

The criteria of a durable medium (BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v Verein für Konsumenteninformation)

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Financial Services analysis: Do messages sent to an e-banking customer's mailbox on the bank's website meet the requirement that information be communicated on a durable medium? David Bowden, consumer credit solicitor and principal of David Bowden Law, comments on what lessons financial services practitioners can learn from the ruling of the Court of Justice of the European Union (CJEU) in BAWAG PSK Bank v Verein für Konsumenteninformation.

Original news

BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v Verein für Konsumenteninformation, Case C-375/15

The CJEU ruled that information transmitted by a bank to its e-banking customers' mailboxes on its website had been provided on a durable medium only if the website allowed the customers to store the information so they could access and reproduce it unchanged for an adequate period without the bank being able to unilaterally change it, and the bank drew the customers' attention to the existence of the information if they had to consult the website to acquire it.

What is the significance of the case?

The CJEU's judgment is only half-good news for financial services providers. While the CJEU ruled that a bank's secure messaging system could amount to a durable medium, it went on to rule that changes to product terms and conditions could not simply be deposited on the messaging system and that active steps had to be taken by a bank to draw these changes to a customer's attention.

What was the background to the case?

BAWAG is an Austrian bank operating throughout Austria. It offers internet e-banking to its customers. As part of the general terms in such e-banking contracts, the bank 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, considered that such a contractual term did not comply with the duty of providing information in a durable medium set out in the Payment Services Directive 2007/64/EC (PSD).

The association brought an action seeking to prevent the bank from either including or applying the challenged contractual term in all its consumer contracts. It won at first instance and also on first appeal. The

bank then appealed to the Supreme Court of Austria, which then stayed the proceedings and referred two questions to the CJEU for a ruling on the interpretation of the PSD.

What did the CJEU decide and why?

The CJEU was asked to decide whether information given through the bank's e-banking mailbox was provided (as opposed to merely being made available) through a durable medium under the PSD.

Advocate-General Bobek in his opinion dated 16 September 2016 looked at this case in the round and considered balancing the minimum requirements of consumer information and protection with technological developments in setting up online and paperless environments for banks to communicate with their customers.

The Advocate-General said that a durable medium, as defined in Article 4(25) of PSD, boiled down to two core components—storability and reproduction—and 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 opined that the consumer was the more vulnerable party and that the PSD prevented information from being provided in a merely ephemeral manner.

However, he rejected the association's view that email and internet sites could not be considered a durable medium because they were not capable of constituting a physical instrument of storage. He considered a durable medium to be a functional equivalent to paper and that Article 4(25) of PSD was to be defined in a broad way and was not to exclude any potential modes of communication. He said that a durable medium relied on functional features which fulfilled the requirements of storability and unchanged reproduction. As long as this was fulfilled, then the actual type and shape of a durable medium could change with the evolution of technical possibility. He found that the PSD had 'arguably reversed the reticent approach towards internet sites' and that internet-based communications systems were not, per se, excluded from being durable media.

As to information being information provided or made available, the Advocate-General said that what was more important was the effective transmission of the information and that such information had to 'cross the line from the domain of the service provided in order to enter into the sphere of awareness of the user'. He said information placed in an e-banking mailbox did not leave the particular sphere of the bank to penetrate the domain of the regular communication instruments used by customers.

The CJEU has agreed with its Advocate-General, but has sent the case back to the Austrian courts so that they can decide whether, on the facts of this case, the bank's e-banking system allows the payment service user to store information addressed personally to that user 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 CJEU also left it for the Austrian court to decide whether the changes to the information and conditions defined in Article 42 of PSD, and the changes to the relevant framework contract as well, could be regarded as having been actively communicated by the payment service provider to the user of those services.

How has the market been interpreting Article 41(1) of PSD in relation to a durable medium for e-banking?

Although this is the first time the CJEU has ruled on the concept of a durable medium as it appears in PSD, that same term appears in many other pieces of EU financial services legislation. On 27 January 2010, the EFTA Court ruled in E-4/09: *Inconsult Anstalt v Financial Market Authority of Liechtenstein (Finanzmarktaufsicht)* on the concept as it appears in the Insurance Mediation Directive 2002/92/EC. The court held that an internet site could constitute a durable medium if it:

- enabled the customer to store the information in question
- enabled the customer to store the information in a way which made it accessible for a period of time adequate to the purposes of the information, ie for as long as it was relevant for the customer to protect his interests stemming from his relations with the insurance intermediary

- allowed for the unchanged reproduction of information, which had to be stored in a way that made it impossible for the insurance intermediary to change it unilaterally

And the court ruled that it was irrelevant whether the customer had expressly consented to the provision of information through the internet.

That ruling has now been expressly endorsed by the CJEU in *BAWAG*.

How do the case findings change or affirm the market's interpretation? What steps do clients or customers need to take to ensure compliance with Article 41(1) of PSD in conjunction with Article 36(1)?

The CJEU ruling is quite disappointing and seems to take a quite sceptical view of modern technology. To be a durable medium for the CJEU there must be no possibility of a bank accessing its system to change the data stored there. The Advocate-General said that 'unchanged reproduction' meant that it ought to be technically impossible for the payment service provider to unilaterally change or delete information once transmitted to the user and that a mailbox hosted and administered by the payment service provider was unlikely to comply with the requirements of guaranteeing unchanged reproduction since it was technically under the payment service provider's control. If a payment service provider was to surrender control of its e-banking system to another organisation, then that would cause more problems than it solved.

As to product terms and conditions changes, the CJEU decision means that changes cannot simply be put up in a secure part of a bank's e-banking system. The CJEU ruled that what was needed was active behaviour by the provider aimed at drawing the user's attention to the existence and availability of the information on the site. Both the CJEU and the Advocate-General said this could be met by sending a letter or email to an address regularly used by the user. Sending such communications by regular post has a cost. There is no good reason given as to why an e-banking user who is regularly using that facility cannot be given notice of product condition changes on an e-banking platform. This ought to be possible where a message appears on the first screen displayed after log-on. However, this is not what the CJEU has ruled with its consumer-protection-focused interpretation of the PSD.

Will there be any further clarification of this in the Revised Payment Service Directive?

The Revised Payment Service Directive 2015/2366/EU (PSD2) was adopted on 25 November 2015. It has to be implemented by 13 January 2018, on which date the PSD will be repealed. 'Durable medium' is defined in Article 4(35) of PSD2 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 six places in the operative provisions as follows:

- Article 44 of PSD2—prior general information (that is information and conditions) is to be provided at the payment service user's request on paper or on another durable medium
- Article 51 of PSD2—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 52 of PSD2
- Article 53 of PSD2—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 of PSD2 on paper or on another durable medium
- Articles of 57 and 58 of PSD2—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 of PSD2—Member States shall require that payment service providers make every possible effort to reply on paper or, if agreed with the user, on another durable medium, to the user's complaints

Finally, it should be noted that both the CJEU and the Advocate-General agreed with the court's ruling on a durable medium as that term appears in the Consumer Credit Directive 2008/48/EC. In C-42/15: *Home Credit Slovakia AS v Klára Bíróová*, the Third Chamber ruled on 9 November 2016 that the durable medium requirements meant that what was relevant for a consumer was that:

- they should be able to store the information which had been addressed to them personally—to rest assured that its content would not be altered
- the information would be accessible for an adequate period, and
- it would be possible to reproduce it unchanged

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