

# The debit and credit card framework contract and its influence on European legislative initiatives

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### *Abstract*

*This paper explores the significance of the “contractual mechanism” behind electronic payment transactions and its influence on European legislation. Its main purpose is to investigate how European directives see the electronic payment operation and take in account its characteristics.*

*Card payments are divided into two distinct contractual episodes: the debit or credit card contract and the consecutive mandates given by the cardholder to his bank to pay the suppliers and to debit his account. This division seems not to be taken into account by European legislator in 2008, on Directive 2008/48/EC on credit agreements for consumers, as it was not taken in account before, in 1987. The same can be said of Directive 97/7/EC on the protection of consumers in respect of distance contracts. In contrast, Directive 2007/64/EC on payment services in the internal market (PSD) seems to be a turning point in redefining the contractual structure behind payment transaction. This directive differentiates between single payment transactions not covered by a framework contract and individual payment transactions covered by such a contract. PSD distinguishes, namely for information purposes, the framework contract and the subsequent payment orders given by the user to the payment service provider.*

*El presente artículo se ocupa del análisis del complejo contractual que sostiene una operación de pago mediante tarjeta y de su impacto en el derecho comunitario. Se pretende, en concreto, averiguar cómo las Directivas Europeas entienden el conjunto de operaciones que están por detrás del pago electrónico y como las enmarcan en términos contractuales.*

*En particular, se analiza la Directiva 2008/48/CE, en materia de crédito al consumo, el dispuesto en la Directiva 97/7/CE sobre el pago mediante tarjeta en la contratación a distancia y, finalmente, la Directiva 2007/64/CE sobre los servicios de pago en el mercado interno. Este último texto ha introducido el concepto de “contrato marco” de servicios de pago y lo ha tratado en separado de las concretas operaciones de pago ordenadas pelo usuario. El clarear de la distinción entre contrato marco de servicios de pago y las órdenes de pago dadas en su ejecución es patente en lo que a los deberes de información impuestos a el proveedor del servicio de pago dice respecto. Lo que se pretende averiguar es, sin embargo, se la misma distinción se mantiene al largo del texto comunitario, como en el plan de las operaciones no autorizadas y de sus respectivas consecuencias.*

*Titulo:* El contrato marco de tarjeta de débito e de crédito y su importancia en las iniciativas legislativas europeas

*Keywords:* plastic card, electronic payment, framework contract, consumer credit, distance contracts, payment services

*Palabras clave:* tarjeta de débito, tarjeta de crédito, contrato marco, crédito al consumo, contratos a distancia, servicios de pago

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## 1. Introduction

According to the most recent data collected by the Portuguese central bank (*Banco de Portugal*), more than 10 million debit cards and almost 8.5 million credit cards were in use in Portugal (pop. 10 million) in the year 2010<sup>1</sup>. During that same year, 1.6 billion transactions, amounting to over 86.5 billion euros, were made with these cards in Portugal and abroad<sup>2</sup>.

These numbers, magnified by extension in the EU and around the world, reveal the significance of electronic payment, making it a subject worthy of academic attention. The focus of this paper will be to expose flaws in European legislation that result from a deficient understanding of the contractual structure that is the basis of electronic payment.

## 2. The contractual structure behind a card payment

Both the card agreement, signed between a cardholder and his bank, and the merchant agreement, signed between a supplier and his bank, play a major role in defining the parameters of credit and debit card use. The fact that these master contracts plan in advance, globally, future transactions between the parties warrants simpler and faster “application contracts” between them, which provokes the standardisation of these contracts. The parties’ conduct, rights, and duties in future contracts, including every fee, price or cost generated by electronic payment, are agreed upon in advance with the signing of the first contract<sup>3</sup>.

