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Advocate General's opinion is that a bank's secure messaging system is 'durable medium'

*BAWAG PSK Bank für Arbeit & Wirtschaft AG v. Verein für
Konsumenteninformation
Case C-375/15*

Article by David Bowden

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Advocate-General Bobek has had to rule on 2 provisions in the Payment Services Directive in a case referred to the CJEU by the Austrian Supreme Court. This concerns a test case challenge brought by the Austrian Consumer's Association. He has ruled that the 'durable medium' requirements can be met electronically provided that information can be stored for an adequate period and that its unchanged reproduction is guaranteed. On these technical measures he ruled that it should be technically impossible for the payment service provider to unilaterally change or delete information once transmitted to the user. However he said that a mailbox hosted and administered by a payment service provider itself is unlikely to comply with the requirements of guaranteeing unchanged reproduction because it remains under the payment service provider's control. Finally, when it comes to changing product terms and conditions, he ruled that merely placing these new conditions in an electronic e-banking mailbox was not sufficient under the PSD. A bank had to take steps to ensure that a customer not only received them but was aware of their contents. He said this could be met by sending them to a regular email account that a customer held. The case will now go to a chamber of the CJEU who will decide whether to uphold its Advocate-General's opinion.

BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v. Verein für Konsumenteninformation
The Government of the Republics of Italy and Poland intervening
Case C-375/15 15 September 2016
Court of Justice of the European Union - Advocate-General Bobek

What are the facts?

BAWAG is an Austrian bank operating in Austria. It offers internet e-banking to its customers. As part of the general terms in such e-banking contracts, BAWAG includes a contractual term stating that 'notices of changes' will be communicated to the customer through the internal mailbox of its internet e-banking system. Verein für Konsumenteninformation (an Austrian Consumer Association), considers that such a contractual term does not comply with the duty of providing information on a 'durable medium' set out in the Payment Services Directive ('PSD') 2007/64/EC.

The CJEU was asked to establish whether information given through BAWAG's e-banking mailbox is 'provided' (as opposed to merely being 'made available') through a 'durable medium' under the PSD. The Advocate-General looks at this case in the round considering striking a balance between the minimum requirements of consumer information and protection and technological developments to set up online and paperless environments for banks to communicate with their customers.

What does the Payment Services Directive say?

The relevant parts of the Payment Services Directive ('PSD') 2007/64/EC are these.

- **Article 4 (12)** – 'framework contract' means a payment service contract which governs the future execution of individual and successive payment transactions and which may contain the obligation and conditions for setting up a payment account'
- **Article 4 (25)** - "'durable medium" means any instrument which enables the payment service user to store information addressed personally to him in a way accessible for future reference for a period of time adequate to the purposes of the information and which allows the unchanged reproduction of the information stored'
- **Article 36 (1)** – on 'Prior general information' says: 'Member States shall require that before the payment service user is bound by any single payment service contract or offer, the payment service provider, in an easily accessible manner, makes available to the payment service user the information and conditions specified in Article 37. At the payment service user's request, the payment service provider shall provide the information and conditions on paper or on another durable medium...'
- **Article 41** - on 'Prior general information' for 'framework contracts' says: 'Member States shall require that, in good time before the payment service user is bound by any framework contract or offer, the payment service provider provide the payment service user on paper or on another durable medium with the information and conditions specified in Article 42. The information and conditions shall be given in easily understandable words and in a clear and comprehensible form,....'
- **Article 44** – on 'Changes in conditions of the framework contract' says: 'Any changes in the framework contract as well as the information and conditions specified in Article 42, shall be proposed by the payment service provider in the same way as provided for in Article 41(1) and no later than two months before their proposed date of application.'

Are there any recitals in the Payment Services Directive of relevance?

There are a number of recitals to the PSD that are also relevant. These are:

