Single euro payments area – have payers' rights been sacrificed for efficiency?

Contributed by **Graf & Pitkowitz**

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Introduction

Pursuant to the European Commission's website,(1) in addition to providing the legal platform for the Single European Payment Area (SEPA), the EU Payment Services Directive(2) seeks to make cross-border payments as easy, efficient and secure as national payments within member states.

The Payment Services Act(3) transposed the directive into Austrian law in November 2009. In accordance with the single migration deadline under the SEPA Regulation,(4) the international bank account number (IBAN) only rule became obligatory for national transactions in Austria as of February 1 2014.(5) Following the European Commission's suggestion, the transition period for the implementation of IBANs and bank identifier codes (BICs) was extended by six months, until August 1 2014. Austrian banks continued to process and accept euro payment transfers and debit orders using national account numbers and bank sort codes during the extended transition period.

A recent Supreme Court case(6) considered whether a recipient's bank was liable for damages arising from its execution of a payment order using an incorrect account number and bank sort code as unique identifiers, which caused the payment to be sent to an unknown third party, rather than the recipient named in the payment order.

Facts

The payment order was placed in July 2010. Although the Payment Services Act was already in force, payment orders could still be made in the old format (ie, using an account number and bank sort code, rather than an IBAN) during the transition period.

The plaintiff used his bank's electronic banking system to place a payment order. He provided the recipient's name (as required in the electronic form), an incorrect – but nonetheless existing – bank account number and the bank sort code of the recipient's bank. The defendant (the recipient's bank) would not disclose the name of the bank account holder that received the funds due to secrecy obligations.

The plaintiff sued the recipient's bank for damages totalling two-thirds of the amount paid, thereby acknowledging liability for one-third of the amount due to contributory negligence. The plaintiff argued that the damages had occurred because the defendant had failed to perform a consistency check. Further, the plaintiff argued that by requiring the recipient's name in the electronic form, the recipient's name became a unique identifier, because the plaintiff reasonably assumed that the payer's bank would not request this information without cause.

Previous Supreme Court decisions

Before the Payment Services Act came into effect, the Supreme Court regularly held that in interbank transfer scenarios (ie, in situations where no direct legal relationship between the payer and the recipient's bank exists), the relationship between the payer's bank and the recipient's bank qualified as a contract with protective character in favour of a third party (ie, the payer). Based on this qualification, the recipient's bank was liable for pure financial losses occurring in the course of a transfer. Accordingly, the recipient's bank had to perform consistency checks – that is, the bank had to verify whether the recipient's name as stated in the payment order matched the account holder's name. Following well-established case law, the Supreme Court regularly held that a failure to perform consistency checks constitutes negligence and that a recipient's bank would be liable for damages arising from the transfer.

In a 2002 decision,(7) the Supreme Court declared provisions in a bank's general terms and conditions void and held that the increase in efficiency caused by stopping consistency checks did not outweigh the risks imposed on the payer, as a slight error in the account number could lead to the payment order being sent to an incorrect or even insolvent recipient.

In a 2011 decision,(8) the Supreme Court again declared provisions in a bank's general terms and conditions stating that the account number and the bank sort code were sole unique identifiers to be void, in accordance with Section 864(a) of the Civil Code. However, the Supreme Court has clarified that this well-established case law will no longer apply under the Payment Services Act.

Decision

The Supreme Court held that European payment service providers had decided that only IBANs and BICs qualify as unique identifiers, even though the Payment Services Directive states that the recipient's name is a valid identifier.(9)

In its well-argued decision, the Supreme Court addressed different scenarios based on three agreements regarding unique identifiers:

- If the parties agree on an IBAN-only transaction, a consistency check must be performed solely on the basis of the two check digits.
- If the parties agree that the account number will serve as the only unique identifier, the payer's bank may be held liable,(10) due to its inability to perform a consistency check, as it lacks the recipient's account number.
- Until August 1 2014, if the parties agreed that the account number and recipient's name would serve as unique identifiers, the payer's bank had to perform a consistency check. However, this consistency check was not possible, as the payer's bank lacked the necessary information regarding the recipient's account.

If a payer includes the recipient's name as additional information – without agreeing that it will serve as a unique identifier – the payer's bank need not perform a consistency check.

Based on the plaintiff's pleas (eg, the plaintiff did not argue that he had agreed to use the recipient's name as a unique identifier; nor did he plead that there was a contract in favour of a third party. In addition, he made no plea regarding the bank's refusal to disclose the recipient's name due to its secrecy obligations), the Supreme Court held that the request to provide the recipient's name when placing a payment order did not imply that there was an agreement to use the recipient's name as a unique identifier.