The existence of a single debit or credit card contract is not enough, however, to make an electronic payment. Each time the cardholder asks his bank to pay a certain amount of money on his behalf to a third party, a specific authorisation of the transaction by the bank is necessary to complete the transaction. In other words, an electronic payment demands *two* distinct *moments* in which the parties exchange a matching offer and acceptance. When the initial framework or master contract is made, the payment beneficiaries and the amounts to be paid by the bank are still unknown. Only when the “application contracts” (i.e., sales of goods, contracts for services) are made with third parties (the suppliers) and the cardholder gives an order (or a mandate) to pay to the issuer is the electronic payment executed.

A contractual mechanism that allows the parties to fragment the same economic transaction in two separate agreements is crucial in cashless and long distance payment systems. The first agreement is carefully and exhaustively planned, even if only by one of the parties, unilaterally,

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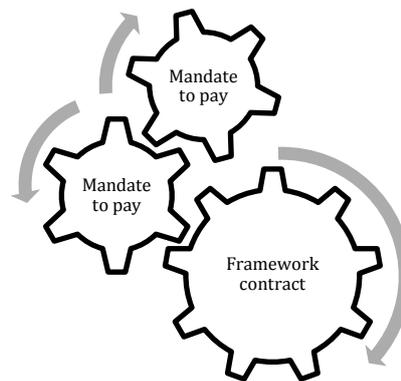
<sup>1</sup> The numbers are exactly 10.391.148 debit cards and 8.484.935 credit cards: see BANCO DE PORTUGAL (2011), p. 54, Graphic 23.

<sup>2</sup> *Idem*, p. 56, Graphic 25.

<sup>3</sup> For a deeper analysis of this master card agreement, see GUIMARÃES (2011), pp. 173-342.

in advance and thinking on a large group of potential costumers, using standard clauses. A second agreement is formed through several automatic gestures with the help of an ATM or POS terminal. Additionally, the technique of formulating a skeleton contract allows for the consummation of subsequent “second degree” or “application” contracts, virtually *ad aeternum*, without further negotiations.

This type of contractual scheme that is the foundation of a card payment is known as a *framework* or *master contract*<sup>4</sup>.



To recognise the card agreement as a master or framework contract implies that this agreement is considered as a legally binding agreement and not merely as a preliminary or preparatory agreement reached during the negotiation process. Also the orders given to the bank by the cardholder are taken as contracts, as mandates to pay, even if made in a *sui generis* way, through the exchange of electronic messages in computer terminals, and not purely as the performance of a previous contract.

The card agreement is an *internal* or *bilateral* framework contract<sup>5</sup> in that it prepares the contracts to be made by the exactly same parties in the future (the mandates for the payment of certain sums given by the cardholder to the issuer). However, it is also an *external* or *unilateral* framework contract because it anticipates the future transactions between the cardholder and the suppliers from whom he purchases goods or acquires services. The same is true for the merchant agreements. The contracts between the cardholder and the dealers are “application contracts”, contracts that develop the initial framework contract, as are the mandates given by the

<sup>4</sup> See, in the UK, GOODE (1995), pp. 79-80 (note 37) and STEPHENSON (1993), pp. 24-25; in Germany, LARENZ and WOLF (2004), p. 428, §113, KIENHOLZ (2000), pp. 28-29 and SCHWINTOWSKI and SCHÄFER (2004), p. 423; in Italy, SPINELLI and GENTILE (1991), pp. 395, 397-398; in Spain, BATUECAS CALETRO (2005), p. 233 (note 108) – despite defending the thesis of the “normative contract” – and RIVERO ALEMÁN (2002), pp. 537, 546; in Portugal, GUIMARÃES (2011), pp. 541-572. Not too far away from this conception, defending the card contract as a “normative contract”, see, in Spain, BATUECAS CALETRO (2005), p. 186 *et seq.*, GETE-ALONSO Y CALERA (1997), pp. 157-158, CHULIÁ VICENT and BELTRÁN ALANDETE (1999), p. 141, NÚÑEZ LOZANO (1997), p. 98 *et seq.* and VICENT CHULIÁ (1990), p. 813.

