

Case C-287/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date of Receipt:**

5 April 2019

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

25 January 2019

Defendant and appellant in the appeal on a point of law:

DenizBank AG

Applicant and defendant in the appeal on a point of law:

Verein für Konsumenteninformation

Subject matter of the main proceedings

Consumer protection — Transparency monitoring — Effectiveness of clauses which contain tacit consent and by means of which the liability risk for unauthorised payments is shifted to the detriment of the payment service user — Applicability of the derogation pursuant to Article 63(1) of Directive 2015/2366

Subject matter and legal basis of the reference

Interpretation of Directive 2015/2366/EU (Payment Services Directive), Article 267 TFEU

Questions referred

1. Is point (6)(a) of Article 52 in conjunction with Article 54(1) of Directive 2015/2366/EU (Payment Services Directive), pursuant to which the payment service user will be deemed to have accepted proposed changes in the conditions unless the payment service user notifies the payment service

provider before the date of their proposed date of entry into force that they are not accepted, to be interpreted as meaning that tacit consent can also be agreed with the consumer for any conceivable contractual conditions without any restriction?

2.a) Is point (14) of Article 4 of the Payment Services Directive to be interpreted as meaning that the NFC function of a personalised multifunctional bank card by means of which low value payments are debited from the associated customer account constitutes a payment instrument?

2.b) If Question 2.a) is answered in the affirmative:

Is Article 63(1)(b) of the Payment Services Directive regarding the derogations for low value payments and electronic money to be interpreted as meaning that a contactless low value payment using the NFC function of a personalised multifunctional bank card to be regarded as anonymous use of the payment instrument within the meaning of the derogation?

3. Is Article 63(1)(b) of the Payment Services Directive to be interpreted as meaning that a payment service provider can rely on that derogation only if it can be established, according to the objective state of technical knowledge, that the payment instrument does not allow its blocking or prevention of its further use?

Provisions of EU law cited

Directive 2015/2366/EU of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market (Payment Services Directive), point (14) of Article 4 and Articles 52, 54 and 63

Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), Article 20(4)

Provisions of national law cited

Zahlungsdienstegesetz (Law on payment services, 'the ZaDiG'), point (14) of Paragraph 4 and Paragraphs 48, 50 and 57

Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code, 'the ABGB'), Paragraph 879(3)

Konsumentenschutzgesetz (Law on consumer protection, 'the KSchG'), Paragraph 6(3)

Brief summary of the facts and procedure

- 1 The applicant is an association for upholding consumer interests that is entitled to bring an action under Austrian consumer protection law. The defendant engages in banking throughout Austria and uses General Terms and Conditions and standard forms in the course of trade with consumers, for inter alia the use of payment cards provided with the NFC function (Near Field Communication).
- 2 With these payment cards of the defendant, consumers can pay low value sums of up to EUR 25 in a contactless manner without entering their PIN code at points of sale that are technically equipped for such payments. The payment of higher sums requires additional authentication via a code. The NFC function of the bank cards is automatically activated when the customer uses the card for the first time.
- 3 The following clauses in the aforementioned General Terms and Conditions of the defendant are of importance in the preliminary ruling proceedings:

Clause 14:

‘Changes in the customer guidelines: Changes in these customer guidelines shall be proposed to the customer no later than two months before the planned date of their entry into force. The payment service user will be deemed to have accepted these changes and the changes will therefore be deemed as having been agreed unless the customer notifies DenizBank AG before the date of their proposed date of entry into force that they are not accepted. The proposed change referred to above shall be provided to the customer on paper or, provided that he agrees to this, on another durable medium. In its proposed change, DenizBank AG shall inform the customer and make him aware that his silence in the sense referred to above shall be deemed to constitute consent to the change. In addition, DenizBank AG shall publish on its website a comparison of the provisions affected by the change in the customer guidelines and shall also send the comparison to the customer. Vis-à-vis a trader, it is sufficient to make the proposal regarding the change available for retrieval in a manner agreed with the trader. In the case of such an intended change in the customer guidelines, the customer, who is a consumer, has the right to terminate his framework contracts for payment services (in particular the current account agreement) free of charge and without notice before the entry into force of the changes. DenizBank AG shall also inform the customer of this in its proposed change.’

