Summary

This thesis discusses the private law consequences of statutory best practice rules.

Statutory best practice rules are characterised as public law in the sense that the rules i) protect public law interests, including trust in the market and fair competition, ii) are sanctioned by public law sanctions such as injunctions, fines, withdrawal of authorisation, etc., and iii) are enforced by public supervisory authorities such as the Danish Financial Supervisory Authority.

However, best practice rules also aim to protect the legal position of customers in a relationship with a stronger professional contracting party, and the rules govern the relationship between two private parties, e.g. a bank and its customer. It is therefore only natural that the question of how best practice rules affect a private law claim arises.

Best practice rules are so-called legal standards. This is also the case for both the rule of fault (in Danish: ”culpareglen”) and Section 36 of the Danish Contracts Act (in Danish: ”aftaleloven”). Consequently, the thesis initially describes the concept of legal standards (Chapter 2). Subsequently, the different types of best practice rules are described, including the different professions and areas regulated by best practice rules (Chapter 3). Unlike other presentations dealing with best practice rules, the thesis is not based on one area or set of rules, but instead aims to treat best practice rules as a legal concept across different sectors.

The second – and main – part of the thesis is the analysis. The subject of the analysis is not the content and extent of one or more best practice rules. Instead, it is analyzed how best practice rules affect the assessment of whether there is a basis for a claim for damages, a claim for illegality of the contract or a claim for defects, respectively.

In the section about tort law (Chapter 4), it is concluded that not any breach of best practice rules will lead to liability. Both the standard of culpability and best practice rules are behavioural standards, and to a large extent the assessment of what is best practice and what is not culpable will correspond. However, best practice rules set a higher standard than the standard of culpability and also cover other interests than the interest of the customer. Consequently, what constitutes best practice is not 1:1 the same as what constitutes liability. These are two independent assessments, although a best practice rule must be regarded as a significant contribution to filling out the standard of culpability.

Although the practice of The Danish Financial Complaint Board (in Danish: ”Det Finansielle Ankenævn”) might indicate otherwise, there is no basis for generally presuming that a violation of best practice rules leads to liability for damages. However, there is a distinction between on one hand clear and precise best practice rules and on the other hand broader and general legal standards. The more precise the rule of best practice, the closer to a presumption of liability for breach.

Chapter 4 about tort law also describes statutory liability as several laws containing best practice laws stipulate that "non-compliance shall give rise to liability for damages in accordance with the general rules of Danish law". A rule of this (or similar) wording does not affect the assessment of fault for non-compliance with best practice rules, but it is nevertheless a signal to both the industry in question and the courts that the otherwise public law nature and sanctions of the law does not hinder private law consequences.

The statutory liability in Danish law is compared to the Norwegian Financial Agreements Act, section 3-46 (1), which states that ”if the service provider has breached [its] obligations according to section 3-1 first paragraph, the agreement can be terminated according to the rules in section 3-48, and compensation can be demanded according to section 3-49".

It is concluded that even though the Norwegian Financial Agreements Act appears to contain a better consumer protection than the Danish rules on statutory liability, it entails a risk that the standard of best practice will be limited rather than that the liability for non-compliance will be increased.

Chapter 5 deals with the basis for invalidity under Danish contract law on grounds of non-compliance with best practice rules. It is concluded that although it cannot be ruled out a priori that cases may arise where section 5-1-2 of the Danish Law (in Danish: ”Danske lov”) will be relevant, Section 36 of the Danish Contracts Act is the primary legal basis for claims for invalidity on the grounds of violation of best practice rules. Section 33 of the Danish Contracts Act appears to play a minor role in case-law but could expediently be invoked more often.

The chapter reviews both Danish and Norwegian case law on best practice and invalidity as, despite almost identical legal bases, Danish and Norwegian courts approach the issue differently. In contradiction to standard of culpability, Section 36 of the Danish Contracts Act is not a behavioural standard. Thus, similar to the assessment of tort liability – and perhaps even more so – the assessment of breach of best practice and the assessment of contractual fairness are two independent assessments. The best practice rule plays a role in the assessment of the fairness of the contract, but case law establishes that there is a requirement for materiality. The violation of best practice must be material to lead to invalidity, and the non-compliance must have influenced – or at least been likely to influence – the contracting party's decision to enter into the agreement.

As the third part of the analysis, Chapter 6 examines the basis for claiming non-conformity with the contract on the grounds of non-compliance with best practice rules. In court cases regarding noncompliance with best practice rules, the remedies for defects in the Danish Sale of Goods Act (in Danish: ”købeloven”) (and the similar general principles of contract law) are not invoked nearly as often as tort and invalidity and are correspondingly not very well described in the legal literature.

However, the liability for defects may be a somewhat overlooked way of seeking compensation for non-compliance with best practice rules. Best practice rules fill out the contractual duty of loyalty. Non-compliance with best practice rules will therefore often also constitute a breach. Although this may not necessarily lead to termination (which presupposes materiality), it may nevertheless provide the basis for a proportionate reduction (of the customer’s payments, fee, etc.), which, unlike a claim for damages, does not require the customer to prove fault on part of the professional party.

Finally, the thesis discusses the argument of ”effective law enforcement” and how this argument may affect the basis of a private law claim for non-compliance with public law rules (Chapter 7).
For frame of reference, the thesis also describes a solution from the United Kingdom, which is an example of a complete mixture between private and public law, interests and actors.