12 |
| 1.5.7.1 Suretyship under Austrian Law | 12 |
| 1.5.7.2 Suretyship under Norwegian Law | 14 |
| 1.5.7.3 Authority under Austrian Law | 15 |
| 1.5.7.4 Authority under Norwegian Law | 17 |
| <u>2 PROBLEM.....</u> | <u>21</u> |
| <u>3 RELEVANT CASE LAW.....</u> | <u>23</u> |
| 3.1 The flat-case - OGH 1 Ob 244/02t..... | 23 |

| | | |
|----------|--|-----------|
| 3.2 | The burglar case – OGH 1 Ob 114/05d | 26 |
| 3.3 | Norwegian case – Eidsivating lagmannsrett LE-2000-883 | 27 |
| 4 | <u>CONTRACTS WITH PERSONS FULLY CAPABLE OF CONTRACTING.....</u> | 29 |
| 4.1 | Suretyship under Austrian Law..... | 29 |
| 4.2 | Suretyship under Norwegian Law | 30 |
| 4.3 | Comparison of suretyship | 32 |
| 4.4 | Authority under Austrian Law | 32 |
| 4.5 | Authority under Norwegian Law..... | 39 |
| 4.6 | Comparison of Authority | 40 |
| 4.7 | General Terms and Conditions under Austrian Law..... | 40 |
| 4.8 | General Terms and Conditions under Norwegian Law | 41 |
| 4.9 | Comparison of General Terms and Conditions..... | 42 |
| 4.10 | Additional contractual obligations under Austrian Law | 42 |
| 4.11 | Additional contractual obligations under Norwegian Law | 43 |
| 4.12 | Comparison of Additional contractual obligations | 43 |
| 5 | <u>CONTRACTS WITH PERSONS INCAPABLE OF CONTRACTING</u> | 44 |
| 5.1 | Suretyship under Austrian Law..... | 44 |
| 5.2 | Suretyship under Norwegian Law | 45 |
| 5.3 | Comparison of the suretyship | 46 |
| 5.4 | Authority under Austrian Law | 46 |

| | | |
|-----------------|--|------------------|
| 5.5 | Authority under Norwegian Law..... | 49 |
| 5.6 | Comparison of Authority | 49 |
| 5.7 | General Terms and Conditions, Additional Contractual Relations under Austrian and Norwegian Law | 49 |
| <u>6</u> | <u>CONCLUSIO</u> | <u>50</u> |
| | <u>SELECTIVE BIBLIOGRAPHY</u> | <u>A</u> |

Abbreviations

| | |
|------------|--|
| ABGB | Allgemeines Bürgerliches Gesetzbuch (Austria) |
| Avtl | Avtaleloven (Norway) |
| BGH | Bundesgerichtshof (supreme court Germany) |
| Finansavtl | Finansavtaleloven (Norway) |
| KEM-V | Kommunikationsparameter-, Entgelt- und Mehrwertdiensteverordnung (Austria) |
| KSCHG | Konsumentenschutzgesetz (Austria) |
| OGH | Oberster Gerichtshof (supreme court Austria) |
| PIN | Personal Identification Number |
| PRN | Premium Rate Number |
| PRS | Premium Rate Service |
| PRSP | Premium Rate Service Provider |
| SMS | Short Message Service |
| TKV | Telekommunikations- Kundenschutzverordnung (Germany) |
| TSP | Telephone Service Provider |
| Vgml | Vergemålsloven (Norway) |
| VwGH | Verwaltungsgerichtshof (Austria) |

1 Introduction

1.1 Problem

Nowadays almost every person has a telephone connection, either in the form of a fixed telephone line at home and or a mobile phone. A study of the International Telecommunication Union shows that in the end of 2008 1,270 billion people worldwide had a subscription for a fixed line and 4,1 billion people had a subscription for a mobile phone¹.

Beside normal telephone calls in 2007 also 74% (2,4 billion people)² of all mobile phone users used the short message service (from now on referred as SMS) on a regular basis. Next to the normal telephone services (such as calls, SMS, etc.) exist also a huge variety of so called premium rate telephone services. These services can be accessed by calling or using SMS to a special telephone number and cost usually a multiple of a normal call or SMS. The variety of which services are offered is huge and goes from telephone sex over future telling to download of music or games. Especially in the last years, with the fast development of cell phones the SMS premium rate services (from now on referred as PRS) became more and more popular. There is something in for all target groups. So the download of ring tones, music and games for the cell phone became more and more popular among children and such services as sport news, weather forecasts and parking services more popular among adults.

Legal problems with the usage of PRS arise when other people than the subscriber of the telephone connection is using it without the permission of the owner. In this thesis I will examine the liability of the subscriber for the fees of PRS on the one hand when a person

¹ *International Telecommunication Union* (2009)

² *Wikipedia*, Mobile Phones

fully capable of contracting and on the other hand when a person incapable of contracting uses a PRS with the telephone connection of someone else without their permission.

1.2 Delimitation

I will focus in this thesis on the liability of the subscriber for telephone calls made by third parties. Therefore I will just look briefly at the contractual relation between the telephone service provider and the premium rate service provider (from now on referred as PRSP).

I will not write about the possible issues of criminal law or the possibilities of the subscriber to regress at the user of the PRS.

I will assume in this thesis that the offers of the PRSP comply with the marketing and contract regulations of national and international law.

Furthermore I will assume that the services of the PRSP are provided without any deficits.

1.3 Way of approaching the problem

I will approach the problem in the way that I first will show the relevant case law and then analyze if, in my opinion, the high court came to the right solution with the right legal instruments. I will begin with examining the Austrian Law because I come from Austria and studied there.

I will try to compare my results to Norwegian Law. Since I never studied Norwegian Law I will try to find legal instruments which seem to be similar to the Austrian ones and try to apply them to the circumstances of the cases and see if the results would be the same.

1.4 Sources

As point of departure I will examine the problems stated above according to Austrian Law. I will look at decisions of the Austrian courts especially of the supreme court (Oberster Gerichtshof from now on referred as OGH) and also from German courts especially of the supreme court (Bundesgerichtshof from now on referred as BGH) because the OGH itself

and the authors of the literature often refer to decisions and literature of Germany because the legal systems are very similar.

I will also look into Norwegian Law and compare it to the Austrian Law. In order to show the differences between the two legal systems I will describe the Norwegian Law always right after the Austrian Law and show the similarities and differences. I don't claim a completeness of the Norwegian Law because in the time given to write this thesis it would be impossible to study the entire Norwegian legal system.

1.5 Definitions

1.5.1 Persons fully capable of contracting under Austrian Law³

With the age of 18 sane persons achieve the majority and are fully capable of contracting.

1.5.2 Persons incapable of contracting under Austrian Law⁴

To determine what is understood under this term in Austrian Law we have to look at the §§ 21⁵, 151⁶, and 865⁷ Allgemeines Bürgerliches Gesetzbuch (from now on referred to as ABGB).

³This definition is based on: *Koziol/Welser I* (2002), p 54

⁴ The definitions in this section are based on: *Koziol/Welser I* (2002)

⁵ Own translation of § 21 ABGB (the italic written is added by the author of the thesis): "(1) Minors (*under the age of 18 years*) and persons, who for any other reason than their minority are not able to handle all or several of its affairs, are under the special protection of the laws.

(2) Minors are persons, who are not yet 18 years old; if they are not yet 14 years old, they are underage."

⁶ Own translation of § 151 ABGB (the italic written is added by the author of the thesis): "(1) A minor (*under the age of 18 years*) is, without explicit or silent consent of its legal representative, neither able to contractual dispose nor to commit himself.

(2) After achieving maturity (*over the age of 14 years*) he can dispose or commit over things, which were given to him to dispose freely and his income from private acquisition, so far as the satisfaction of his necessities of life are not endangered.

Persons under the age of 7 years

Persons under the age of 7 years are incapable of contracting. They are only able to commit and dispose over rights through their legal representative.

Any contract made by a person under the age of 7 years is void. There is one important exception to this rule in § 151 Abs 3 ABGB that a legal transaction which is usually entered by children in that age and concerns an every day transaction will be backdated valid when the child fulfills his obligations.

Persons between the age of 7 and 14 years

Underage minors have a limited contractually capability. According to § 865 ABGB they are able to accept a promise just made to their benefit. According to § 1421 ABGB⁸ they are able to fulfill already existing debts and discard their obligation. If an underage minor wants to obligate himself, either his legal representative must contract for him or accept the deal afterwards.

(3) If a minor (*under the age of 18 years*) enters a legal transaction, which is usually entered of minors at the same age and concerns an every day transaction, this legal transaction will be backdated valid as soon as the minor fulfills his obligations.”

⁷ Own translation of § 865 ABGB: “Children under seven years and people over seven years, who do not have the use of rationality, are - except in cases provided for in § 151 paragraph 3 ABGB – unable to make or accept a promise. Other minors between the age of 7 and 18 years or persons to whom a trustee is appointed, can accept a promise which is just to their benefit; if they take over, however, a burden tied up with it or have to promise something themselves, the validity of the promise depends – except in cases provided for in § 151 paragraph 3 and § 280 paragraph 2 – on the consent of the legal representative or the court, regulated in principle part three and four of this law. Until the consent is given the other part can not rescind but can require an explanation in reasonable time.”

⁸ Own translation of § 1421 ABGB: “Also a person who is usually incapable to administer her property can fulfill a right and an expired guilt, and discard his obligation. If an uncertain or not expired guilt would have been fulfilled, the person who is entrusted with the custody, the trustee or the curator, is entitled to claim back the performed.”

If an underage minor makes a contract which would obligate him, without the permission of the legal representative, the contract is not void but pending invalid. Through an ex post approval the contract can gain full validity.⁹

Persons between the age of 14 and 18 years

For minors between the age of 14 and 18 years are in principal the same rules applicable as for underage minors but they have in certain situations an adjusted capability to contract. They are able to obligate themselves to services and can dispose over their income of own earning and things, which were given to them to dispose freely, so far as the satisfaction of their necessities of life are not endangered.

Persons not capable of contracting

Persons who are over seven years, who do not have the use of rationality, are incapable of contracting. As long as no procurator is appointed the same rules are applied as for persons under the age of 7 years. That means that contracts are void. After a procurator is appointed the same rules as for persons between 7 and 14 years of age apply. That means that contracts are pending invalid. As the same rules as for children apply I will from now on not always refer to persons incapable of contracting and just talk about children.

1.5.3 Persons fully capable of contracting under Norwegian Law¹⁰

As in Austria sane persons gain with the age of 18 years the full capability of contracting.

1.5.4 Persons incapable of contracting under Norwegian Law¹¹

To determine which persons are incapable of contracting under Norwegian Law we have to look into the *vergemålsloven* (from now on referred to as *vgml*). The relevant articles are

⁹ *Koziol/Welser I* (2002), p 52 ff

¹⁰ *Lilleholt* (2009), p 89

¹¹ The definitions in this section are based on: *Lørdrup/Kluftun/Linge/Gjøslie* (2008)

§§ 1¹², 2¹³, 33¹⁴, 34¹⁵, 36¹⁶ and 37¹⁷ vgml. The main rule under Norwegian Law is that persons under the age of 18 years are incapable of contracting.

