



WHEN A PAYMENT SERVICE PROVIDER MUST “PROVIDE” INFORMATION ON A “DURABLE MEDIUM”... IS AN ELECTRONIC EMAILBOX ENOUGH?

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INTRODUCTION

BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG (“BAWAG”) is a bank operating in Austria. It offers contracts for internet e-banking to its customers. One of the provisions in the general terms in such e-banking contracts grants BAWAG the right to communicate ‘notices of changes’ to the customer through the internal mailbox of its internet e-banking system. The Verein für Konsumenteninformation, a consumer association, requested BAWAG to cease the usage of these terms as it would not comply with the duty of a payment service provider (“PSP”) to provide information on a ‘durable medium’ as set out in Directive 2007/64 on payment services (“PSD”).

To this regard, the Supreme Court of Austria addressed two questions to the European Court of Justice (“ECJ”) for a preliminary ruling.

On 26 January 2017 the ECJ delivered its judgment¹.

In this memo we will analyze the ECJ’s ruling as well as compare it to an earlier decision of the court regarding the same notion of ‘durable medium’.

LEGAL BACKGROUND

The relevant legal provisions were article 36(1) PSD, with regard to a single payment service contract or offer, and article 41(1) PSD, related to framework contracts. Both require a PSP to provide certain information and conditions “on paper or on another durable medium” to its customers.

¹ ECJ 5 January 2017, C-375/15, *BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v Verein für Konsumenteninformation*.

The ECJ specifies that this obligation of information contains in fact two requirements. On the hand, the requirement to use a durable medium which must contain the information concerned and, on the other hand, the requirement that the information must be provided to the payment service user.

THE NOTION ‘DURABLE MEDIUM’

A ‘durable medium’ is defined in article 4(25) PSD as “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 allows the unchanged reproduction of the information stored”.

The ECJ indicates, referring to recital 24 PSD, that certain Internet sites can meet the aforementioned definition. This will indeed be the case if such website (1) enables the storage of information personally addressed to the customer in a way accessible for future reference for an adequate period of time, (2) guarantees the unchanged reproduction of the stored information, and (3) does not provide the PSP (or any third party managing the website) with the possibility to unilaterally modify the content.

These three conditions could already be found in earlier decisions of the ECJ on the notion ‘durable medium’. It will be up to the national court of Austria to verify if these circumstances are met by the system put in place by BAWAG.

THE NOTION ‘PROVIDED’

Regarding the interpretation of the word ‘provided’, the Court makes a distinction between two methods of transmitting. One by which the PSP actively provides the user with the required information and another one by which the

information is merely 'made available'. The latter thus requires the user to take some active steps to obtain the information. The ECJ rules that only in the first practice the information is 'provided'.

The Court however specifies that if "*such a transmission is accompanied by active behaviour of the provider aimed at drawing the user's attention to the existence and availability of that information on that site*" the information is also 'provided' and not just 'made available'.

The latter seems to be the most interesting point of this judgment and seems somehow to differ from the Court's earlier decisions regarding the notion of "durable medium".

THE ECJ DECISION IN CONTENT SERVICES

One of these earlier rulings was the case *Content Services*².

The latter was not related to the information requirements for PSP's, but, more in general, to suppliers offering consumers goods and services via distance sale contracts. Therefore, it did not concern the PSD, but the Directive 97/7 on the protection of consumers in respect of distance contracts.

Similar to the articles concerned under PSD in *BAWAG*, article 5 Directive 97/7 states, in particular, that on conclusion of a distance contract, the consumer must 'receive' confirmation of certain information on a 'durable medium'. The referring (again Austrian) court asked the ECJ for further interpretation about the latter notion in a situation where a supplier makes the information available on its website which consumers can access by clicking on a hyperlink.

The ECJ stated that the practice used in *Content Services* did not qualify as 'provided' on a durable medium. According to the Court, article 5 Directive 97/7 requires only a 'passive conduct' by the consumer. Therefore, making available a hyperlink referring to a website which contains the necessary information and thus requiring the consumer to undertake an action, namely clicking on the link, is not in accordance with this article.

Comparing both decision on this point, the ECJ seems to take a less strict approach with regard to the information obligation of PSP's under PSD than those of suppliers under Directive 97/7.

After all, in *BAWAG* the court decided that, a PSP 'provides' the required information on a durable medium if this information is available on

the PSP's website and if the payment service user receives a notification when the information would be modified. Checking the modified information still requires the customer to undertake an action, i.e. going to the website to check the (modified) information, and is thus not only a passive conduct.

We believe both decision are however not in contradiction with each other.

The reasoning and argumentation of the Court are in both decisions very similar. Already in *Content Services* the ECJ recognizes that a website can qualify as a 'durable medium'. However, this will only be the case, according to the Court, if it concerns a "sophisticated website", meaning one that allows the consumer to store information which is personally addressed to him in such a way that he can access it and reproduce it unchanged during an adequate period without the seller being able to amend the content unilaterally.

In *Content Services* it was explicitly recognized that the supplier's website did not meet these conditions. In contrast to *BAWAG*, the Court did not have to address the situation in which a website ensures that information can be stored, accessed and reproduced by the consumer.

Therefore, in our view, *BAWAG* is rather a further elaboration of the notion 'provided on a durable medium' by the ECJ than a shift by the latter in its case law.

As final remark we notice that, although the ECJ had to assess *BAWAG* under the 'first' PSD, it seems that the interpretation given is also of significance for the revised PSD ("**PSD2**") as the definition of 'a durable medium' is identical in both directives and the relevant legal provisions remained unaltered (i.e. article 44(1) and article 54(1) PSD2).

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² ECJ 5 July 2012, C-49/11, *Content Services Ltd v Bundesarbeitskammer*.