- **Recital 20** – ‘.... . While it is important to guarantee consumers' rights by provisions which cannot be derogated from by contract, it is reasonable to let enterprises and organisations agree otherwise. certain core provisions of this Directive should always be applicable irrespective of the status of the user.’
- **Recital 23** - ‘The information required should be proportionate to the needs of users and communicated in a standard manner. However, the information requirements for a single payment transaction should be different from those of a framework contract which provides for the series of payment transactions.’
- **Recital 24** - ‘In practice, framework contracts and the payment transactions covered by them are far more common and economically important than single payment transactions. If there is a payment account or a specific payment instrument, a framework contract is required. Therefore, the requirements for prior information on framework contracts should be quite comprehensive and information should always be provided on paper or on another durable medium, such as printouts by account printers, floppy disks, CD-ROMs, DVDs and hard drives of personal computers on which electronic mail can be stored, and Internet sites, as long as such sites are accessible for future reference for a period of time adequate for the purposes of information and allow the unchanged reproduction of the information stored. However, it should be possible for the payment service provider and the payment service user to agree in the framework contract on the manner in which subsequent information on executed payment transactions is given, for instance, that in Internet banking all information on the payment account is made available online.’
- **Recital 25** - ‘In single payment transactions only the essential information should always be given on the payment service provider's own initiative. As the payer is usually present when he gives the payment order, it is not necessary to require that information should in every case be provided on paper or on another durable medium.’
- **Recital 27** - ‘The way in which the required information is to be given by the payment service provider to the payment service user should take into account the needs of the latter as well as practical technical aspects and cost-efficiency depending on the situation with regard to the agreement in the respective payment service contract., the payment service user should take some active steps in order to obtain the information, such as requesting it explicitly from the payment service provider, logging into bank account mail box or inserting a bankcard into printer for account statements. For such purposes the payment service provider should ensure that access to the information is possible and that the information is available to the payment service user.’

What happened in the Austrian courts?

The Austrian Consumer's Association brought an action seeking to prevent BAWAG from either including or applying the challenged contractual term in all its consumer contracts. It won at first instance and also on first appeal. BAWAG then appealed to the Supreme Court of Austria who then stayed the proceedings and referred the 2 questions to the CJEU for a ruling on the interpretation of the PSD.

The reference for a preliminary ruling was lodged at CJEU on 15 July 2015. A hearing took place on 30 June 2016 at which both sides as well as the European Commission made oral submissions.

What were the terms of reference to the CJEU?

The court in Austria referred these 2 questions to the CJEU. These were:

- In the case of information in an electronic format transmitted by a bank to an e-mail inbox of a customer as part of online banking ('eBanking') so that the customer can retrieve this information by clicking on it after logging in to the eBanking website – does Article 41(1) in conjunction with Article 36(1) of Directive **2007/64/EC** have to be interpreted as meaning that this information has been provided on a durable medium?
- If the answer to the 1st question 1 is in the negative, then is Article 41(1) in conjunction with Article 36(1) of the PSD to be interpreted as meaning that in such a case:
 - the information from the bank is indeed provided on a durable medium, (but not notified to the customer), merely made accessible to him? or
 - all that happens is that the information is made accessible without the use of a durable medium?

What had the EFTA Court ruled in *Inconsult Anstalt v. Financial Market Authority of Liechtenstein (Finanzmarktaufsicht)* E-4/09?

On 27 January 2010 the EFTA court gave its ruling in this case in relation to the term 'durable medium' as it appears in the Insurance Mediation Directive **2002/92/EC**. The Court held that an Internet site can constitute a 'durable medium' under Article 2(12) of IMD provided that these criteria are met by the internet site:

- it must enable the customer to store the information in question,
- it must enable the customer to store the information in a way which makes it accessible for a period of time adequate to the purposes of the information – this is for as long as it is relevant for the customer to protect his interests stemming from his relations with the insurance intermediary.

- it must allow for the unchanged reproduction of information stored. The information must be stored in a way that makes it impossible for the insurance intermediary to change it unilaterally. It is for the insurance intermediary to ensure that the methods of electronic communication he employs permit this kind of reproduction, and
- For an Internet site to qualify as a '*durable medium*' it is irrelevant whether the customer has expressly consented to the provision of information through the Internet

What had the CJEU then ruled in *Content Services v. Bundesarbeitskammer C-49/11*?

On 5 July 2012 the 3rd Chamber of the CJEU (Judges Lenaerts, Malenovský, Juhász, and von Danwitz, with Advocate General Mengozzi) handed down its judgment. This case was also an Austrian one in which the CJEU was asked for a preliminary ruling on 'durable medium' as it appeared in Distance Selling Directive **97/7/EC**. It also looked at consumer information provided by means of a hyperlink to the supplier's website.

The CJEU considered Article 5(1) of Distance Selling Directive. It said this must be interpreted as meaning that a business practice consisting of making the stipulated information accessible to a consumer only via a hyperlink on business's website did not meet the DSD's requirements. This was because the information had neither been '*given*' by that business nor '*received*' by the consumer within the meaning of the DSD. The CJEU ruled that a business website could not be regarded as a '*durable medium*' within the meaning of Article 5(1) of the DSD.

What opinion has Advocate-General Sharpston recently given on 'durable medium'?