Persons under the age of 15 years

Under Norwegian Law there is only one step on the way to full capability of contracting. § 33 vgml states that all children can dispose freely over funds they have gotten from their legal representatives or from other persons for their own disposition.

¹² Own translation of § 1 vgml: “With minors this law refers to underage persons and to persons made minor by law. Persons are underage if they are not yet eighteen years old.”

¹³ Own translation of § 2 vgml: “Minors are unable to dispose over their own capital and to commit themselves in legal dispositions as long as nothing different is appointed.”

¹⁴ Own translation of § 33 vgml: “An underage person can dispose over funds he has earned on his own after he reached the age of fifteen years or he has gotten to dispose freely over from the legal guardian or another person.

The legal guardian can take away this right with respect to if the needs of the child require that. If the underage person is over fifteen years old and takes care of himself the acceptance of the court is needed.”

¹⁵ Own translation of § 34 vgml: ”A person made minor by law can make working contracts on his own and quit them. If he, in consideration of his welfare needs, the court can decide that just his legal representative is able to make or quit such contracts and that the legal representative is able to cancel contracts made before by the person made minor by law.

The person made minor can dispose over funds he earned on his own after he was made minor or he got from the legal representative or another person for his own disposition. The legal guardian can take away this right with respect to if the needs of person made minor require that.”

¹⁶ Own translation of § 36 vgml: “If a minor made a contract which he is not able to make on his own and which he has not validly fulfilled the other party can withdraw from the contract. The decision to withdraw can be declared to the minor.

If the other party knew that the person he is contracting with was a minor and he didn’t have any reason to believe that he was able to make this contract he can’t withdraw from the contract before the time when it should be fulfilled as long as the legal representative doesn’t refuse to accept the contract in that time. Also the other party can not withdraw from a contract about work as long as the minor fulfills his duties. “

¹⁷ Own translation of § 37 vgml: “If a contract, which a minor can not conclude on his own, is not approved or the other party withdraw from the contract because of § 36, every party has to return what they got and if that is not possible replace the value. The minor has to replace what he got just in that amount what it was use for him.”

§§ 36 and 37 vgmI regulate what happens with contracts made by minors. If a minor makes a contract which he cannot conclude according to § 2 vgmI the contract is invalid. Both the minor himself and the legal representative can plead on the invalidity. The contract is not void from the beginning because it can be approved ex post by the legal representative or by the minor if he became 18 years in the meantime.¹⁸ There are special rules when a party can withdraw from the contract but I won't go into detail here because it is not relevant for this thesis.

Persons between 15 and 18 years

The same rules as for persons under the age of 15 years apply but under certain circumstances they can in addition dispose freely over their own working contracts.

Persons not capable of contracting

Persons who are older than 18 years and do not have the use of rationality, are incapable of contracting. They are made minors by law. For them the same rules apply as for over 15 year old persons. They have certain additional rights, as for example to have an own business, but it is not necessary to go into detail here.

Comparison

It can be said that there is only one big difference between Austrian and Norwegian Law when it comes to the capability of contracting. In Austria children under the age of 7 years and persons made incapable by law are incapable of contracting. Contracts made by them are void. In Norway contracts made by all minors are pending invalid if they are not able to conclude such contracts. They can be withdrawn from both parties under certain circumstances.

¹⁸ *Lørdrup/Kluftun/Linge/Gjøslun* (2008), p194

1.5.5 Premium rate services

Premium rate telephone numbers are telephone numbers for telephone calls during which certain services are provided, and for which usually prices higher than normal are charged.¹⁹ Today PRS can also be used by sending a SMS to a specific number. These telephone numbers are usually allocated from a national telephone numbering plan in such a way that they are easily distinguished from other numbers.²⁰

In Austria the 0900 prefix is used for premium rate numbers (from now on referred as PRN) that charge per minute and the 0901 prefix is used for PRN that charge by call. For adult content the prefix is 0930 for per minute tariffs and 0931 for event based tariffs.²¹

In Norway any telephone number starting with 82 (mostly 820/829) is charged at premium rates (82x xx xxx).²²

The variety of PRS is very broad. A few examples are video games and crossword puzzle tips, horoscopes, dating and party lines, payment of parking tickets, voting (e.g. for TV shows), weather information, telephone sex and, today among young people very popular, various features (ring tones, games, screensavers, etc.) for the cell phone.

1.5.6 Involved parties and contractual relations of a premium rate service

When contracting with a premium rate telephone service various parties are involved and are related through various contracts. In this section I will just describe and examine the parties and the contractual relations relevant for the discussion in this thesis. There are various other parties and contractual relations but they are not relevant in order to discuss the liability of the subscriber for contracts made by third parties.

¹⁹ *Wikipedia*, Premium-rate telephone number

²⁰ *Wikipedia*, Premium-rate telephone number

²¹ *Rundfunk und Telekom Regulierungs GmbH*

²² *Post- og Teletilsynet* (2008)

1.5.6.1 Involved parties²³

User of the telephone

The user of the telephone is the person actually making the phone call or sending the SMS. It doesn't matter if he owns the phone or not.

Subscriber

The subscriber is the person who owns the telephone and has contractual relationship to the telephone service provider.

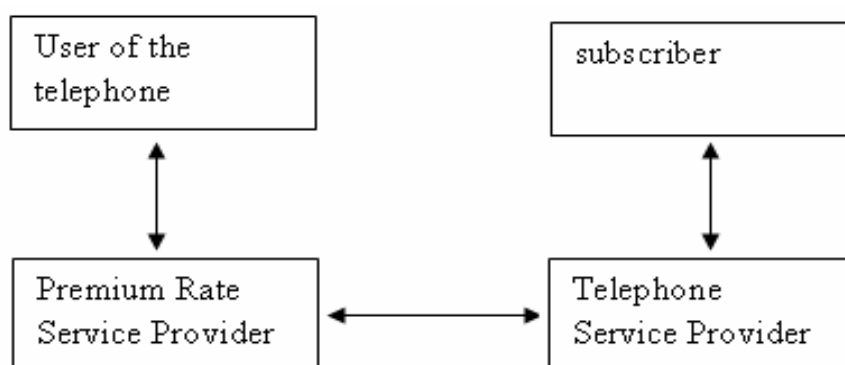
Telephone Service Provider (from now on referred as TSP)

The TSP provides the telephone connection and the access to the public telephone network.

Premium Rate Service Provider

A PRSP advertises the PRS as an own service and with an own telephone number, the PRN. If a telephone user calls this number, or sends a SMS to this number, the call or message will be transferred to the PRSP who provides the demanded service.

1.5.6.2 Contractual relations when using a premium rate telephone service



²³ The discussion in this section is based on: *Schmitz/Eckhardt (2007)*, p 560-567

Subscriber – Telephone service provider

This contract between the subscriber and a TSP is a “contract for the performance of a continuing obligation, in which the TSP obligates to provide the customer access to the public telecommunication network and to enable the customer to exchange speech or other data with other users of a fixed line telephone service or a mobile telephone service through setting up outgoing and incoming telecommunication connections.”²⁴ The user is obligated to pay the connection fee.

It is important to divide this contractual relation from the contractual relation between the user of a PRS and the PRSP.²⁵

User – Premium Rate Service Provider

The content of the contract between the user of the telephone and the PRSP is for the PRSP to provide the requested performance to the user. The user of the telephone has to pay the fee for the service. As I will describe below, usually the subscriber gets billed for the use of the PRS through his normal telephone bill. The PRSP usually doesn't know who is actually calling because he just knows which telephone number is calling. He always sends the bill to the subscriber of the telephone number and not to the actual user of the service.

There are various parties involved to connect a user to a PRSP. According to the BGH²⁶ the relevant view of the user is important. When he calls or sends a SMS to a PRN, he is only aware of the contractual relationship to the PRSP.²⁷ Other relations relevant to set up the connection to the PRSP are not known by the average user of a PRS. Because of that the user only has a contractual relationship to the PRSP.

Through this contract the PRSP obligates himself to provide the requested performance. The advertised price for the service includes all costs. That means it also includes the

²⁴ Own translation of parts of BGH, III ZR 58/06, p 4

²⁵ OGH, 1 Ob 244/01t

²⁶ BGH, III ZR 58/06

²⁷ With further references: *Schmitz/Eckhardt* (2007), p 562

connection fee of the TSP. This share goes to the TSP and the rest goes to the PRSP and its other contractual partners.²⁸

While the contractual relation with the TSP already exists when the user engages the PRS the contract with the PRSP is made at that time²⁹.

Telephone Service Provider – Premium Rate Service Provider

The TSP transfers the call or SMS which is made by the user who dialed a certain PRN to the PRSP. In most cases the TSP also collects the money for the PRSP through its own billing system.³⁰ It is possible that the PRSP collects the fee itself from the subscriber but that is unusual.

If the PRSP bills the user himself he has anyway all affirmative defenses if the contract is not valid or has certain deficits. If the PRSP transfers his rights to the TSP the subscriber cannot lose rights, no matter in which way the rights would be transferred³¹.

Because of that I will, as stated above, not examine this in detail because it is not relevant for this thesis.

1.5.7 Legal instruments

1.5.7.1 Suretyship under Austrian Law³²

Suretyship is a contract between the creditor and the bailman, where the bailman obligates himself, to satisfy the claim of the creditor if the debtor doesn't pay. Because of the high risk of a suretyship § 1346 Abs 2 ABGB³³ requires that the formal obligation must

²⁸ OGH, 1 Ob 244/01t

²⁹ *Zib* (2005), p 396

³⁰ With further references: *Stögmüller* (2003), p 253

³¹ OGH 1 Ob 244/02t, approvingly *Zib* (2005), p 396

³² The following definition is based on: *Koziol/Welser II* (2002), p 138f

³³ Own translation of § 1346 Abs 2 ABGB: "The suretyship contract needs for its validity that the formal obligation of the bailman has to be in writing."

be in writing. The reason for that is to warn the bailman. The requirement of writing is not fulfilled if the contract is made by electronic means. This is not in breach with Article 9 of the E-Commerce Directive³⁴ where it states that “Member states shall ensure that their legal system allows contracts to be concluded by electronic means” because under Article 9 (2) c E-Commerce Directive the suretyship is explicitly excluded.

Another criterion is that the debt the bailman should be liable for is substantiated³⁵. The requirement is already met if the principal debtor is not called by name but if the circumstances leave no doubt which one the parties meant as the obligator. It’s enough if the debtee, because of the behavior of the bailman and after taking all circumstances known by the parties in consideration according to the practice of fair dealing, could rely on and actually did rely on that the suretyship is made for the obligator meant by him and who is also known by the bailman³⁶.