Clause 15:

‘No proof of authorisation: As the purpose of payments of low-value sums without entering a personal code consists in simplified processing of a payment transaction without the need for authorisation, DenizBank AG does not have to prove that the payment transaction was authorised, accurately recorded, entered in the accounts and not affected by a technical breakdown or some other deficiency.’

Clause 16:

‘No liability for unauthorised payments: Since, when the payment card is used to make low value payments without entering a personal code, DenizBank AG is unable to prove that the payment transaction was authorised by the cardholder, DenizBank AG is not obliged, in the event of an unauthorised payment transaction, to refund the sum of the unauthorised payment transaction and to restore the debited account to the state in which it would have been had the unauthorised payment transaction not taken place. Any further claims against DenizBank AG — insofar as they are based on slight negligence on the part of DenizBank AG — are also excluded.’

Clause 17:

‘Warning notice: The risk of misuse of the payment card for low value payments without entering a personal code shall be borne by the account holder.’

Clause 18:

‘Block on low value payments in the case of disappearance of the payment card not possible: It is technically impossible for the payment card for low value payments to be blocked. In the event of disappearance (e.g. loss, theft) of the payment card, it shall continue to be possible for low value payments up to the amount of EUR 75 to be made without entering a personal code even after a block pursuant to point 2.7. These sums shall not be refunded. As low value payments within the meaning of Paragraph 33 ZaDiG (Zahlungsdienstegesetz [Law on payment services]) are involved, only individual payment transactions of up to a maximum of EUR 25 are possible and it is not possible to block the payment card for low value payments without entering a personal code, Paragraph 44(3) ZaDiG is not applicable.’

Clause 19:

‘Unless point 3 expressly contains special provisions for low value payments, the provisions of point 2 (Card services) also apply to such payments.’

- 4 The court of first instance allowed the action in relation to Clauses 14 to 19. It stated that Clause 14 was grossly prejudicial. The requirements for the application of the derogation for low value payment instruments were not met, because the payment card could also be used for other payments. Under no circumstances could the additional function of contactless payment without authentication be regarded as a payment instrument.
- 5 The court dealing with the appeal on the merits (Berufungsgericht) shared this legal view. It stated that if one were to focus solely on the contactless payment function, there was no use of a payment instrument, but rather the transaction should be treated in the same way as MOTO credit card transactions. The fact that, unlike ‘electronic purses’, the NFC payment function for low value sums,

which could be performed without entering a PIN, was automatically activated militated in favour of this. Moreover, the ATM card used for NFC transactions was not anonymous, but rather both personalised and secured by means of a code.

Main submissions of the parties to the main proceedings

- 6 The applicant argued that the clauses were ineffective. Clause 14 could also encompass core services and was grossly prejudicial and non-transparent. The NFC payment function associated with an ATM card was not covered by the derogation for low value payment instruments and electronic money.
- 7 The defendant contended that Clause 14 met the legal requirements. The individual payment functions of the card had to be assessed separately.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 8 In its appeal on a point of law, the defendant argued that Clause 14 met the requirements of the directive and the law on the basis of their literal wording, and therefore did not need to be subjected to further scrutiny with regard to proportionality and transparency. The possibility of also agreeing such tacit consent with consumers was indispensable to legal certainty in practice in the context of mass transactions, because it was not feasible to obtain express declarations of consent from the vast majority of customers. A restriction of this possibility to certain contractual conditions, or the requirement to describe in advance the changes that are possible via tacit consent in such a detailed way that the clauses satisfied the strict requirement of transparency, was excessive and imposed impracticable requirements on the wording of permissible General Terms and Conditions.
- 9 However, the Oberster Gerichtshof (Supreme Court) has previously ruled on several occasions that a tacit consent clause is not automatically permissible simply because it meets the formal requirements, but rather contractual amendment clauses enabled in that manner are, in addition, subject to control within the meaning of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and the national transposition of that directive (Paragraph 879(3) ABGB and Paragraph 6(3) KSchG).
- 10 According to this view, particularly extensive contractual amendments that relate to the bases of the legal relations between the parties cannot come about by way of tacit consent; if a clause allows practically unrestricted amendments in favour of the undertaking and to the detriment of the consumer by way of mere tacit consent, it is to be regarded as grossly prejudicial. Furthermore, the case-law regards a clause as being non-transparent if there is a complete lack of clarity as to not only which services the payment service provider could restrict by way of assumed consent, but also the extent to which the fee paid by the consumer can be changed. However, it could indeed be permissible if the authority to make changes

