

THE OBLIGATIONS OF THE FINANCIAL SERVICE PROVIDERS IN THEIR RELATIONSHIP WITH THE CONSUMER: FOCUS ON THE ROMANIAN REGULATION ON THE PAYMENT SERVICE PROVIDERS' OBLIGATIONS

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Abstract

The domain being under research comes within the paradigm already laid down by us since 2009, concerning the legal regime of the professionals' liability regulated by the laws on consumer protection. It comprises the professionals' specific obligations and liabilities instituted *ex legis*, in their relationship with the consumer and are also regulated in the field of financial services.

The research into the obligations instituted *ex legis*, in the field of payment service for professionals such as payment service providers in their relationship with the consumer implies an analysis of the regulations that resulted following the transposition and implementation in the national legislation of the Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market.

The desideratum aimed by setting forth these regulations is to set up an internal community market in the field of payment services in order to assure a unitary regulation framework at European Union level, subordinated to the principle of free movement of these services.

One of the main obligations that professionals who are payment service providers have in their relationship with the consumer is that of informing the consumer in different stages of this relation, and this obligation has different content for each of these stages.

The general regulation framework regarding consumer information carried by the professional, at national level, is heterogeneous, being statutory in all the fields in which consumer protection is regulated, hence in the field of payment services as well.

Highlighting, synthesizing and explaining the information obligations that the providers of payment services have in their relationship with the consumer is a requirement for assuring the transparency, accuracy and for raising responsibility in providing payment services. This is required even more as the opening of the payment services market allows the traditional payment service providers such as the credit institutions to join other new bodies to provide such services.

Consequently, indicating the reference points regarding the obligations of the payment service providers in their relation with the consumer, is what the present study intends to achieve, together with the purpose of being the precursors of a Codex in the field, at national level, that would represent a work instrument for both the provider and the consumer, make whole the premises for the transposition of the Directive 2007/6/EC to become effective and efficient.

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(i) Introduction

For the establishment of the EU internal market, the good functioning of the single market in payment services is of capital importance, needing a modern and coherent legal framework for payment services. This framework is constituted by Directive 2007/64/EC¹ of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC.

By means of this legal framework, the provision of payment services is subject to the same rules and conditions within the European Union, thus guaranteeing equal competitive conditions for the payment service providers, and at the same time ensuring the safety, effectiveness and low costs of the payment service transaction.

¹ Published in the Official Journal L 319 , 05/12/2007 p. 0001 - 0036, consolidated version of 7.12.2009, hereinafter called Directive 2007/64/EC;

Directive 2007/64/EC was transposed into national legislation through the Romanian Government Emergency Ordinance 113/2009². The approach applied by Directive 2007/64/EC is that of full harmonization, but the Member states may regulate more favourable provisions for the payment service user.³

GEO 113/2009 regulates a broader domain focusing on three interconnected pillars: (i) instituting a new category of payment service providers which are the payment institution, regulating the conditions of access towards providing payments services on Romanian territory as well as regulating the requirements for prudential supervision of payments institutions; (ii) instituting transparent conditions and requirements for the information of the user by the provider on payment services; (iii) regulating the rights and obligations of the payment users and providers.

The perspective of this study is that of the relationship between the payment service provider who provides the consumer – natural person, with professional payment services and the user of the payment service that uses the service in his capacity of payer, that is to say the holder of a payment account⁴, as well as in his capacity of payee, meaning the expected receiver of the funds that were the object of a payment transaction. Hence, the payment service provider can provide payment service to a payer or to a payee. For the accuracy of the present study we will appoint the consumer with the terms of „user”, „payer” or „payee”, in relation with the concrete situation we are referring to.⁵

We emphasize *ab initio* that one of the benefits⁶ brought by regulating the financial services at EU level are the provisions on the speed of the payment transactions

² Published in the Official Gazette of Romania, Part I, no. 685 of October 12, 2009, amended and adopted through Law no. 197/2010, hereinafter called GEO 113/2009;

³ On Directives and their effect see Craig, P. & deBurca, G. (2009) *Dreptul Uniunii Europene*, Editia a 4-a, Editura Hamangiu, pp.166, 348-355; and see the transposal of Directive 2007/64/EC in Romania in „Conformity Assessment of Directive 2007/64/EC”, final raport, July 2011, Tipik Communication Agency SA, www.tipik.eu accessed on March 30, 2013;

⁴ Where there isn't a payment account, by the person who issues a payment order;

⁵ Considering that consumers need a high level of protection, an increased protection in relation with the enterprises, the Directive 2007/64 contains on the one side imperative dispositions that cannot be waived through the contracts concluded with the consumers, dispositions that can be comprised in the contracts concluded between the payment services providers and the enterprises, and on the other hand dispositions applicable independent of the user's status.