As the suretyship should secure the forcefulness of the primary debt it relies on the existence of its debt (accessory). According to § 1351 ABGB³⁷ the suretyship is also invalid if the main debt is not originated valid or the suretyship expires if it debt expires. To that rule there is only one exception in § 1352 ABGB³⁸. Who bails for a main debtor who is incapable of contracting is obligated as an undivided co-debtor, even if he didn’t know that. The bailman secures in this case the claim of return of the creditor.

³⁴ Directive 2003/31/EC

³⁵ With further references: Wessely/Eugen (2003), p 5

³⁶ OGH, 4 Ob 546/79

³⁷ Own translation of § 1351 ABGB: “Debts which never existed or which are abrogated cannot be taken over nor be affirmed.”

³⁸ Own translation of § 1352 ABGB: “Who bails for a person which is incapable of contracting is, albeit he didn’t know about this character, obligated as a undivided co-debtor.”

1.5.7.2 Suretyship under Norwegian Law³⁹

The regulations for suretyship in Norwegian Law are spread through the different laws. There are no such requirements as under the Austrian Law. A suretyship can be made in writing or orally. The accessoriness is not as strong as under Austrian law. The main rule for solidary debts, such as the suretyship, is that it doesn't have any influence on the other debtors if one of them is not liable. But the relationship between the bailman and main debtor is special in the case of a suretyship. This leads to that there is made an exception in the favor of the bailman under the suretyship. So it can be said that accessoriness is given.⁴⁰

In the Finansavtaleloven (from now on referred to as finansavtl) the suretyship is regulated in a stricter way but this law is only applicable for contracts and assignments between customers and financial institutions. § 61 (1)⁴¹ finansavtl requires that the suretyship is in writing and the debt must be substantiated. An explicit accessoriness also is not given here but the same as stated above applies here. The above stated about the requirement of writing in the E-Commerce Directive also applies here.

Comparison

The big difference between the two laws is that in Austria the suretyship is regulated very strictly. In Norway there are no special requirements beside that the main debt has to be valid what makes it much easier to make a suretyship. Only in the relation between a consumer and a financial institution there are almost the same requirements as in Austria.

³⁹ The definition in this section is based on: *Smith* (1997)

⁴⁰ *Smith* (1997), p 56

⁴¹ Own translation of § 61(1) finansavtl: "The contract of suretyship must, in order to be obligatory, be in writing and contain a substantiation of the debt or the highest sum the bailman shall secure. § 8 second sentence does not apply for a suretyship with a consumer."

1.5.7.3 Authority under Austrian Law

There are two different kinds of authority under Austrian law, the intern and the extern authority. The difference lies in the way the authority is given. If just the principal declares the authority just to the agent it is an intern authority and if he declares it to the public it is an extern authority. The difference is important for the case if an agent pleads on intern authority which is not given the contract is not valid for the one who should have given the authority even if the third party is in good faith.⁴²

Three requirements must be fulfilled in order to impute the actions of a third person to someone else in order to entitle or obligate him directly⁴³:

1. Act in the name of the principal⁴⁴

The agent must reveal to the business partner that he is acting for somebody else.

This is called the “principle of disclosure⁴⁵”.

2. Power of representation⁴⁶

The agent must have the permission to represent the principal. There is no valid representation without a permission to represent.

3. Capability of contracting of the agent

§ 1018 ABGB⁴⁷ is interpreted⁴⁸ in that way that only persons who are at least limited capable of contracting can be used as an agent. Persons incapable of contracting can't represent someone else, because the agent has to make a declaration of intention and a person incapable of contracting can't constitute a relevant intention.

⁴² With further references: *Koziol/Welser I* (2002), p 184

⁴³ With further references: *Koziol/Welser I*(2002), p 180

⁴⁴ With further references: *Koziol/Welser I* (2002), p 180

⁴⁵ In german "Offenlegungsgrundsatz"

⁴⁶ With further references: *Koziol/Welser I* (2002), p 181

⁴⁷ Own translation of § 1029 ABGB: “Contracts are, with the limitations of the authorisation, for the constituent and for the third party binding, even if the constituent had authorised an agent who is unable to commit himself.”

⁴⁸ *Schwimann/Binder* (1988), §1018 Rz 1,

The agent also has to stick to the range of the authority. But in cases that the principal just tell the agent what he is allowed to do he would also be bound to the contract made by the agent if the third party had good faith that the agent was acting in the range of the authority. This case is usual for both kinds of authority because the details are often not addressed for the public. For example if I want that someone buys a picture for me at an auction I don't want everybody to know where my price-limit is. In that case the principal is bound to the contracts made by the agent if the agent exceeds the authority. But it is important to differentiate that case from where no authority is given. The agent can do more than he is allowed to. This is to protect the third party who doesn't know what exactly the agent is authorized for. The case of course lies different if the principal declared externally to what extent he gave authorization to the agent.

Apparent authority⁴⁹

In the §§ 1027 ff deals the ABGB with certain special cases of appearance of authority, what is called implicit authority. Certain actions can be seen as a concession of authority without that the conditions of § 863 ABGB⁵⁰ are met.

Who indicates that he has given authority to someone else has to accept the power of representation against himself and can't plead that he hasn't made an according declaration of intent.⁵¹ This instrument is called apparent authority.

Here the legislator wanted to protect the third party to the disadvantage of the principal because the appearance militates in favor of the authority and the appearance moreover was caused by the same person who is now affected by it. The trust in the outer facts is protected.

⁴⁹ In German "Anscheinsvollmacht", the following definition is based on: *Koziol/Welser* I (2002), p 185f

⁵⁰ Own translation of § 863 ABGB: "(1)It is not only possible to decelerate your intention explicit through words and commonly accepted signs but also implicit through actions, which under consideration of all circumstances leave no reasonable ground to doubt.

(2) As to the signification and effect of actions and omissions the habits and customs of the fair legal relations have to be taken in consideration."

⁵¹ *Welser* (1979), p 10

The trust protection needs circumstances which are able to arouse the justified belief in the third party that the principal is authorized to close the deal. If the third party would have been able to discover the lack of authority or even knew about, then he doesn't deserve protection for his trust and so the requirements for an apparent authority are not met. The trust must furthermore have its reason in the behavior of the constituent which has created the outer facts and creates the belief of the third party that the power of representation is given.

These requirements have to be examined strictly because it bears the risk of apparent authority.

Three requirements must be fulfilled in order to apply the legal instrument of the apparent authority:⁵²

1) Notoriousness

The facts must arouse in the third party the justified assumption that the person acting has authority of the principal.

2) Good faith

The third party must not have any reason to doubt that authority was given.

3) Accountability

The principal must have caused the apparent through an objective negligent way or didn't correct it.

If the age criteria of the authority also applies for the apparent authority needs a closer examination what will be done below.

1.5.7.4 Authority under Norwegian Law⁵³

The Norwegian Law doesn't say directly which requirements have to be fulfilled in order to set up an authorization. But in the *Avtaleloven* (from now on referred to as *avtl*) there exist eight paragraphs on how to withdraw an authorization.

⁵² The following list is based on: *Freudenthaler/Wiesinger* (2005)

⁵³ The definition of this section is based on: *Woxholth* (2006)

The Norwegian Law divides the authority in two groups, the dependent and the independent. The authority through contract⁵⁴ count as dependent authority and the authority through position⁵⁵ and the authority through public declaration⁵⁶ as independent. The independent authority evolves either because someone takes a position which brings the authority with is after law or through declaration of the principal to the third party. These are not relevant for the thesis and therefore I will not go into that in depth.

The authority through contract is regulated in § 18⁵⁷ avtl. This kind of authority evolves out of the declaration of the principal to the agent and there are no form requirements for this declaration.

In order to impute the actions of the agent to the principal the agent must fulfill three requirements:

- 1) Act in the name of the principal:
As under Austrian law § 10⁵⁸ avtl sets up the requirement that the agent must act in the name of the principal.
- 2) Power of representation
The agent must have authorization of the principal and this authorization must not be withdrawn.
- 3) Contracting within the authority

⁵⁴ In Norwegian: “oppdragfullmak”

⁵⁵ In Norwegian: “stillingsfullmakt”

⁵⁶ In Norwegian: “frasagnsfullmakt”

⁵⁷ Own translation of § 18 avtl: “If the authority is set up just through a declaration from the principal to the agent, it is withdrawn when the principal declares that the authority should not be valid any longer and this declaration reaches the agent.”

⁵⁸ Own translation of § 10 avtl: “If the agent deals in the name of the principal and within the given authority the legal act originates rights and responsibilities directly for the principal.

If someone has because of the contract with someone a position, which after the law brings an ability⁰ with it to contract for another person, he has the authority to make contracts, which fall inside these borders. ”

The agent must contract within the given authority. This principle is stated in § 10 avtl.

It is necessary to look at point 3) a bit closer. Here it makes a difference if it is an independent or an independent authority. If it is a dependent authority the principal is not bound by a contract if the agent didn't contract within the authority even if the third party was in good faith. That is stated clearly in § 11⁵⁹ avtl. With a independent authority it is according to § 11 avtl possible that the principal is bound by a contract made by the agent even if the agent was not contracting within the authority if the third party was in good faith.⁶⁰

Combined Authority⁶¹

This kind of authority counts to the independent authorities. It covers the cases which have in common that there are various events occurring which raise in the third party the reasonable expectation⁶² that he contracted with a person who has authority.⁶³ As the supposed principal raised the expectation in the third party he is bound by the contracts of the supposed agent.

The tendency in Norwegian Law is that the courts apply the effects of authority in cases that they think that the third party had good reasons to count on an authority if the supposed principal has contributed to raise this expectation in the third party. If the supposed agent acts under this circumstances that, under normal life experience, the third party can count on that he represents the supposed principal, then there is no doubt that this creates an

⁵⁹ Own translation of § 11 avtl: "Has the agent contracted against the orders, given to him by the principal, and the third party understood it or should have understood it, the principal is not bound by the contract, even if it was inside of the authority.

Has the principal just notified the agent about the authority (§18), the same applies even if the third party was in good faith."

⁶⁰ *Woxholth* (2006), p 257

⁶¹ In Norwegian: "kombinasjonsfullmakt"

⁶² In Norwegian: "forventningsprinsipp"

⁶³ *Woxholth* (2006), p 253

authority even if there is no real contract between the supposed agent and the supposed principal.⁶⁴

Comparison

The legal instrument of authority is similar in both countries. The biggest differences are that there is no age limit under Norwegian law for which persons you can be used as an agent and there are stricter liability rules when it comes to the authority through contract. Under Austrian law someone would be bound under certain circumstances if the agent extends the authority and under Norwegian Law the principal would not be bound. Very similar are the legal instruments of apparent authority and combined authority. Both have the goal to protect the third party if they have a good reason to believe that authority was given.

⁶⁴ *Lassen* (1992), p 38

2 Problem

Legal problems arise when someone engages a PRS with the telephone connection (fixed line or cell phone) belonging to somebody else. The question arising then is if the owner of the telephone connection, who has a contractual relation to the TSP and gets billed for the used service, what often is a multiple of a normal phone call, is liable for calls and contracts made by somebody else.