were to be defined in such a way that, for instance, it encompasses changes made necessary by statutory amendments or administrative or judicial requirements, or changes in favour of the user, or sets out their objective for specific areas.

- 11 This case-law is based on the reasoning that, despite the formal right to object, tacit contractual consent in practice amounts to nothing more than unilateral authority to make changes on the part of the trader, because experience shows that, generally speaking, consumers do not even look into proposed changes.
- 12 Point (6)(a) of Paragraph 48(1) and Paragraph 50(1) ZaDiG 2018 govern, in accordance with the wording of the Payment Services Directive, which information must be provided by the trader and to what he must refer in the event of planned changes *if* an agreement on tacit consent has been entered into. The Oberster Gerichtshof takes the view that this wording requires the existence of such an agreement without actually governing its content. Therefore — unlike providers of telecommunications services pursuant to Article 20(4) of Directive 2002/22/EC (Universal Service Directive) — payment service providers are not permitted directly by the directive to agree a unilateral possibility of amendment for any conceivable general terms and conditions by way of tacit consent.
- 13 By means of unrestricted tacit consent agreed on a single occasion, it would be possible at any time to place customers into contractual models that are unfavourable for them without any restriction and thus rely on their tendency not to look into extensive contractual texts, their lack of understanding of the effects or the fact that they feel that they are left with no alternative but to accept the changes because termination appears to be the only other possibility.
- 14 The Oberster Gerichtshof believes that this view is confirmed by recital 63 of the Payment Services Directive, which reads as follows: ‘In order to ensure a high level of consumer protection, Member States should, in the interests of the consumer, be able to maintain or introduce restrictions or prohibitions on unilateral changes in the conditions of a framework contract, for instance if there is no justified reason for such a change’.
- 15 Pursuant to Article 63(1)(b) of the Payment Services Directive, in the case of payment instruments which, according to the framework contract, solely concern individual payment transactions not exceeding EUR 30 or which either have a spending limit of EUR 150, or store funds which do not exceed EUR 150 at any time, payment service providers may agree with their payment service users that Articles 72 and 73, and Article 74(1) and (3), do not apply if the payment instrument is used **anonymously** or the payment service provider is **not in a position** for other reasons which are intrinsic to the payment instrument to **prove** that a payment transaction was **authorised**.
- 16 In the main proceedings, the preliminary question arises as to whether the NFC payment function of a personalised card is a payment instrument within the

meaning of point (14) of Article 4 of the Payment Services Directive in the first place. The Oberster Gerichtshof answers this in the affirmative.

- 17 Moreover, clarification is required as to when a payment instrument is used anonymously.
- 18 According to the wording of Article 63(1)(b) of the Payment Services Directive, it can be assumed that ‘anonymous’ use and ‘other reasons which are intrinsic to the payment instrument’ have in common the fact that the payment service provider is not in a position to prove that a payment transaction was unauthorised.
- 19 It is not unambiguously clear whether, within the meaning of the directive, such proof cannot actually be provided in the case of the use of a personalised bank card without a PIN. In this connection, it is questionable how the possession of the card indicates authority to make transactions.
- 20 In the main proceedings, the contractual clauses at issue also contain derogations based on Article 63(1)(a) of the Payment Services Directive. In this respect, it is questionable whether it is technically possible to block bank cards for low value payments or whether it is even a case of technical possibility. In other words, clarification is required as to whether payment service providers are authorised not to exhaust the technical possibilities and thus shift the liability risk for unauthorised payments onto the user of the payment services.

WORKING DOCUMENT