On 9 June 2016, Eleanor Sharpston gave her opinion in *Home Credit Slovakia AS v. Klára Bíróová C-42/15* when she was required to interpret the phrase '*drawn up on paper or on another durable medium*' where it appears in the Consumer Credit Directive ('CCD') **2008/48/EC**. This case is still waiting to be heard by a chamber of the CJEU itself.

Her opinion was that this phrase in Article 10 of the CCD refers to the medium on which the credit agreement is drawn up and given to the consumer. Those words cover both the terms of the credit agreement concluded by the parties and the items of information listed in Article 10(2) of CCD which comprise part of the credit agreement.

She ruled that a national rule that requires all the compulsory information to be supplied in writing within a single, signed document is not precluded by the CCD. A national rule that permits elements of the compulsory information to be supplied on paper or on another durable medium in the lender's general terms of business, rather than in the signed consumer credit agreement itself, is likewise not precluded by CCD. However she ruled that as a minimum the following conditions have to be in place:

- the separate documents containing the compulsory information should be given to the consumer at the same time and prior to conclusion of the agreement,
- the credit agreement should contain clear and precise cross references to the compulsory information and indicate where it can be found in the lender's general terms of business, and
- the lender should be able to prove that he has given the compulsory information to the consumer prior to the conclusion of the agreement.

Are there any special provisions in Austrian Law?

The PSD was transposed into Austrian law by means of the Bundesgesetz über die Erbringung von Zahlungsdiensten (Austrian Law on Payment Services - **BGBI. 2009 I, No 66**). Paragraph 26 of that law says:

'(1) The payment service provider must in good time, before the payment service user is bound by a contract or a contractual offer, 1. in the case of a framework contract in accordance with Paragraph 28, communicate the information and terms of the contract to the payment service user in paper form or, where the payment service user agrees, on another durable medium, ...'

Paragraph 29 of that law which deals with amendments to framework contracts says:

'(1) The payment service provider must 1. propose amendments to the framework contract to the payment service user at the latest two months before the planned time of their application, in the manner provided for in Paragraph 26(1)(1) and Paragraph 26(2), and,
2. where an agreement in accordance with Paragraph 28(1)(6)(a) has been made, point out
(a) that the consent of the payment service user to the changes is deemed to have been given if he has not notified the payment service provider of his rejection before the proposed time of application of the amendments, and

(b) *that the payment service user has the right to terminate the framework contract without notice, free of charge, before the amendments come into force.*

What did the CJEU rule on 'durable medium'?

The Czech Advocate-General referred firstly to the definition of 'durable medium' in Article 4(25) of the PSD and said it boiled down to 2 core components – 'storability' and 'reproduction'. He noted that the EU had to '*reconcile the tension between the need to adjust to the evolution of technology which makes commercial transactions more agile via the internet*' and the protection of consumer rights. He said the consumer was '*the more vulnerable party*' and that PSD prevented information from being provided '*in a merely ephemeral manner*'.

The Advocate-General rejected the consumer's association view that email and internet sites cannot be considered a 'durable medium' because they were not capable of '*constituting a physical instrument of storage*'. He said '*durable medium*' was a concept as a '*functional equivalent to paper*' and that the definition in Article 4(25) was '*to be defined in a broad way*' and was not to exclude '*any potential modes of communication*'.

The Advocate-General said that '*durable medium*' is '*independent from the physical structure or hardware characteristics of a medium or support*'. Instead it relies on '*functional features*' which '*fulfil the requirements of storability and unchanged reproduction*'. He said as long as this was fulfilled then the actual type and shape of a durable medium '*may change with the evolution of technical possibility*'. He said that PSD had '*arguable reversed the reticent approach towards internet sites*' and drew support from the EFTA court in *Inconsult Anstalt* in support. He said that internet-based communications systems '*are not per se excluded from being "durable media"*'.

As to the CJEU ruling in *Content Services*, he said that this was '*of limited utility*' in interpreting the PSD. Rather he preferred the EFTA court approach in *Inconsult Anstalt* that '*different kinds of technical arrangements such as internet-based mailbox systems*' can comply with the '*durable medium*' requirements. He said that e-banking mailboxes could be considered a 'durable medium' where either:

- it fulfilled the requirements in its own right, or
- it could be considered '*an avenue for transmitting electronic documents*'.

The Advocate-General said that the key question is '*whether the information can be stored for an adequate period and whether its unchanged reproduction is guaranteed*'. He went on to say that the existence of a mailbox '*presupposes a secured independent storage space that users access with a username and password*'. On '*unchanged reproduction*' he expanded on this to rule that this meant '*it ought to be technically impossible for the payment service provider to unilaterally change or delete information once transmitted to the user*'.