For minors and other persons incapable of contracting I will mostly write about mobile phones because it is not very likely that such persons have a fixed line. The result of the examination would not be different if they used someone else's fixed line.

Usually persons incapable of contracting are rejected if they want to subscribe for a telephone service, such as a mobile phone⁶⁵. Not even an acceptance from the parents is enough to get a subscription. So for persons incapable of contracting there are usually two ways of getting a mobile phone. First, their parents conclude a contract with the TSP and pass on the mobile phone to their children. Second, as long as they are over 14 years old buy a pre paid telephone card with their own money.

I will only examine the first case in detail because that is the case where a third party uses the phone of someone else. But I will throughout the thesis also make remarks to the second case.

First I will look at the current case law of the Austrian and Norwegian courts concerning this problem.

Then I will examine the problem with two different scenarios according to first the Austrian law and afterwards to the Norwegian Law:

⁶⁵ Klees (2005), 628

- 1) Someone uses a PRS with the phone of someone else. In order to delimitate this thesis to private law I will only examine the case that the telephone connection was used with the knowing and the permission of the subscriber. But important to state here is that the user had only permission to make normal telephone calls and no permission to use PRS by the owner of the telephone connection.
- 2) The scenario in this case is that a person incapable of contracting gets a mobile phone to use. The permission is just given for normal phone calls but also PRS are engaged.

3 Relevant Case Law

In this section I will describe the relevant case law from Austria and Norway. The names of the cases are given by me in order to make it easier to refer to the cases afterwards.

In Austria the courts have made a few decisions concerning this problem. Most cases are about the morality of telephone sex hotlines but also include a legal examination of the liability.

I only have found one decision of a Norwegian court second instance⁶⁶. This decision contents unfortunately no real legal approach but nevertheless I will exhibit it shortly.

3.1 The flat-case - OGH 1 Ob 244/02t

In this case the claimant, a TSP, claimed the payment of 205.000 ATS (about 15.000 €) for the use of PRS. The defendant said that these PRS were not engaged by her but by her life-partner at that time. She said that she wasn't using her flat with the telephone connection at all that time because she was away because of her education. Her life partner used her flat with her permission and has also used the PRS.

The TSP said, that it doesn't matter who has made the phone calls which caused the phone bill from the defendants' telephone line. Because of the general terms and conditions, which became integral part of the contract between the parties, the customer is liable also for claims of payment, which were caused by the usage of services through third parties as long as it was caused in his sphere of influence.

The defendant claimed that she didn't have the possibility to check the amount of the telephone calls. But it would not have been a problem for the claimant to block the connection after reaching an atypical amount. The claimant is in breach of contractual duty

⁶⁶ In Norwegian: "lagmannsrett"

of protection and care. Furthermore was claimed that the use of telephone sex hotlines, which were engaged in this case, are immoral and therefore can't be content of a valid contract.

The court of first instance said that telephone sex hotlines are not immoral. Furthermore has the claimant not violated any contractual duty because the disproportional rising of a telephone bill was not considered by the courts as such an obligation. The clause that the subscriber is liable for the usage of the telephone line through third parties is after all not abnormal, so that the subscriber doesn't have to count on it, because it is clear to every subscriber that the TSP charges the subscriber with the dues and not the actual user. Also the general terms and conditions stand after applying § 879 Abs 3 ABGB, because it has to be imputed to the sphere of the defendant and not the claimant if she gives third parties access to her flat and through that to her phone, without being able to control any misuse. The court of second instance affirmed the decision.

The OGH affirmed that telephone sex hotlines are not unmoral but in this case it doesn't really matter because it doesn't depend on immorality because as Hoffmann⁶⁷ states in his critic of the BGH decision III ZR 5/01 correctly, those two contracts have to be distinguished. On the one hand the subscription between the TSP and the customer and on the other hand the contract between the PRSP and the user of the telephone line. Even the fact that the TSP collects the fee for the PRS together with the connection fee cannot lead to the loss of objections of the contract with the PRSP.

The claimant has in his general terms and conditions regulated that he has the right to claim higher fees than the normal connection fees which compensate next to the normal technical and operational services other services including services of third parties. Objections and pretensions of the customer not relating to the connection fee but the performances of a third party can only be used against the third party. The OGH said that such a clause is invalid according to § 937 ABGB and § 6 Abs 1 Z 14 KSCHG because the customer would lose his rights. Because of that the customer has the right to claim that he is not the contractual partner of the PRSP and because of that he doesn't owe the fee for the PRS,

⁶⁷ Hoffmann (2002)

because the telephone call, which created the fee, was made by another person. Also § 11 of the general terms and conditions of the claimant, that the customer is liable for fees of services of third parties, as long as they were caused in his sphere of influence, doesn't hinder this assumption. This clause can affect only the relation between the contractual partners so that the customer is without a doubt liable for the connection fee of the TSP if a third party uses his phone. But for claims of the PRSP which are caused by another contract are not covered by the contract between the subscriber and the TSP. That means that the clause of the general terms and conditions doesn't apply here.

The OGH affirms the current opinion⁶⁸ in the Austrian literature that the specialty of PRS is that the premium service is the telephone conversation itself and the identification of the caller is made through the telephone number. The PRSP can act on the assumption that the caller is also the subscriber or at least was given authority. With the legal instrument of the apparent authority a liability of the subscriber is reached. But the basic principles of the apparent authority developed by the legislation are in conflict with his thoughts. Compared to these principles the third party is only worth protecting in his trust of outer circumstances if the relevant circumstances are assisted by the one whose deficit this protection is. The apparent authority requires that the trust has its reason in the acting of the constituent and causes the trust of the third party that authority is given.⁶⁹ The fact that the customer of the claimant has a telephone connection which is maybe - but not typically - used by other persons, cannot raise the apparent of authority, because the respondent – in this case the employee of the PRSP – usually does not know, if she is contracting with the subscriber or a third person, which uses this connection with or without permission. For apparent authority the publicity is missing.⁷⁰ Usually the permission to use a flat with a telephone connection includes also the silent authority to use the phone. This assumption of such an authority will only include normal services of the TSP which are compensated by the connection fee. After common experience of life it cannot be said that an average subscriber wants to give authority to a third person to use significant more expensive PRS

⁶⁸ *Wessely/Eugen* (2003); *Zib*, (1999), p 230;

⁶⁹ For further references see: OGH 1 Ob 244/02t

⁷⁰ For further references see: OGH 1 Ob 244/02t

on his costs. Even if the PRSP would have knowledge that the subscriber has given third persons a general allowance to use his phone he can't assume that after taking good faith in consideration and without additional circumstances that the allowance also includes his services.⁷¹

After taking § 96 ABGB and § 1029 ABGB in consideration the OGH comes to the conclusion that there is no legal assumption that the person who is making legal declarations for the principal acts within the given authority. Who is using a telephone to do business is not relieved of the duty to make sure if he is contracting with a person who is authorized to it.⁷²

As the two contracts have to be seen separately the defendant owes the connection fee without a doubt because of the upper cited § 11 Abs 1 of the general terms and conditions. Concerning the fee for the PRS it is proved that the defendant is not contract partner of the PRSP and because of that she is not liable for it.

3.2 The burglar case – OGH 1 Ob 114/05d

In this case the OGH confirms its decision in the flat case⁷³. In this case the claimant, the operator of a student home, has a telephone system in the student home with 30 local loops and 246 party lines. From one of the party lines the services of a PRSP, in this case telephone sex services, were engaged for almost 33 hours with one phone call. The claimant said that the student, who rented the room from where the call was made, was on holidays between the end of June and the beginning of July 2001. When he left his room he locked the apartment but in order to get fresh air into the flat he left a window tipped. During his absence it came to a burglary in his flat where various phone calls were made with his telephone line. The last call, the one to the telephone sex hotline of the PRSP, was connected for 32 hours 54 minutes and 44 seconds. It was not possible to detect who made this call.

⁷¹ For further references see: OGH 1 Ob 244/02t

⁷² For further references see: OGH 1 Ob 244/02t

⁷³ OGH 1 Ob 244/02t

The defendant claimed that a student home is an “open house” where anybody could make calls to a PRSP with every party line. This argument contradicts the made conclusions. According to that the usage of a party line of a flat requires the input of a Personal Identification Number (from now on referred to as PIN).

In its decision the OGH sticks to its explanations of the flat case⁷⁴. The arguments of the defendant conclude that because of that the claimant hasn't blocked certain PRN, he authorized the students or third persons to use the party lines for expensive phone calls at the expense of the operator of the student home in relation to the TSP as the one who gets the bill for the services. But against this few militates the common life experience as referred to in the flat case⁷⁵. Thereafter the absence of the block of certain numbers doesn't allow the conclusion that the claimant as subscriber of the telephone line wanted to authorize the inhabitants of the student home or unknown burglars to telephone calls with telephone sex hotlines for several hours.

The appeal got declined and the decisions of the lower courts got thereafter confirmed that the claimant got back the money paid for the PRS.

3.3 Norwegian case – Eidsivating lagmannsrett LE-2000-883

The matter in dispute in this case was a bill from Telenor Mobil AS against the subscriber A for the use of his mobile telephone for an amount of 31.928,96 NOK (ca 4.000 €). A had a subscription for a mobile phone at Telenor Mobil AS. A paid the first bill for around 5.018,50 NOK without any complaint. Around 4.000 NOK of the bill were for PRS. Afterwards he got the bills on a monthly basis and all bills had in common that a big part of the fees were produced through calls to PRS. He paid some bills before deadline and some after.

After A came into a delay of payment and owed an amount of 9.277,15 NOK to Telenor Mobil AS the telephone company decided to block his telephone line. A paid this amount a few months afterwards and Telenor opened the telephone line again. The following bills

⁷⁴ OGH 1 Ob 244/02t

⁷⁵ OGH 1 Ob 244/02t

were not paid anymore and the phone line got blocked again after three month with an outstanding amount of 31.928,96 NOK. Most of that amount was produced through calls to a PRSP.

The court of first instance found A guilty to pay the outstanding amount.

A claimed that he never has used any PRS and someone else must have abused his subscription. He said that he had both orally and in writing told Telenor Mobil AS to block his subscription for PRS. He further claimed that Telenor Mobil AS has made a mistake in the billing process, that his SIM-card was cloned or that his phone was hacked and therefore produced this calls to the PRSP. A also mentioned that he was working and always had the phone with him but since he was working it was impossible for him to use this PRS in that amount. The total amount of hours called from this phone was 140. Just 70 hours of that in the relevant time period.