⁶ But obviously not the only one;

performance. Therefore, the payment transaction execution time by the provider, calculating from the moment the payment order is received, shall be, at the latest, the end of the following workday, for all the payment orders initiated by the payer and made in Euro or in the official currency of a Member State that is not part of the Euro zone, term by which the operated sum is credited in the account of the payee's provider.

As early as 2009 we have laid down the new paradigm on the legal regime of the professionals' liability regulated by the laws on consumer protection. It consists of instituting *ex legis* specific obligations and liabilities for professionals, in their relations with consumers, in various fields in which consumer protection is ensured, among which the field of payment services as well.⁷

One of the obligations the payment service provider has in relationship with the user is the obligation to provide information to the latter in different stages, pre-contractual and during the execution of the contract, and this obligation has a different content in each of these stages. The study focuses on the payment service provider's obligation to inform the user before concluding the contract. The premise of the study is the protection ensured for consumers through the mechanism of the informational formalism, as mechanism that ensures legal security and protects the contractual parties found in a weak position.⁸

(ii) Payment service providers

The capacity of payment service provider can be held by: - credit institutions; - institutions which issue electronic money; - payment institutions; - the national central bank when not acting in its capacity as monetary authority. GEO 113/2009 institutes a new category of financial service providers that is the payment institutions, generating the payment market to open up allowing the traditional payment service providers such as the credit institutions to join other new bodies to provide such services.

The GEO 113/2009 also regulates the conditions of access to carrying out payment services provision on Romanian territory, as well as the requirements for

⁷ See Apan, R.D. (2009) The Legal Regime of Trader's Liability, Regulated by the Laws on Consumer Protection - a New Paradigm, *Interdisciplinary Management Research*, vol. 5, pag. 577-584;

⁸ Developed in H. JACQUEMIN, *Le formalisme de protection de la partie faible au rapport contractuel*, in *Annales de Droit de Louvain*, vol. 70, 2010, no 1 ;

prudential supervision of their activity correlated with the operational and financial risks these bodies face during their activity.

The minimal requirements for access to this activity for any entity that intends to provide payment services on Romanian territory are those of obtaining authorisation before beginning to carry out the activity. The authorisation is granted by the National Bank of Romania for Romanian legal persons only if the required information and documents annexed to the application comply with the requirements and regulations in the field. The notification procedure for carrying out activity on Romanian territory by payment institutions from other Member States and the notification procedure for carrying out activity outside Romania by payment institutions that are Romanian legal persons is in compliance with the „European Passport” principle.

(iii) Transactions listed as payment services

The transactions that, in accordance with the provisions of art.8 of the GEO 113/2009 are listed as payment services, and which determine, according to this criterion of the nature of transactions, the scope of the regulation, are the following: - services that allow depositing, withdrawing cash and those for operating the payment account; - performing the following payment transactions when the funds are/are not covered by a credit line open for a payment service user: credit-transfer transactions, including scheduled payment orders transactions, direct debit, including single direct debits, card payments or similar device payments; - issuance and/or acceptance of payment instruments; - money remittance (paying bills); - issuance and/or acceptance of certain payment instruments (e.g. card); - performing payment transactions for which the consent of the payer is given by way of any telecommunicational, digital or informatic means and the payment is executed by the operator of the informatic system or network who acts only as an intermediary between the payment service user and the supplier of the goods or services.

Negative scope in view of the activities that by their nature fall under the payment service notion, as indicated above, without making and exhaustive listing, are the following: - payment transactions made exclusively in cash directly from the payer to the payee, without any intermediary intervention; - money exchange business, where the funds are not held on a payment account; - Payment transactions initiated through paper based payment instruments and card such as cheques, bill of exchange, promissory note, vouchers, traveller's cheques, postal money orders;

- payment transactions carried out within a payment or settlement system with financial instruments or related to financial instrument asset servicing.

(iv) The contractual rapport between the payment service provider and user

The contractual rapport between the payment service provider and user can take the form of a single payment transaction or that of a framework contract, which includes a number of payment transactions. The framework contract is defined by the GEO 113/2009 as being the payment service contract that regulates the future execution of single payment transactions, and it can contain the obligation and the conditions of setting up a payment account.

The payment transaction is an act, initiated by the payer or by the payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and the payee. Consequently, a number of payment transactions are to be operated under the framework contract, hence the high economic importance of the framework contract up against the single payment transactions, which have an occasional character, and will not fall under the incidence of a framework contract.