<sup>5</sup> See GUIMARÃES (2011), pp. 570-572. The distinction between *internal* and *external* master contracts is inspired on the same distinction made traditionally by Italian and German doctrine concerning *normative* contracts. For further developments on *internal/external* normative contracts, see, for all, GUGLIELMETTI (1969), pp. 48-51, and MESSINEO (1962), p. 122; see also GUIMARÃES (2011), p. 73 *et seq.*

cardholder to the issuer.

### 3. *The card framework contract and the law*

The electronic payment operation's legal fragmentation into two different episodes, the debit or credit card contract and the consecutive mandates given by the cardholder to his bank to debit his account, was not considered by European legislators in April 2008 when drafting Directive 2008/48/EC of the Parliament and of the Council on credit agreements for consumers<sup>6</sup>, as was the case in 1987<sup>7</sup>. The same can be said about consumer protection legislation for distance contracts in Directive 97/7/EC of the European Parliament and of the Council of 20.5.1997, art. 8 (*Payment by card*)<sup>8</sup>.

In contrast, Directive 2007/64/CE of the European Parliament and of the Council of 13.11.2007 on payment services in the internal market<sup>9</sup> (PSD) seems to be a turning point in legislating payment transactions and the contractual structure behind them, admitting that

“In practice, framework contracts and the payment transactions covered by them are far more common and economically important than single payment transactions. If there is a payment account or a specific payment instrument, a framework contract is required (...)” [“Whereas” (24), p. 4].

It is debatable, however, if the subsequent solutions that Directive 2007/64/CE has introduced comply with this recognition of the contractual complexity of payment transactions. These arguments will be developed in the analysis below.

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<sup>6</sup> OJ L 133, 22.5.2008, p. 66.

<sup>7</sup> See Council Directive 87/102/EEC of 22.12.1986 (OJ L 42, 12.2.1987, p. 48), amended by Council Directive 90/88/EEC of 22.2.1990 (OJ L 61, 10.3.1990, p. 14), and Directive 98/7/EG of the European Parliament and of the Council, 16.2.1998 (OJ L 101, 1.4.1998, p. 17), for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit. Directive 87/102/EEC was repealed by Directive 2008/48/EC with effect from 12 May 2010 (art. 29).

<sup>8</sup> OJ L 144, 4.6.1997, p. 19. Directive 97/7/EC was amended in 2007 by Directive 2007/64/CE (see the next note) that has deleted art. 8 (art. 89) and was very recently repealed (as of 13 June 2014) by Directive 2011/83/UE of the European Parliament and of the Council, 25.10.2011 (OJ L 304, 22.11.2011, p. 64), on consumer rights (art. 31).

<sup>9</sup> OJ L 319, 5.12.2007, p. 1.

### 3.1. The credit card framework contract and consumer credit law

The application of consumer credit law to credit card transactions poses several problems created both by Directive 2008/48/EC and Directive 87/102/EEC<sup>10</sup>. The inclusion of credit card transactions in the credit agreements covered by both Directives is, nevertheless, commonly accepted<sup>11</sup>. Both texts adopt a very large definition of a credit agreement.

Portuguese Decree-Law n. 133/2009 defines credit agreement on art. 4<sup>o</sup>/1 c), as “an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan, use of a credit card or other similar financial accommodation”. Credit card agreements are, therefore, expressly mentioned as credit agreements in the context of Portuguese consumer credit law. Spanish Law 16/2011 adopts also a large definition of consumer credit agreement on art. 1.1, similar to the one included on the Directive, not mentioning, however, credit card agreements.

Several credit agreements are, nevertheless, excluded in these laws based on the nature of the consumer, the amount of credit (“less than 200 euros or more than 75,000 euros”), the absence of interests or other charges, or the time period given for repayment (“within three months”)<sup>12</sup>. These criteria are difficult to apply to credit card agreements, leading to an impossible conclusion about the inclusion of a specific credit card contract in consumer credit provisions.