Telenor Mobil AS replied that a failure in the calculation program can be excluded because in the time where the SIM-card was blocked the traffic form the subscription stopped and if there would be a mistake there would still be traffic registered. Telenor Mobil AS stated further that subscriber A is according to the general terms and conditions liable for all calls made with that phone also in case of misuse by a third party. The one who can prevent a misuse is the customer and therefore he is liable for it. Telenor Mobil AS accepts to have the risk if the phone is technically manipulated by a third party as long as the subscriber is not involved in that. To the statement that A never has engaged any PRS Telenor Mobil AS raised the question why he paid the bills then the first times. To A's statement that he was not able to use the PRS in that amount because he was working full time Telenor Mobil AS replied that the 70 hours he called the PRSP are only a daily amount of 30 minutes.

Regarding the statement of A that he has orally and written asked to block the PRS from his phone nothing could be found in the archives of Telenor Mobil AS.

The second instance hold up the decision of the first instance. The court states that the arguments delivered by A are not plausible and therefore they believe the explanation of Telenor Mobil AS.

A legal approach to the problems arising in this case is unfortunately missing.

4 Contracts with persons fully capable of contracting

I will now examine the liability of the subscriber with different legal instruments of the Austrian legal framework and afterwards compare it to the Norwegian legal framework.

4.1 Suretyship under Austrian Law

The Mobilkom Austria AG⁷⁶ states in its general terms and conditions under point 18.1⁷⁷ that: “Please note that if third parties engage telecommunication services of us (Mobilkom Austria AG) or of other providers with your SIM Card, your code or otherwise with your connection you are liable for the claims for payment as long as it can be assigned to your sphere of influence.”⁷⁸ The question arising here is if this point can be interpreted as a suretyship.

As stated above in the definitions the formal obligation of the bailor needs to be in writing and adequately defined.

First it is doubtful if the debt is adequately defined. The general terms and conditions are the suretyship contract. At the time the subscriber makes the contract with the TSP, and therefore when the general terms and conditions become a term of the contract, it is not clear for which debt the subscriber should be liable and who would be the debtor. So the needed definition is not met.

Second it is also doubtful if the requirement that the agreement is in writing is met. It is enough to fulfill the requirement when after interpretation of the intentions of the parties

⁷⁶ I choose the general terms and conditions of this TSP because in the sector of mobile telephones it is with a market share of 42,3% in the end of 2008 this provider has a dominant position in the market place according to *RTR Telekom Monitor* (2009)

⁷⁷ Allgemeine Geschäftsbedingungen der mobilkom austria AG from the 2. June 2009

⁷⁸ Own translation of point 18.1 of the general terms and conditions

enough evidence is found in the contract that an intention to make a suretyship can be seen. But the aim of § 1346 Abs 2 ABGB is only met if the bailman signs a paper wherefrom clearly can be seen that a suretyship is wanted⁷⁹. The reference to another document, as it is in this case made with the general terms and conditions because the contract only refers to the general terms and conditions should only be enough when the document of the suretyship is attached directly to the contract⁸⁰. It has to be questioned if a suretyship is made when the subscriber just signs the contract which refers to the general terms and conditions. That is probably not enough to constitute a suretyship.

4.2 Suretyship under Norwegian Law

Telenor Mobil AS⁸¹ states in its general terms and conditions under Point 12: “Anyone registered as a customer with Telenor is responsible for paying for the services Telenor supplies under the agreement. This responsibility also covers the use of the services by others, including use by unauthorized persons, unless it can be proven that the unauthorized use was made possible as a result of negligence on Telenor's part.”⁸² That means that the subscriber has the responsibility to pay for all traffic made from his phone. He is also liable for the misuse of his phone by other people.⁸³ Here the same question arises if this can be interpreted as a suretyship.

As described above under Norwegian law there are no requirements for how a suretyship has to be constituted. It doesn't have to be in writing or substantiated in a certain way. It is possible to bail for an undefined amount and for an undefined number of debts.⁸⁴ The

⁷⁹ OGH, 8 Ob 675/90

⁸⁰ With further references: Wessely/Eugen, Ich war es nicht! oder: Haftung für die Inanspruchnahme von Mehrwertdiensten durch Geschäftsunfähige, MR 2003, p 6

⁸¹ I choose the general terms and conditions of this TSP because in the sector of mobile telephones with a market share of 53,8% in the end of 2008 this provider has a dominant position in the market place according to: <http://www.telenor.no/om/telenor-i-norge/nokkeltall/>

⁸² Abonnementsvilkår for Telenor from the 1. July 2007

⁸³ Eidsivating lagmannsrett LE-2000-06-22, p 4

⁸⁴ *Smith* (1997), p 73

jurisprudence is very restrictive with this kind of general suretyship but it is possible. So it could be argued that with accepting the general terms and conditions someone is giving a suretyship for every kind of use of his phone for which he has to take the responsibility. I could not find any decision of a Norwegian court what would address this kind of problem.

In this context it is also required to raise the question if a TSP maybe is falling under the definition of a financial institution. The Directive 2002/65/EC⁸⁵ states in Article 2 (b) that a “financial service means any service of a banking, credit, insurance personal pension, investment or payment nature”. The Norwegian Law implemented this Directive in the Finansavtaleloven. The finansavtl refers for the definition of financial services to § 1-3 Finansieringsvirksomhetsloven. There it states: “Enterprises, Companies and other institutions are reckoned as a financial institutions if they do business with financing, except...”⁸⁶ Business with financing is defined in § 1-2 Finansieringsvirksomhetsloven. There it states that “As business with financing is classified to give, arrange or to give guarantee for a credit or to collaborate in another way with financing for another than your own business, except...”⁸⁷ I won’t examine here in detail if a TSP falls under these laws because it would go beyond the scope of this thesis. But I think that in the constellation where a TSP operates similar to a credit card company (you can use a service now and pay to the TSP with the next bill) it is worth a thought if the special law, which is made to protect the consumer, is applicable. In the case that the law would be applicable the strict requirements for the suretyship would apply and in that case a suretyship would in the case of this thesis probably fail both because of the requirement of writing and of substantiation.

⁸⁵ Directive 2002/65/EC of the European Parliament and of the Council concerning the Distance Marketing of Consumer Financial Services

⁸⁶ Own translation of § 1-3 Finansieringsvirksomhetsloven

⁸⁷ Own translation of § 1-2 Finansieringsvirksomhetsloven

4.3 Comparison of suretyship

Under Austrian Law a liability of the subscriber can't be achieved through the suretyship because none of the three requirements is fulfilled. Under Norwegian Law there are no such requirements and therefore it would be possible to achieve a liability. The question what arises here is if the TSP maybe can be seen as a financial institution wherewith stricter requirements would have to be fulfilled. If that would be the case a suretyship would probably also fail under Norwegian Law.

4.4 Authority under Austrian Law⁸⁸

In the above described scenario the examination of authority failures because on the one hand the user of the PRS never tells the PRSP that he is contracting for someone else. He would have to tell the PRSP that he is acting for the subscriber with his authority. Because of that the principle of disclosure is not fulfilled.

On the other hand the power of representation is not given. The owner of the telephone connection has not given the user of the PRS the permission to use a PRS. The user just got permission to use the phone what is under the condition of the normal experience of life understood that he can make normal phone calls. The third requirement of the capability of contracting of the agent would be fulfilled in the first scenario above.

The OGH⁸⁹ said in the flat case, that in the surrender of a flat with a telephone connection in it can be seen as a silent authority to make normal phone calls, and that the subscriber is liable for the connection fee. The result of the OGH is correct but the reasons are not⁹⁰ according to the Austrian literature, especially Zib⁹¹. An authority for these calls is not necessary because the set up of a connection is not a declaration of intent but an act of usage in a contract for the performance of a continuing obligation of the subscriber with the

⁸⁸ The discussion of this section is based on: *Zib* (2005), 396ff

⁸⁹ OGH, 1 Ob 244/02t

⁹⁰ With further references: *Zib* (2005), p 400

⁹¹ *Zib* (2005), 396ff

TSP. Because of that the risk assignment has to be done according to general terms and conditions or if there are none through additional contractual interpretation. The subscriber is liable for all actions of persons who he has given access to his telephone connection⁹². The same counts for PRS as far as it concerns just the connection fee of the TSP.

The usage of the PRS itself relies on an explicit or implied statement of intention of the user.⁹³ In this case a contract is not made before the call whereby the question of authority arises. In that point the OGH says, that you cannot presume that the subscriber wanted to give the third party also permission to use the PRS⁹⁴. Crucial for that is that the PRS is much more expensive than a normal call or SMS⁹⁵. All in all the OGH is probably right in that point to a large extent. It cannot be assumed, without special indication, that the intent of the subscriber also includes the usage of extensive and expensive PRS if he gives the permission to use a phone. But in a very restricted amount it could be assumed⁹⁶.

It can be said that no authority is given to use the telephone to make calls to a PRSP.

Apparent Authority under Austrian Law⁹⁷

Now I will examine if the subscriber is nevertheless liable for the acts of a third party. Whenever a contract is made with the misuse of identity characteristics, the act has to be treated as acting under the name of someone else. If the third party arouses in the respondent the appearance that he is the subscriber then maybe the subscriber is liable for these actions if it can be imputed to his sphere of influence⁹⁸.

⁹² BGH, III ZR 96/03, MMR 2004, 308

⁹³ With further references: *Zib* (2005), p 400

⁹⁴ In more detail OGH, 1 Ob 244/02t

⁹⁵ BGH, III ZR 96/03, MMR 2004, 308

⁹⁶ With further references: *Zib* (2005), p 400

⁹⁷ The discussion of this section is based on: *Zib* (2005), 396ff

⁹⁸ *Zib* (2005), p 401

Three characteristics of the appearance of a legal position require a special examination:

- Notoriousness

The OGH states in the flat case⁹⁹, that the legal instrument of the apparent authority doesn't apply because the needed notoriousness is missing, as the respondent, in this case the employee of the PRSP, doesn't know the identity of the caller. That means, that the PRSP usually does not know if he makes a contract with the subscriber or with a third party, who uses the telephone line with permission or not. The PRSP has to make sure if his contractual partner is authorized to make these contractual declaration.

In the literature Wessely/Eugen¹⁰⁰ already pointed out correctly, that the user of the PRS is only identified by the number of the telephone connection. The apparent authority does not failure because of the notoriousness. The telephone number is not ex parte made to an identification characteristic by the PRSP but this is usually agreed in the general terms and conditions¹⁰¹. Because of that PRS are not comparable to the consulted case of the OGH¹⁰² where it stated that without adequate evidence, it cannot be implicated that an employee is given authority to make legal declarations just because he is allowed to use the phone of a company. The case lays differently when the telephone number is used as an identification characteristic and the parties have agreed to it. Then the legal appearance, that the subscriber acts himself is given. The fact that the PRSP actually relies on that he makes a contract with the subscriber or a person who is authorized, is affirmed by the Austrian literature¹⁰³.