Accordingly, the Supreme Court held that the recipient's name qualified as additional information, in accordance with Article 74(3) of the directive. Thus, neither the payer's bank nor the recipient's bank had to include the recipient's name in the consistency check.

The Supreme Court concluded that the payer bears the risk of a wrongful payment transaction due to an incorrect unique identifier and is limited to taking actions against the recipient on the grounds of unjust enrichment. In addition, the Supreme Court briefly stated that the plaintiff did not question the recipient bank's right and obligation to deny disclosure of the recipient's name.

Comment

Banking secrecy

In its decision, the Supreme Court briefly addressed a German publication by Dorothee Einsele(11) regarding claims based on unjust enrichment of wrongful payment transfers, which confirms the position of the recipient's bank. Under Austrian law, secrecy obligations prevail over a payer's legal interest in disclosure of a recipient's name.

Is there a problem in practice?

In at least one case, a recipient denied repayment of funds which it wrongfully received during a transaction. Despite the two check digits, there is a 1% chance that an IBAN is incorrect and refers to an existing account.

Banks argue that this risk is extremely low and, in practice, recipients typically approve the re-transfer of wrongfully received funds. However, even if the recipient is willing to return the funds it has received, a re-transfer may be hindered due to insolvency (ie, the recipient's lack of liquidity).

If a recipient denies a re-transfer, the payer must file criminal charges in order to bypass the secrecy obligations which prevent banks from disclosing details about a recipient. While this is a reasonable (but costly and time-consuming) way to proceed with respect to Austrian payment transfers, it imposes unacceptable obligations on payers in cross-border transfer scenarios.

While the reduction of transfer costs within the SEPA is undoubtedly beneficial to payers and recipients, banks often charge material costs for cross-border inquiry orders. Further, payers' banks tend to charge their own costs alongside those charged by the recipient's bank for inquiry orders.

From a legal standpoint, the applicable laws create additional obstacles – for example, information rights and secrecy obligations are governed by the laws of the country of residence of the recipient's bank.(12) Further, repayment claims against a recipient are subject to the laws of its country of residence.(13) The same applies to criminal charges.

With regard to recovering payments due to a wrongful transfer, the position of payers has been weakened by the Payment Services Directive(14) and thus the Payment Services Act. This was true in the case at hand, considering the fact that the European payment service providers – rather than a legislative body – rejected the recipient's name as an identifier. To achieve the European Commission's goal (ie, to make cross-border payments as easy, efficient and secure as national payments within member states), the directive and the Payment Services Act must be amended in order to re-establish the level of protection available to payers that was offered before the directive came into force. However, this would reduce the efficiency achieved by limiting this level of protection.

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Endnotes

(1) www.ec.europa.eu/finance/payments/framework/index_en.htm.

(2) EU Directive 2007/64/EC of the European Parliament and EU Council on payment services in internal markets, amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ L 319, 5.12.2007, p 1), November 13 2007.

(3) B*undesgesetz über die Erbringung von Zahlungsdiensten* (*Zahlungsdienstegesetz* – ZaDiG), BGBl. I Nr 66/2009, as amended.

(4) EU Regulation 260/2012 of the European Parliament and EU Council establishing technical and business requirements for credit transfers and direct debits in euro and amending EU Regulation 924/2009 (OJ L 94, March 30 2012, p 22), March 14 2012.

(5) Unlike Austria, some EU member states extended the deadline for implementing the IBAN-only rule for national transactions until February 10 2016, in line with the SEPA Regulation.

(6) OGH, October 23 2014, 2 Ob 224/13z.

(7) 4 Ob 179/02f.

(8) 1 Ob 244/11f.

(9) *Haghofer* in *Weilinger*, ZaDiG [2012] § 35 Rz 36. This decision has been heavily criticised, as it impairs customer protection interests.

(10) When implementing the Payment Services Directive, the Austrian legislature – in accordance with Recital 48 of the directive – imposed the obligation to perform consistency checks solely on the payment service provider of the payer.

(11) *Die bereicherungsrechtliche Rückabwicklung von Zahlungen wegen falscher Kontoangabe* by Dorothee Einsele in FS Dieter Reuter [2010] 53, 67f.

(12) Article 4(1)(b) of EU Regulation 593/2008/EC of the European Parliament and EU Council on the law applicable to contractual obligations (Rome I), June 17 2008.

(13) Article 10(4) of EU Regulation 864/2007/EC of the European Parliament and EU Council on the law applicable to non-contractual obligations (Rome II), July 11 2007.

(14) Interestingly, these aspects are not addressed in the brochure entitled "The Payment Services Directive - what it means for consumers" , which is available at www.ec.europa.eu/finance/payments/docs/framework/psd_consumers/psd_en.pdf.