Going further on this he was clear that '*a mailbox hosted and administered by the payment service provider is unlikely to comply with the requirements of guaranteeing "unchanged reproduction" since it is technically under the payment service provider's control*'. He said that despite the apparent complexity, the basic point remained can consumers '*retain that information in a safe format for later evidentiary purposes*'? For this he drew an analogy to a previous era where contractual documents would be '*obligatorily stored in an archive room in the bank itself*'.

He said that '*electronic documents should be capable of being stored separately in a way which permits the user to download and/or print the document*'. Where a consumer could store such a document on his personal hard-drive, then he said that his would '*in principle fulfil the temporal criteria*'.

What did the CJEU rule on 'information provided or made available'?

The Advocate-General's conclusion on this is that '*information concerning changes to a framework contract transmitted by a payment service provider solely through an e-banking mailbox is not "provided" in the sense of Article 41(1)...but merely "made available" to a payment service user*'.

He said that what was more important is '*the effective transmission of the information*' and that such information must '*cross the line from the domain of the service provided in order to enter into the sphere of awareness of the user*'. He drew an analogy with a previous era where a customer may have had a personal safety box at a bank and said that merely putting letters in that box addressed to a customer '*could hardly be seen as effectively reaching the personal sphere of the customer*'.

For this reason he said information placed in an e-banking mailbox '*does not leave the particular sphere of the bank to penetrate the domain of the regular communication instruments*' used by customers. In this category, however, he did include a personal email account (that is not one provided by or in connection with the bank account). Part of the reasoning for this approach is consumer protection with the Advocate-General noting that '*consumers and enterprises are not in the same position and do not need the same level of protection*'. Finally he noted that the limited exemptions in the PSD itself referred only to '*low value payment instruments and electronic money*'.

What will happen next with this case?

The case will now proceed for a determination before one of the chambers of the Court of Justice of the EU. In the overwhelmingly majority of cases, the CJEU decides to follow the advice of its Advocate-General. It is not clear when this will come on for hearing but we are looking at a date in 2017.

Is there similar wording in other EU measures?

Yes. Wording in relation to '*durable medium*' also appears in these measures:

- Distance selling directive – **97/7/EC**,
- Electronic commerce directive – **2000/31/EC**,
- Distance marketing of consumer financial services directive – **2002/65/EC**,
- Insurance mediation directive – **2002/92/EC**, and
- Consumer rights directive – **2001/83/EC**.

What does the Consumer Credit Directive say about 'durable medium'?

Interestingly, the Advocate-General does not refer to this in the body of his opinion but it is referenced in footnote 3 which refers back to the opinion of Advocate-General Eleanor Sharpston in *Home Credit Slovakia*. Directive **2008/48/EC** also uses the term '*durable medium*'. It is defined in Article 3(m) as meaning '*any instrument which enables the consumer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored*'.

What will be the position under the 2nd Payment Services Directive?

PSD2 **2015/2366/EU** was adopted on 25 November 2015. It has to be implemented by 13 January 2018 on which date PSD will be repealed. '*Durable medium*' is defined in Article 4(35) as meaning:

'any instrument which enables the payment service user to store information addressed personally to that payment service user in a way accessible for future reference for a period of time adequate to the purposes of the information and which allows the unchanged reproduction of the information stored'.

'*Durable medium*' is then referred to in 6 places in the operative provisions as follows:

- **Article 44** – '*Prior general information*' (that is information and conditions) is to be provided by the payment service provider user's request '*on paper or on another durable medium*'.
- **Article 51** – Member States shall require that, in good time before the payment service user is bound by any framework contract or offer, the payment service provider provide the payment service user '*on paper or on another durable medium with the information and conditions*' with the information and conditions specified in Article 52.
- **Article 53** – On '*Accessibility of information and conditions of the framework contract*' this provides that at any time during the contractual relationship the '*payment service user shall have a right to receive, on request, the contractual terms of the framework contract as well as the information and conditions specified in Article 52 on paper or on another durable medium*'.
- **Articles 57 and 58** – Member States may '*require payment service providers to provide information on paper or on another durable medium at least once a month, free of charge*'.
- **Article 101** - On '*Dispute resolution*' provides that Member States '*shall require that payment service providers make every possible effort to reply, on paper or, if agreed between payment service provider and payment service user, on another durable medium*' to users' complaints.

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