When a credit card contract is made between a cardholder and the issuer, there are often multiple options given for repayment: the holder can choose to repay the credit in a single payment or to make two or more payments during a specified period of time<sup>13</sup>. Additionally, the majority of credit card agreements establish a credit limit that is greater than 200 euros and less than 75,000 euros, which the cardholder can continuously use (or not) several times during the lifetime of the contract. Furthermore, credit cards are often used in multiple single transactions involving amounts of less than 200 euros. However, at the moment when a credit card (master) agreement

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<sup>10</sup> In Portugal, these Directives were transposed to national law by Decree-Law n. 133/2009, 2.06, and by Decree-Law n. 359/91, 21.09, respectively. In Spain, transposition was taken care by Law 16/2011, 24.06, and by Law 7/1995, 23.03, respectively.

<sup>11</sup> On the other hand, Directive 2008/48/EC expressly excludes its application to “deferred debit cards, under the terms of which the credit has to be repaid within three months and only insignificant charges are payable” [“Whereas” (13)].

<sup>12</sup> Art. 2(2), points (c), (f), Directive 2008/48/EC. For similar exclusions, see art. 2(1), points (c), (d), (f) and (g), Directive 87/102/EEC. In Spain, see Law 16/2011, 24.06, art. 3, c), f), j), and art. 4.5. In Portugal, see Decree-Law n. 133/2009, 2.06, art. 2<sup>o</sup>/1, c), f), g).

<sup>13</sup> This particularity of credit card payments is also pointed out by CASTILLA CUBILLAS (2010), p. 88 (n. 24).

is made, it is impossible to determine if the transactions will reach the credit range delineated by the directives. Finally, if the contract is not written down or some important information is missing while the cardholder has yet to use his card, is the contract valid? How do we know if the cardholder is a consumer if he has not yet used the card (either for business or personal use<sup>14</sup>)? How can compliance with European legislation or national laws be judged in the moment the contract is signed? In that particular moment, the amounts that will be paid with the card and the repayment options selected by the cardholder are not yet known. Even the ultimate decision of using the card has not been made.

The necessity to legislate the parameters of credit card contracts prior to effective card transactions was not taken in account by the European legislator nor by national legislators when transposing the directive on consumer credit agreements. A corrective interpretation of the law must be made to comply with consumer credit directives. For a credit card agreement to be included in consumer credit provisions it should be enough that the credit card agreement allows for payment to be postponed for more than three months with fixed interest or other charges and for the cardholder to utilise the card for personal use. The consumer's credit limit must stay between the values fixed by law despite the repayment options chosen by the cardholder at the end of each month and the exact value of each card transaction<sup>15</sup>.

The consumer credit directives and the subsequent national laws have been constructed on the basis of a credit agreement that results in a single deal.

The consumer credit legislators did not take into account the conclusion of a master long-term agreement that contains the complete program of credit card transactions—except for the when, how much, and to whom the payment should be made. And they did not take into account the legal fragmentation of the transactions into different contracts of consecutive single mandates to pay. This is true despite Directive 2008/48/EC admitting the existence of a “linked credit agreement”, understood as an agreement that “serves exclusively to finance on agreement for the supply of specific goods or the provision of a specific service”. This condition is not met by credit cards as they serve to finance a large group of undefined transactions to be made with unknown suppliers<sup>16</sup>. One credit agreement per contract for the supply of goods or services is the type of *linked operation* the legal text intends to address. This same concept was expressed implicitly in Directive 87/102/EEC by demanding different conditions for the linked contracts, i.e., the *exclusivity* of the grantor of credit when making credit available to customers of a certain supplier<sup>17</sup>. This demand, however, is only met by the mandate given by the cardholder to the issuer to pay this supplier. However, this *second* agreement, the mandate to pay, is not the credit

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<sup>14</sup> See art. 3, point (a).