- Good faith

Doubtful could be, if the trust of the PRSP in the identity or the authorization of the caller is legitimate. A closer examination has to be done if outer facts raise doubts to normal

⁹⁹ OGH, 1 Ob 244/02t

¹⁰⁰ Wessely/Eugen (2003), p 6

¹⁰¹ With further references: Zib (2005), p 401

¹⁰² OGH, 7 Ob 26/90,

¹⁰³ agreeing Zib (2005); Wessely/Eugen (2003); different opinion Hoffmann (2002)

circumstances¹⁰⁴. Such doubts don't exist when the identity is checked on the basis of identity characteristics given to the subscriber. That is on the one hand the fixed telephone line and access to it and on the other hand for example a pin-code for the mobile phone. The legitimate trust of the PRSP can't be per se declined just because there is a possibility of misuse by non authorized persons. The possibility of misuse exists also in other parts of the law for example at a credit card. There nobody doubts on the good faith of the third party who trusts the additional identity characteristics such as a pin code. It is not clear how the PRSP should check the identity of the caller. The M-Commerce relies on the identification of the customer based on the telephone number.

It can be said that the needed legal appearance and the good faith of the PRSP is in most cases given. That doesn't mean that the subscriber of the telephone line is liable for the legal appearance which is produced through the telephone number. For that the subscriber has to be accountable for the legal appearance.

- Accountability

The relevant accepted accountability principles in this scenario would be the fault-based principle¹⁰⁵ and the risk-based principle¹⁰⁶.

The fault-based principle says, that who has not only adequate caused the appearance of a declaration of intent but also was, if he would have been enough careful, able to prevent it, is liable for the declaration¹⁰⁷.

Next to the fault-based principle comes the imputation of the risk-based principle which can go further than the duty of care. The question here is if the subscriber has created a higher risk of misuse or can control the existing risks better than the other party¹⁰⁸. In E-Commerce business a higher risk can't be seen just because someone owns identification

¹⁰⁴ With further references: *Zib* (2005), p 401

¹⁰⁵ In German "Verschuldensprinzip"

¹⁰⁶ In German "Risikoprinzip"

¹⁰⁷ With further references: *Zib* (2005), p 402

¹⁰⁸ With further references: *Zib* (2005), p 402

characteristics, such as a telephone line which would make it possible to create liability without any infringement of the duty of care¹⁰⁹. Because of that the accountability to the subscriber can just be based on the fault-based principle.

If the behavior of a third party can be imputed to the subscriber it has to be examined for each case on its own. This allows the conclusion of two points:

First it is noteworthy that there are cases in which the accountability is given. That leads to the important intermediary result that a paragraph of general terms and conditions in a contract with a TSP making a subscriber liable for claims of payment for the usage of services of third persons is nothing more than a repetition of the law as long as the subscriber has accountability for it. It is not grossly discriminatory risk shifting in the sense of § 879 Abs 3 ABGB¹¹⁰ because there is no risk shifting to the subscriber. The different opinion of the VwGH¹¹¹ is to refuse referring to Zib¹¹².

Furthermore such general terms and conditions are not grossly discriminatory. The assignment for the risk of the loss of identification characteristic given to the customer, and even more for the abuse of the transfer, is found in other decisions¹¹³. The case is different if the identification characteristics have not been given away but the abuse was achieved through technical matters (for example hacking of a PC or duplication of a credit card). In its decision about a credit card the OGH¹¹⁴ said, “That the exclusion of liability of the bank concerning the technical abuse of a credit card has to be seen different from the exclusion of liability for misuse. There are no doubts against the exclusion of liability in the general terms and conditions in case of the loss of the credit card and the code. But cases are

¹⁰⁹ *Zib* (1999), 230

¹¹⁰ Own translation of § 879 Abs 3 ABGB: “A clause in general terms and conditions or a contract form which does not constitute one of the mutual principal services, is at all events void if it discriminates one party grossly after all circumstances were taken in consideration.”

¹¹¹ VwGH, 2004/03/0066

¹¹² With further references: *Zib* (2005), p 403

¹¹³ E.g. OGH 2 Ob 133/99v

¹¹⁴ OGH, 2 Ob 133/99v, similar opinion in BGH, III ZR 96/03

different when without fault of the owner the credit card is duplicated and the pin code has been “spied out”.

Because of that the bank has to prove that the original credit card and not a falsification has been used. The use of the PIN is grave evidence that the owner has used his credit card or that he at least has made the misuse culpably possible.¹¹⁵ As long as the right PIN was used the proof of the first apparent argues for a usage of the original card through the owner himself or for a breach of his duty to observe secrecy.”¹¹⁶ Also in case of electronic signatures through where a chip-card and a PIN is given in the custody of the owner § 21 Signature Law¹¹⁷ codifies an obligation to diligent store the certificate and in case of loss to revoke it. If declarations of intent are made with the electronic signature the owner is liable according to the rules of the appearance of a legal position¹¹⁸.

For the connection fees the OGH¹¹⁹ said that general term and condition mentioned above is valid and he furthermore stated, that “the customer is without a doubt liable for the connection fee which was emerging from his telephone line in a way which is imputable to him.”¹²⁰ The OGH didn’t have to make a decision about PRS because it meant that this clause is not applicable there. But the decision should not be different. In a later decision¹²¹ the OGH justifies its decision and states that “the reason for the different treatment of connection fees and fess for PRS is, that a contract of the subscriber with the PRSP can only come off through the action of a third person if the third person has authority (or at least apparent authority). The case lies different with the connection fees caused by the third party because there is no new contract made but services are used in coverage of an already existing contract which is made by the subscriber.”¹²²

¹¹⁵ *Taupitz* (1997), p 780

¹¹⁶ Own translations of parts of the decision OGH, 2 Ob 133/99v

¹¹⁷ English translation available at:

http://www.ris.bka.gv.at/Dokumente/ErV/ERV_1999_1_190/ERV_1999_1_190.html

¹¹⁸ With further references: *Zib* (2005), p 403

¹¹⁹ OGH, 2 Ob 244/02t

¹²⁰ Own translation of parts of the decision OGH, 1 Ob 244/02t

¹²¹ OGH, 4 Ob 227/06w

¹²² Own translation of parts of the decision OGH, 4 Ob 227/06w

Under German law we also find a similar provision in the third sentence of § 16 Abs 3 of the German Telekommunikations-Kundenschutzverordnung¹²³ after which the service provider is not entitled to claim the connection fees as long as the network access was used to an extent for which the customer is not responsible. This clause regulates the legal consequences of physical access to the network access as for example the use of the rooms of the customer, for which the customer can be responsible or not, and is used also in relation to PRS by the BGH¹²⁴.

Second, in the flat-case¹²⁵ decided by the OGH, accountability should have been affirmed. If a subscriber leaves his flat with the telephone connection to someone else, in this case for three month, then he caused the appearance of the declaration of intent adequate and could have prevented it with suffice care. The BGH said in a decision¹²⁶ that “Further he (the subscriber) must impute the behavior of third parties whom he has given access to his connection.”¹²⁷ This sentence should also be applied for the Austrian law.¹²⁸

That is comparable to the case that someone gives his mobile phone with his PIN to someone else who engages then without permission of the owner PRS. The legal appearance is then imputable. In a very similar case, when somebody can use a digital signature given to him by the owner or when he got it because of the fault of the owner, then the owner is bound to contracts made with his signature.

¹²³ Own translation of § 16 Abs 3 sentence 3 TKV: “If the proof is provided, that the network access was used in an extent for which the customer is not responsible, or facts justify the assumption that the extent of the connection fees can be attributed to the manipulation of the public telecommunication network by a third party, the provider is not entitled to claim the connection fee from the customer.”

¹²⁴ BGH, III ZR 96/03

¹²⁵ OGH, 1 Ob 244/02t

¹²⁶ BGH, III ZR 96/03

¹²⁷ Own translation of parts of the decision BGH, III ZR 96/03

¹²⁸ *Zib* (2005), p 404

Not imputable would be cases in which a telephone connection gets tapped by a third party or the telephone line is used completely without consent such as in the burglar-case¹²⁹. Additional it can be said about this case that the good faith of the PRSP is probably also not given since the connection has lasted for 33 hours.

4.5 Authority under Norwegian Law

Of the three authority forms of the Norwegian law in the case of this thesis only the authority through contract is suitable because if someone gives his mobile phone to someone else or allows the usage of his fixed line under normal circumstances he wouldn't make that public and tell it third parties.

An examination again fails at least because of the requirement to act in the name of the principal. The user of the phone usually never tells the PRSP that he is not the subscriber. As under Austrian law the authority to use the phone probably doesn't bring the authority with it to make calls to a PRSP which are usually more expensive than a normal call. It is not possible to assume that the subscriber wanted to authorize the user for any call. Under normal life circumstances it can be assumed that only normal calls are included in the right to use the telephone. Because of that also the third requirement, that the agent has to act within the authority, is not given.

Even though the normal authority rules can't be applied here under certain circumstances the combined authority is applicable.

Combined Authority

As under Austrian Law this legal instrument has the goal to protect the third party if someone else raises the appearance that he has given someone else authority. There are no real criteria worked out under Norwegian Law. Here the court would look at the situation as a whole and then decide if the third party is worth protection.

¹²⁹ OGH 1 Ob 114/05d

In the case of this thesis the remarks made for the Austrian law also apply here even though the legal instruments are a little bit different in the way that under the Norwegian Law the requirements are not elaborated. In my opinion the subscriber would also be liable under Norwegian Law because of the same reasons as in Austria. He causes the justified assumption of the PRSP that he is the one calling or that he has given authority to the user. In my eyes the PRSP here is worth protection and not the subscriber.

4.6 Comparison of Authority

Under both jurisdictions a liability through the legal instrument of the authority fails because the requirements are not fulfilled. But I think that in both countries a liability is given because of the instruments of the apparent authority and the combined authority. These instruments have in common that they are evolved to protect the third party who is in good faith that authority was given.

4.7 General Terms and Conditions under Austrian Law¹³⁰

Different from the evaluation of the content of the risk assignment is the question if it were possible to take a clause into the general terms and conditions of a contract between the TSP and the subscriber which affects the relationship between the subscriber and a PRSP. The OGH said in its flat-decision¹³¹ that “this clause of the telephone connection contract can only affect the contract between the parties of this contract”¹³². Claims of the PRSP are not covered by the contract between the TSP and the subscriber and because of that the general terms and conditions can’t cause a liability of the subscriber for the contract which was made by two other parties.

¹³⁰ The discussion of this section is based on: *Zib* (2005), 396ff

¹³¹ OGH, 1 Ob 244/02t

¹³² Own translation of parts of the decision OGH, 1Ob244/02t

In the flat case it seems to be right because the general terms and conditions in the referred case didn't refer to fees of PRSP¹³³. But that doesn't have to be like that. The TSP can with corresponding configuration of his general terms and conditions transport declarations for and at the PRSP as an agent or make contracts in favor of third parties. It just has to be apparent in the general terms and conditions that the TSP is not acting for itself but for the PRSP. The VwGH¹³⁴ said that such a risk distribution clause with an explicit extension to a third party can be valid¹³⁵.