At national level, the doctrine draws the landmarks of the notion of framework contract for banking services and shows that its object „ consists of determining the types and categories of services attached to the opened account. These services materialize through the receipt of unreimbursable deposits, payment and payment collection, cheque issuance, card issuance, credit granting”⁹

The *de facto* way in which the notion „payment services framework contract” regulated by GEO 113/2009, was materialized by the credit institutions demonstrates that at national level this notion has achieved a *sui generis* architecture.

The findings are based on the recent analysis of the websites of ten credit institutions that provide payment services in Romania, and that posted on their websites the following: - „ the framework contract for banking services” – one case; - „the

⁹ Turcu I., in „ Theoretical and practical treatise on Commercial Law”, vol.IV, C.H.Beck Publishing House, 2009, pp.476-477, points out the three aspects on establishing the relationships between the client and the bank, that together form the „framework contract for banking services”: „The technical registration in the bank’s records of the account that will hold the future transactions, opening the account that allows the settlement of the mutual debts that will arise between the bank and the client through the current account, the same account will be used for the number of services the bank will operate for the client”;

general framework for banking services – general business conditions” – two cases; – „the general conditions of business” – 8 cases.¹⁰

Each of the contracts and conditions indicated above are drawn in a new, updated version, including the regulation made to payment services through GEO 113/2009.

The analysis of the concrete ways in which the providers understood to apply the provisions of GEO 113/2009 denotes the following: – „the framework contract for payment services” has a complex composition, regulating a good number of banking services¹¹. A separate chapter is assigned to bank account operations and the regulation on payment services”; – „the framework contract and general conditions of business” contains only clauses on the provision of services related to payment transactions and account functioning; – „general conditions of business” covers clauses on various categories of banking services as well as on payment services.

In relation to these heterogenous solutions adopted in practice by the payment service providers when applying GEO 113/2009, we intend to analyse whether they are in accordance with the regulation on the providers’ obligation to inform the users, prior to concluding the contract, and we present the regulation below.

(v) The payment service provider’s obligation to inform the user on the payment service framework contract, prior to concluding the contract

The provider’s obligation to inform the user prior to concluding the framework contract¹² is conceived to have as outcome, the user’s possibility to compare the services offered by the payment service providers, their conditions and costs, so as to be fully informed when choosing the payment service provider.

¹⁰ We will continue to use these terms;

¹¹ Saving products, crediting operations, etc.

¹² As we indicated in chapter IV, the contractual relationship between the payment service provider and user can take the form of a single payment transaction or the form of a framework contract, which includes a number of payment transactions, therefore we will exist an information obligation before concluding the contract for a single payment transaction, another before concluding the framework contract and before each payment transaction finalized during the progressive execution of the framework contract. The content of the information obligation covers specific elements for each of these cases. Only the obligation to inform the user prior to concluding the framework contract is studied here.

The holder of the obligation to inform the user¹³ prior to concluding the framework contract is the payer's provider.¹⁴

The obligation to inform prior to concluding the framework contract individualizes and at the same time takes specific elements with regard to the aspects on which the provider will inform the user, provided by art. 99 of the GEO 113/2009.

The importance of the information obligation resides in the influences it can have on the entire basis of the framework contract, as it can be observed from the mandatory elements of its content: the payment service provider's identification data, the identification data of the supervisory authority and those of the public registry of authorisation; the payment service and its characteristics, the maximum execution time for the payment service to be provided; all charges payable; the interest rate and exchange rate to be applied to the payment transaction or whether there are to be used the reference interest rate and the reference exchange rate; the means of communication between the parties; the security requirements, the conditions under which the payment service provider reserves the right to block a payment instrument and how and within what period of time the payment service user is to notify the payment service provider of any unauthorised or incorrectly executed payment transaction; the legal regime of the provider and user's liability; the conditions for changes in and termination of the framework contract, the right of the payment service user to terminate the framework contract, procedures for the settlement of disputes, the out-of-court complaint and redress procedures and the competent authorities available to the payment service user.

The information obligation can be fulfilled by the provider also by remitting the user a copy of the framework contract draft. It is also regulated the user's right to request the provider, prior to concluding the contract, to provide the user with a copy of the framework contract, a right that corresponds with the provider's correlative obligation to provide the user with the requested information. It is mandatory for the provider to remit the user a paper-based or durable means document, by which it fulfills its obligation for prior information on framework contract.

The deadline by which the obligation for prior information on framework contracts shall be met by the payment service provider, respectively the deadline by

¹³ Which in this case can be only the payer;

¹⁴ The obligation of pre-contractual information and the obligation of information during the contract execution are shared by the payer's provider and by the user's provider.

which the information will be made available to the user shall be no later than 15 days before the user becomes the party of a framework contract. The 15 days period can be reduced with the user's explicit agreement.

