

## CONCLUSIVE EVIDENCE OF HENDED INFORMATION

by

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*On 1st November 2009, the Payment Systems Act no. 284/2009 Coll. came into operation. This new act recodified the former, historically first rule governing payment systems and services since 2003. New legal regulation reflects especially the Directive of European Parliament and Council of the European Union no. 2007/94/EC, about payment services in the internal market. The new law describes some new terms and concepts, e.g. payment service, payment institution, payment account, electronic money institution and the others. If payment services are now being provided, there is a necessity that mutual contractual relation between a payment service provider and their clients must be concluded either according to Basic Contract, or, if occasional transfer made, based on Single Payment Transaction Agreement. The act also very strong reflects the provider's obligation to fulfill final customers with all the information. In order to this information transparency to be legally regulated, the Act implemented two basic forms of presenting this information, i.e. be obliged to provide this information or make this information available. Payment services are such bank products that are expected to be provided electronically. Thus, any electronic banking system could better contribute to the fact that all the information have been evidently provided or made accessible by the payment services provider.*

### KEYWORDS

*Payment service, bank, to provide information, to make information available, electronic means*

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## **1. INTRODUCTION**

In my contribution let me consider the fact which seems to be very trivial from the first point of view. The matter of my interest is the question how the bank or other provider of payment or similar services either to consumers or to small and medium-sized enterprises must prove that General terms and conditions for realization of this financial service to end user were really provided. Why I am dealing with this question? The situation is as follows.

## **2. NEW CONDITION FOR INFORMATION**

On the first of November 2009 the law No. 284/2009 Coll., about payment system came into force. It concerns the re-codification of the first Directive codifying payment services since 2003. This new law comes out from the Directive 2007/64/EC of the European Parliament and of the Council on payment services in the internal market. This law defines some new terms as: payment service, payment institution, payment account, electronic money institution etc. By providing of payment services is now necessary to do with concluding of contract between the provider of payment services and its client on the basis of General contract, or One-shot contract, in case of occasional payment transaction. The law strictly respects the providers' obligation to inform end users of these services. So as to this information right to be legally secured, the law set two basic forms, the first is "information making available" and the second is "providing information". To the providers of payment services belong for example banks, savings and credit co-operatives, payment institutions, issuers of electronic money and other subjects. I think that banks currently provide the widest-range offer of payment services. For that reason I will pay my attention to the banks.

## **3. FORMER CONDITION FOR INFORMATION**

How were the payment services released earlier, it means before coming in force of the above mentioned law? The relationship between bank and its client was codified by the contract about founding and maintaining of current account. Law relations were processed by §§ 708 and following of the law No. 513/1991 Coll., commercial code. This modification described only basic rights and duties of subjects and nowise determined any, let say, major duties on one or other side. But the previous law No. 124/2002 Coll.,

about money transfers, means of electronic payment and payment systems set some partial duties. Particularly it was the duty to inform the client about terms in system of payment, for instance payment system deadlines, then price level of services, the way how to asset this price or exchange rate used. The method of passing information was done in written form. Banks were also obliged to present the mentioned points in their premises or through means of electronic communication. Both this and further information had to be presented to the client in advance and the law didn't specify whether before the very beginning of providing services themselves or before the concluding of contract about current account. As I have mentioned earlier, the present legal status relatively complicated the whole situation concerning information duty. Banks and other providers are obliged to make information possible or available to their clients. If user obtains information on permanent data format, the information is regarded as it has been provided. If the provider allows user to look for information before concluding of contract or during contractual period, the information is regarded as being made available. Moreover, the user has not to be burdened too much in the whole process.

#### **4. THE DUTY TO PROVIDE INFORMATION**

In § 80 of the law about system of payment is quoted that bank or other provider give a lot of information to its client in advance before its client is bounded by General contract, for example deadlines in payment services providing, unique identifier of payment service, way of interest rate assignment, service prices and plenty of others. If these and further items are not given to client properly and before concluding the General contract, law strictly specifies in its § 81, that client is not bounded by this contract. The proof burden is connected with the bank as payment services provider. This situation is very complicated for banks and strictly speaking it comes out from the presumption that client after signature of contract about payment services will not reject the fact that no information has been received. Initiate situation is valid in case of the first written contract between bank and its client. This complicated situation could be solved by fully indisputable confirmative tools, as audio and video recording during dealing with client. However, this possibility is very inconvenient and client would have to agree with such recording otherwise other law could be violated, for example Act No. 101/2000 Coll., about personal data protection. Consequent

client's approval made in signature form (under clause) like: "Client claims to have been informed about all facts concerning this contract before its concluding and fully agrees with them." is not absolutely relevant. I experienced the situation when client objected such fact successfully and disputed he had not noticed it by reading. At the end of this part I would like to say that in these days banks and other providers of payment services bear the risk that client will either dispute his disapproval with information provided by the bank before concluding the written contract about payment services or will dispute the fact that no information was given. It can be also observed that in majority cases all information is made available for clients by means of electronic communication, especially through banks' web pages. Similar situation comes up in case of change of content of contract about payment services. In this case the law also quotes the necessity to provide all changes to the client (user of payment services), but if services are provided electronically (maybe via internet application), it is much easier for the bank or other provider of payment services to prove this service to be granted.

## **5. SOLUTION AVAILABLE**

Payment services are products which are supposed to be provided by electronic means. Nothing is simpler than that by client's logging into the electronic application there appears a window in which a client will be informed about all changes, service amendments, news etc. This window must appear always and if client doesn't open it, application does not allow him to continue. If client opens it, the text content is expected to be read by that client. We can deal with the same assumption as we deliver the registered mail to one's own hand. It is the same in case of electronic communication between bank and client. Only a person who has the access rights is allowed to log into bank system and bank always, at any moment, knows who and when did log into the system. It is always supported with evidence for a determined period that our client log in, what he did in system and how long he used it. According to my opinion the form of electronic communication is always more evidential and transparent than any written form. Now we must focus on the situation of replacing written demonstration by electronic demonstration. But we will need a certain time to mature to this dream.

## REFERENCES

[1] Act No. 284/2009 Coll., about payment system and explanatory memorandum to the Act.

[2] Act No. 513/1991 Coll., commercial code