A clause for the benefit of a third party is not surprisingly in the sense of § 864a ABGB¹³⁶ or grossly discriminating in the sense of § 879 Abs 3 ABGB. If it is formulated in the right way it won't be intransparent in the sense of § 6 Abs 3 KSCHG¹³⁷. It can also not be dubious with regard to its content as long as it just reflects the normal legal conditions as it does in this case here.

4.8 General Terms and Conditions under Norwegian Law

Here probably the same applies as for the Austrian Law. It is possible also under Norwegian Law to make a contract for somebody else as long as it is stated clearly that it is in the name of someone else.

To the content of the general terms and conditions can be said that also the here examined general terms and conditions just reflect the normal legal conditions and there should be no

¹³³ Own translation of the general terms and conditions quoted by the OGH in 1Ob244/02t: "§ 11 Abs 1 AGB of the Telekom Austria: The customer is liable for fees which result from a usage of third persons as long as it can be imputed to his sphere of influence."

¹³⁴ VwGH, 2004/03/0066

¹³⁵ With further references: *Zib* (2005), p 405

¹³⁶ Own translation of § 864a ABGB: "Regulations with exceptional content in general terms and conditions or standard contracts, which are used by one party don't become terms of the contract if they are discriminating the other party as long as he doesn't have to count on them under these conditions especially regarded to the outer appearance of the contract; unless the other party has explicitly pointed it out."

¹³⁷ Own translation of § 6 Abs 3 KSCHG: "A clause in general terms and conditions or standard contracts are void if it is blurry or incomprehensible written."

doubt that they can be set up. The court of second instance didn't object in the Norway decision¹³⁸ against § 12¹³⁹ of the general terms and conditions of Telenor Mobil AS what indicates that they are not in breach with the law.

4.9 Comparison of General Terms and Conditions

In both countries I come to the same conclusion that it is possible under certain circumstances to take a clause into the general terms and conditions which is in favour of a third party. The clauses examined here are just reflecting the normal legal situation so in my opinion they must be valid.

4.10 Additional contractual obligations under Austrian Law¹⁴⁰

All circumstances of the electronic communication have in common that there is a certain risk that very high costs can occur in a very short period of time. Therefore the Austrian legislator enacted for PRS the Communicationsparameter-, Fee- and Premium Rate Services Edict¹⁴¹ (from now on referred to as KEM-V). It states in § 122 KEM-V¹⁴² that a connection with a PRS has to be cut by the TSP after 30 or 60 minutes. That provides a misuse as in the burglar-case¹⁴³ decided by the OGH where a connection was made for 33 hours. But doesn't prevent misuse through repeated calls.

¹³⁸ Eidsivating lagmannsrett LE-2000-06-22

¹³⁹ Abonnementsvilkår for Telenor from the 1. July 2007

¹⁴⁰ The discussion of this section is based on: *Zib* (2005), p 396ff

¹⁴¹ In German: Kommunikationsparametr-, Entgelt- und Mehrwertdiensteverordnung

¹⁴² Own translation of § 122 Abs 1 KEM-V: "Connections with time-dependent charged premium rate services in the areas of telephone numbers with the access codes of 900, 930 and 939 as well as the access code area 118 have to be disabled by the communication service provider in whose communication network the service is provided. The connection has to be disabled latest after 30 minutes and at a connection fee of less then 2,20 € latest after 60 minutes."

¹⁴³ OGH 1 Ob 114/05d

In addition to the protection through the KEM-V can, as a thought, also the additional contractual obligations are consulted. Electronic Communications have in common that on the one hand there is the risk of misuse, as described above, but on the other hand it is easy to evaluate the acquisition data, which is recorded for billing purposes, automatically. Under such conditions a contractual duty of protection for the TSP exists, to warn the subscriber in case of extremely high claims for payment and/or block the access until the bill is paid.¹⁴⁴ If a TSP doesn't do that, he is liable for damages because of additional contractual obligations. In that way the subscriber would be protected against extensive use of his telephone line.

4.11 Additional contractual obligations under Norwegian Law

As in Austria also in Norway additional contractual obligations exist and therefore the same thoughts as for the Austrian Law can be applied here. I would say that a TSP also under Norwegian Law has an additional contractual obligation to inform the subscriber if the phone bill reaches a certain limit. But as seen in the Norway case¹⁴⁵ it depends also on the habit of the subscriber. If he calls for a high amount of money each month and pays the bill then the amount the connection should be blocked is higher than if someone suddenly has higher fees than usual.

4.12 Comparison of Additional contractual obligations

I can't see a difference between the two laws in this point.

¹⁴⁴ With further reference: *Zib* (2005), p 407

¹⁴⁵ Eidsivating lagmannsret - LE-2000-883

5 Contracts with persons incapable of contracting

5.1 Suretyship under Austrian Law¹⁴⁶

The above stated applies also for persons incapable of contracting. But in addition the case of suretyship gets problematic if a claim for payment never arises. Even if the subscriber obligates himself contractual to be liable for the engagement of services of third parties, someone could say that a liability for a not emerged primary debt is impossible.

If a child less than 7 years of age calls a PRN then the contract is void unless the legal transaction is usually entered by children in that age and concerns an every day transaction. Then it will be backdated valid when the child fulfills its obligations.

If a minor between the age of 7 and 18 years calls a PRN the contract is pending invalid. With the approval of the legal representative the contract can gain full validity¹⁴⁷. If the legal representative refuses to approve the contract then the transaction was invalid from the beginning on. The good faith of the contractual partner doesn't help.

As stated before it is possible that a surety exists even if the main contract is invalid because of the incapability of contracting of the debtor. Usually the surety is dependent on the main debt. But § 1352 ABGB states that even if the surety didn't know that the principal debtor was incapable of contracting, he is liable for the debt. The protection of the donor will override the protection of the surety. The main idea can be transported to this case as well¹⁴⁸.

As showed above the legal instrument of the suretyship can't be applied for adults.

¹⁴⁶ The discussion of this section is based on: Wessely/Eugen (2003)

¹⁴⁷ With further references: Wessely/Eugen (2003), p 5

¹⁴⁸ With further references: Wessely/Eugen (2003), p 5

Wessely/Eugen¹⁴⁹ argue that through the formulation of general terms and conditions¹⁵⁰, the described circumstances and the analogy to § 1352 ABGB that the subscriber could be held liable for the fee of a PRS where the services were engaged with his connection and by a person incapable of contracting.

I think that such an analogy can't be made. As stated above for a suretyship there are three conditions which have to be met. First the formal obligation of the suretyship has to be in writing and that the debt has to be adequately defined. These two requirements are at least doubtful as stated above under section 4.1. The third requirement of the accessoriness, which is not given if a person is incapable of contracting, can be constituted through analogy to § 1352 ABGB.

In the case that a person incapable of contracting engages a PRS with the phone of someone else just one of the three requirements can be constituted through analogy. The other two are not given but still required¹⁵¹ and therefore I think that a liability of the subscriber can't be constituted through a suretyship and also not through an analogy.

5.2 Suretyship under Norwegian Law

As stated before under point 4.2 under Norwegian Law a suretyship is possible under certain circumstances. The question arising here is if it makes any difference which age the person has for which a suretyship is made. Contracts of minors are pending invalid. In my opinion it must be possible to make a suretyship for a child especially if the bailman knows that it is a child. The subscriber has the possibility to decide to whom he gives his mobile phone and with that the decision for whom he bails. So in my opinion the same applies for minors as for adults.

¹⁴⁹ Wessely/Eugen (2003), p 6

¹⁵⁰ Own translation of the general terms and conditions mentioned in the article: "The customer is liable for fees which result from a usage of third persons as long as it can be imputed to his sphere of influence"

¹⁵¹ OGH 1 Ob 595/92

5.3 Comparison of the suretyship

The big difference lies already in the legal instrument itself and is pointed out already before. So in my opinion it wouldn't be possible to constitute a liability for minors under Austrian law but it would be possible under Norwegian law.

5.4 Authority under Austrian Law¹⁵²

With the question if authority is given can be dealt quickly.

Two different scenarios can be drawn when it comes to persons incapable of contracting. Children under seven years of age and persons incapable of contracting are unable to be authorized. So even if they would have authorization the contract made by them is void and also the constituent is not liable out of this contract. It is possible to authorize children over the age of seven years. They are able to make contracts for someone else. The risk of authorize them bears the constituent who have chosen the child.

But that doesn't really matter in this case because as I described above under section 4.4 the requirements of disclosure and the power of representation is not given and therefore an examination of authority fails anyway.

Apparent authority

In this case conclusions of section 4.4 apply. In addition it has to be analyzed if the age requirement of the authority also applies for the apparent authority.

The rational behind the legal instrument of the apparent authority is to protect the third party who relies on the appearance caused by the other party. In the case of the thesis the subscriber causes the appearance in the PRSP that he or a person who has authority is engaging the PRS because he gives his mobile phone to the third party or gives her access to the fixed line. The PRSP just sees the telephone number calling and has no chance to check who is actually calling and if this person has authority or not. So he relies on the fact

¹⁵² The discussion of this section is based on: Wessely/Eugen (2003)

that the caller is either the subscriber self or authorized. There is no reason for the PRSP to doubt on that. If someone's phone gets stolen or lost he would have the possibility to block the connection.

The case gets especially problematic if a person incapable of contracting engages the PRS. A child under the age of seven years or a person incapable of contracting is unable to enter contracts. The only exception to this is if the contract concerns an every day transaction and the obligation of the child or person incapable of contracting is fulfilled right away. § 151 Abs 3 ABGB could be applied in cases where the child uses a pre-paid phone, enters an every day contract and buys for example a ring tone for 2 €. In this case the obligation of the child is fulfilled immediately when the money is taken down from the pre-paid card and so the contract is valid. That case is comparable to the situation where a child purchases a comic.¹⁵³

All other contracts made by such persons are void. In the case of this thesis the subscriber is billed afterwards through the phone bill so that the exception does not apply here. Contracts made between the PRSP and a child under the age of 7 years or a person incapable of contracting are void. The question arising here is if the subscriber can be liable for an invalid contract. In my opinion it is not possible to derive rights or obligations from a contract which was never valid. Therefore the subscriber can't be held liable for such contracts.

It's possible to try to create a liability of the subscriber through an analogy to § 1352 ABGB. There the bailsman is still held as a co-debtor even if the contract wherefrom the main debt arose never was valid. But the suretyship protects the bailsman through the additional requirements of writing and substantiation which have to be fulfilled in order that the suretyship is valid. I think an analogy to this special case would go too far.

So in my opinion the protection of a third party can't go that far to say that the subscriber is liable for all kinds of contracts, even if they are void.

¹⁵³ Zankl (2005)

In cases where a child under the age of seven years or a person incapable of contracting engages a PRS, except in cases of an every day contract where the obligation is fulfilled right away, the contract is void and in my opinion the subscriber can't be held liable for it.