Regarding the form in which the provider will inform the user prior to concluding the framework contract, art. 97, paragraph 3 of the GEO 113/2009 stipulates the rule of providing the user with the information on paper or other durable means.

Other information requirements stipulated by the legislative act shall be: easily understandable words and in a clear, complete and comprehensible form, the information shall be provided in Romanian or any other language agreed between the parties.¹⁵

The burden of proof regarding the fulfillment of the provider's information obligation is inverted and falls on the payment service provider; the information shall be given free of charge, but the provider and the user can agree on charges for additional information delivered on user's demand.

Supporting the *de facto* way in which the payment service providers materialized the application of the GEO provisions on the notion „payment service framework contract”, with the regulations on the provider's obligation to inform the user prior to concluding the framework contract, we draw the following conclusions:

The first aspect undergoing analysis is related to the legal technique applied by the providers, rhetorically asking ourselves which of the three means employed are in accordance with the regulation, reason and aim of the regulation in the GEO 113/2009: „the banking service framework contract”; „the framework contract and general conditions of business” or „general conditions of business”?

Stricto-sensu, the providers' use of the „banking services framework contract” appears to be the closest to the provisions of GEO 113/2009, but it is obvious that its content is the most relevant¹⁶, mentioning that the inclusion of the parties'

¹⁵ Provisions of art.97, paragraph (1) on the 15 days deadline, and the provisions of paragraph (3) of the same article, on the form in which the provider's prior information will be provided to the user, paper-based or on any other durable means, are applicable also to the case in which the user receives from the provider an offer for a payment transaction that falls under the incidence of the framework contract;

¹⁶ The content of the clauses comprised in the framework contract/general conditions of business, posted on the 8 payment service providers' websites, will be subject of a subsequent research.

rights and obligations in a contract concerning other banking services, is in principle a viable solution.

As we have underlined above GEO 113/2009 does not stipulate the provider's obligation to remit the project of the framework contract to the user. In order to be in accordance with the legal provisions on the provider's obligation to inform the user, where the provider does not remit, because it is not mandatory by law, the project of the framework contract on paper or other durable means, he shall inform about the project of the framework contract, through a distinct notification on paper or on other durable means.

Consequently, when the user expresses the intention of concluding a framework contract, the obligation of prior information will be fulfilled by the provider, in accordance with the legal stipulations, only by remitting the user, on paper or other durable means, either the project of the framework contract or a distinct notification. The notification shall have the content indicated by art. 99 of the GEO 113/2009, but in our opinion it would be most effective for this notification to have a title and a pre-established template.¹⁷

The title as well as the template of the above mentioned notification should be included in a Codex of Good Practice on the relationships between payment service providers and users. The Codex would contribute with the proper remarks in areas where the regulations of the GEO 113/2009 left space for manoeuvre to the payment service providers.

The analyzed payment service providers stipulated in the contract/conditions that they would be permanently available to the user at all territorial units or on their websites or that they would be communicated on demand. We consider that the prior information on framework contracts carried by posting the contract/conditions of business on the provider's site, although is useful is insufficient as sole solution for achieving the aim provided by GEO 113/2009.

Since GEO 113/2009 stipulates that the form in which the prior information on framework contracts is to be carried out is on paper or other durable means, remitting a notification or the project of the framework contract is necessary and mandatory in order to have an effective user information.

¹⁷ We assess that a model to be followed in the relationships between payment services users and providers is that of the information carried in the field of consumer credit through the form „Standard information at European level on consumer credit” comprised in Annex 1 of Directive 2008/48/EC.

If the provider used the „general business conditions” technique in order to apply the GEO 113/2009 stipulations, there is a possibility for the set out of payment service providers’ and users’ rights and obligations to become an *appendix* of another banking service and so they would not be self-defining.

It is well-known that in banking practice the general conditions of business are not communicated individually, but they are communicated simultaneously with concluding a contract on a banking service, and GEO 113/2009 does not provide the provider’s obligation to communicate the general conditions of business to the user.

Having in view the heterogenous character of the solutions adopted in practice by the credit institutions at national level in applying the provisions of the GEO 113/2009, our plea is for the enactment of a Codex of Good Practice in the field, that would also constitute a work instrument for both the payment service providers as well for the users.

In our view, this Codex is even more necessary as the opening of the payment service market allows the traditional payment service providers such as credit institutions, to be joined by other new bodies that provide such services, thus supporting the activities they carry out but also the users.

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