An important remark has to be made at this point. The relations between the subscriber and on the one hand the PRSP and on the other hand to the TSP have to be differentiated. As stated above the contract with the TSP is already made and the call of the person incapable of contracting is made within this contract. No new contract is made. Between the subscriber and the PRSP exists no contract and so the user of the phone, here the person incapable of contracting, makes a new contract when he calls. But this contract is void and that's why the subscriber is liable for the connection fee of a call made by a person incapable of contracting and not liable for the fee of the PRSP. This leads to the maybe strange seeming solution that the subscriber is liable for the connection fee of the TSP but not for the fees of the PRSP when a person incapable of contracting engages it.

If a child between the age of seven and eighteen years engages a PRS the contract with the PRSP is not void but pending invalid. These children are able to make a declaration of intention. In my opinion this case can be compared to the legal instrument of authority. If someone wants to be represented by a child it is his own decision and it's legally valid as long as the child is over 7 years of age and not out of other reasons incapable of contracting. So also in the case that no direct authority is given in my opinion the subscriber is liable for the fees caused by a child because it is his responsibility to make sure that such calls are not made if he doesn't want it. The risk can't be shifted to the PRSP because he has no possibility to check who is on the other end.

The difference between children under seven years and children between the age of seven and 18 years lies in the fact that children under seven years are unable to make a declaration of intention. So in my opinion the contracts in the first case are void and in the other case just pending invalid.

5.5 Authority under Norwegian Law

As the Norwegian Law has no age requirement for authority the same applies here as for adults and a normal authority is not given because of the same reasons mentioned above.

Combined Authority

The distinction between children under 7 and children over 7 years doesn't have to be made for Norwegian Law. Under Norwegian Law contracts made by minors are just pending invalid and not void. All minors can build a legal declaration of intention. This leads to the differentiation that under Norwegian Law the subscriber would be liable for contracts made by children independent of the age.

5.6 Comparison of Authority

As for persons fully capable of contracting the authority also fails for minors and persons incapable of contracting. In my opinion the subscriber would be held liable under the apparent authority or the combined authority also for minors of contracting with the only exception for Austria that persons under the age of seven years and persons incapable of contracting can't make a contract at all and therefore the subscriber can't be held liable for it.

5.7 General Terms and Conditions, Additional Contractual Relations under Austrian and Norwegian Law

In these points the same rules apply as for persons fully capable of contracting. For these legal instruments it doesn't make any difference if the user of the PRS is capable or incapable of contracting and to avoid repetitions I refer to the examinations above.

6 Conclusio

It can be said that a liability of the subscriber for telephone calls of third parties is in Austria given under certain circumstances through the legal instrument of the apparent authority. In Norway the liability can be given under certain circumstances through the suretyship and through the combined authority.

In the two scenarios mentioned above I would say that in Austria in the case of persons fully capable of contracting and for children between the age of seven and eighteen years liability is given. For Norway I would say that in the subscriber would be held liable for all claims of payment for PRS engaged with his telephone. The reason for that difference lies in the different treatment of children under the age of seven years in Austrian and Norwegian law.

I think that the case of a telephone line or a mobile phone can be compared to a credit card. If you give someone else your card including the PIN-code to take out some money for you and he takes out more, you would without a doubt be liable for it. I don't see any reason why you should come to a different result with a fixed line where you give someone access to or mobile phone where you give away your PIN-code.

Children are a special problem in that field but I don't see a reason why to treat them different as long as they are able to make a declaration of intention. As a parent you can choose if your children are responsible enough to use PRS and understand how much they cost or if it is maybe better to block them. But the PRSP has almost no possibility to check who calls or who sent an SMS because most services are automated and you just deal with a computer.

The subscriber always has the possibility to block certain telephone numbers. In that way he can protect himself against high bills produced by third parties. I admit that the opt-out

principle¹⁵⁴ for PRS of the TSP is not the best way to do it. Rather it should be opt-in¹⁵⁵ because a lot of people are not aware of the possibility to sign out or just ignore it because this possibility is usually written in the general terms and conditions and most people don't read them. Another problem with the opt out principle is that you can just block all services or none. There is no possibility to just block weather services for example and allow sport news. Another question arises what happens if there are new services available which were not available when you made the subscription. For example the possibility to pay parking tickets came in the last few years and someone might not even be aware of that this service exists. How can the subscriber protect himself against such services if he is not aware of. Maybe it would be a good idea to obligate the TSP to inform the customers over new services and give the possibility to opt out in groups. So if you don't want to use parking ticket service you can opt out just for that service.

It can also be said that the TSP has additional contractual obligations to prevent the subscriber from exorbitant high phone bills. In my opinion the TSP has the obligation to tell the subscriber that his phone bill reached a unusual amount and maybe even block his phone until he gets the message. As long as he says that everything is ok and that he knows about the high costs there is no problem to open the line again.

¹⁵⁴ That means that you have the possibility to sign out of certain services

¹⁵⁵ That means you have to sign up for certain services

Selective bibliography

A Statutes and legislation referred to in this thesis

EU Directives

“Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC” Official Journal L 178, 17.7.2000, p 1-16

“Directive 2003/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)” Official Journal L 271, 9.10.2002, p 16-24

Austria

Allgemeines Bürgerliches Gesetzbuch

available at:

<http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622>

Allgemeine Geschäftsbedingungen der Mobilkom Austria AG from the 2. June 2009,

available at:

http://www.a1.net/final/de/Media/PDFs/AGB_Mobil_Stand_02_06_2009.pdf

Kommunikationsparameter-, Entgelt- und Mehrwertdiensteverordnung,

available at:

http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=BgblAuth&Dokumentnummer=BGBLA_2009_II_212

Konsumentenschutzgesetz

available at:

<http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002462>

Norway

Abonnementsvilkår for Telenor from the 1. July 2007,

available at:

<http://www.telenor.no/privat/mobil/abonnement/abonnementsvilkar/abonnementsvilkarenglish.jsp>

Finansavtaleloven

available at: <http://www.lovdata.no/all/h1-19990625-046.html>

Finansieringsvirksomhetsloven

available at: <http://www.lovdata.no/all/tl-19880610-040-001.html>

Vergemålsloven

available at: <http://www.lovdata.no/all/h1-19270422-003.html>

B List of Judgments/Decisions

Austria

OGH, 4 Ob 546/79
 7 Ob 26/90
 8 Ob 675/90
 1 Ob 595/92
 2 Ob 133/99v
 1 Ob 244/02t
 1 Ob 114/05d
 4 Ob 227/06w

All available at: <http://www.ris.bka.gv.at/Jus/>

VwGH 2004/03/0066

All available at: <http://www.ris.bka.gv.at/Vwgh/>

Germany

BGH, III ZR 5/01
 III ZR 96/03
 III ZR 58/06

All available at: <http://www.bundesgerichtshof.de/>

Norway

Eidsivating lagmannsrett, LE-2000-883

available at: <http://www.lovddata.no>

C Books

[*Koziol/Welser I* (2002)]

*Koziol/Welser Bürgerliches Recht*¹² I (2002)

[*Koziol/Welser II* (2002)]

*Koziol/Welser, Bürgerliches Recht*¹² II (2002)

[*Lassen* (1992)]

*Lassen, Kontraktsrettslig representasjon*² (1992)

[*Lilleholt* (2009)]

*Lilleholt, in Knophs oversikt over Norges Rett*¹³ (2009)

[*Lørdrup/Kluften/Linge/Gjøslie* (2008)]

Lørdrup/Kluften/Linge/Gjøslie, Vergemålsloven med kommentarer (2008)

[*Schwimann/Binder* (1988)]

Schwimann/Binder, Praxiskommentar zum ABGB IV/1 (1988)

[*Smith* (1997)]

*Smith, Kausjonsrett*³ (1997)

[*Woxholth* (2006)]

*Woxholth, Avtalerett*⁶ (2006)

D Articles

[*Freudenthaler/Wiesinger* (2005)]

Freudenthaler/Wiesinger, Die Stellvertretung, JAP 2005/2006/10

[*Hoffmann* (2002)]

Hoffmann, Der unerklärliche Einwendungsverlust bei Gebühren für Telefon-Mehrwertdienste, ZIP 2002

[*International Telecommunication Union* (2009)]

International Telecommunication Union, New ITU ICT Development Index compares 154 countries, available at:

http://www.itu.int/newsroom/press_releases/2009/07.html

[*Klees* (2005)]

Klees, Der Erwerb von Handyklingeltönen durch Minderjährige, CR 2005, 626-632

[*Post- og Teletilsynet* (2008)]

Post- og Teletilsynet 30. September 2008, Liste over siste tildelinger av nummerserier i norsk nummerplan for telefon m.m. (E.146), available at:

http://www.npt.no/portal/page/portal/PG_NPT_NO_NO/PAG_NPT_NO_HOME/PAG_RESSURSER_TEKST?p_d_i=-121&p_d_c=&p_d_v=45990

[*Rundfunk und Telekom Regulierungs GmbH*]

Runfunk und Telekom Regulierungs GmbH, Nationale Rufnummern, available at:

<http://www.rtr.at/de/tk/nationaleRufnummern>

[*RTR Telekom Monitor* (2009)]

RTR Telekom Monitor 1/2009, available at:

http://www.rtr.at/de/komp/TKMonitor_1_2009/TM1-2009.pdf

[*Schmitz/Eckhardt* (2007)]

Schmitz/Eckhardt, Vertragsverhältnisse und Fakturierung bei Mehrwertdiensten nach dem BGH im Online- und Offline-Billing, CR 2007, 560-567

[*Stögmüller* (2003)]

Stögmüller, Fakturierung und Inkasso von Mehrwertdiensten, CR 2003, 251-258

[*Taupitz* (1997)]

Taupitz, Zivilrechtliche Haftungsfragen bei Kartenmissbrauch nach österreichischem Recht, ÖBA 1997, 765ff

[*Welser* (1979)]

Welser, Äußerer Tatbestand, Duldung und Anschein im Vollmachtsrecht, JBl 1979, 1

[*Wessely* (2004)]

Wessely, Neues von der Mehrwertdienste-Front, MR 2004/149

[*Wessely/Eugen* (2003)]

Wessely/Eugen, Ich war es nicht! oder: Haftung für die Inanspruchnahme von Mehrwertdiensten durch Geschäftsunfähige, MR 2003/3

[*Wikipedia*, Mobile Phones]

Wikipedia, Mobile Phones, available at:

http://en.wikipedia.org/wiki/Mobile_phone#Usage

[*Wikipedia*, Premium-rate telephone number]

Wikipedia, Premium-rate telephone number, available at:

http://en.wikipedia.org/wiki/Premium-rate_telephone_number

[*Zankl* (2005)]

Zankl in Die Presse 2005/05/02, Mehrwertnummern für Kinder: Müssen die Eltern zahlen?

[*Zib* (1999)]

Zib, Electronic Commerce und Risikozurechnung im rechtsgeschäftlichen Bereich, ecollex 1999, 230

[*Zib* (2005)]

Zib, Haftung bei missbräuchlicher Inanspruchnahme von Telefonleistungen durch Dritte, MR 2005, 396