<sup>15</sup> See GUIMARÃES (2011), pp. 239-249.

<sup>16</sup> See art. 3, point (n) (i), (ii).

<sup>17</sup> See art. 11(2), point (a) to (e), Directive 87/102/EEC.

agreement defined by the Directive in art. 3<sup>18</sup>.

Extensive doctrine has taken position over the years about the inclusion of credit card payments on the linked transactions mentioned on art. 11 of Directive 87/102/EEC and on internal national laws. The condition that the grantor of the credit and the supplier of the goods or services have a *pre-existing agreement* whereunder credit is made available *exclusively* by the former to the supplier's clients hardly can be verified on a credit card transaction as it has been pointed out by most authors<sup>19</sup>. The consumer, in credit card transactions, obtains his credit pursuant to the master contract made with his bank and not to a pre-existing agreement between the supplier and the bank. On the other hand, only in very particular cases a certain bank makes credit available exclusively to customers of a supplier.

The credit card transaction and the subsequent mandate to pay not only implies a pre-existing agreement between the cardholder and its issuer but is also one of a larger group (more or less vast, depending on the holder's consuming habits) of consecutive transactions, identically performed but with different amounts and with different suppliers. In other words, the credit card agreement is a framework contract that has not been taken into account by the consumer credit Directives.

### 3.2. The credit card framework contract and distance contracts

The payment by card in distance contracts was addressed specifically admitted by art. 8 of Directive 97/7/EC<sup>20</sup>. According to this provision:

“Member States shall ensure that appropriate measures exist to allow a consumer: to request cancellation of a payment where fraudulent use has been made of his payment card in connection with distance contracts covered by this Directive, in the event of fraudulent use, to be recredited with the sums paid or have them returned”.

Despite the validity of the possibility to request the cancelation of a fraudulent payment granted by the 1997 Directive, this request could not be made by the cardholder. According to art. 8, this right was given to *the consumer*, defined as a “natural person who, in contracts covered by this

<sup>18</sup> See GUIMARÃES (2011), pp. 457-491.

<sup>19</sup> In Spain, see CASTILLA CUBILLAS (2010), pp. 81, 89-91, DOMÍNGUEZ LUELMO (2007), pp. 129-130, FERNÁNDEZ LÓPEZ (1998), p. 256, GETE-ALONSO Y CALERA (1997), pp. 108-110, GÓMEZ MENDOZA (1993), pp. 791, 793, (1994), pp. 1182-1183, 1187-1188 and NÚÑEZ LOZANO (1997), p. 324; in Portugal, see GUIMARÃES (2011), pp. 463-482; in Germany, see MARTINEK (1993), p. 80, ULMER/HABERSACK (1995), pp. 737-738. Differently, admitting the inclusion of credit card transactions on Portuguese art. 12, Decree-Law n. 359/91, 21.09 (correspondent to art. 11 of 87's Directive), see MORAIS (2004), pp. 437-441, and VASCONCELOS (1993), pp. 129-131, 167-169.

<sup>20</sup> In Portugal, Decree-Law n. 143/2001, 26.4, has transposed Directive 97/7/EC to national law. Art. 10<sup>o</sup> regulated payment by card in distance contracts. In Spain, see art. 106, [Real Decreto Legislativo 1/2007, de 16 de noviembre, Texto Regundido de la Ley General de Defensa de Consumidores y Usuarios](#) (BOE núm. 287, 30.11.2007; TRLGDCU), that replaced former art. 46, [Law 7/1996, de 15 de enero, de Ordenación del Comercio Minorista](#) (BOE núm. 15, 17.1.1996; LOCM).

Directive, is acting for purposes which are outside his trade, business or profession”<sup>21</sup>. The cardholder, however, may possibly be someone who *never acted* (with or without professional purposes) in distance contracts. Nevertheless, he is undoubtedly the person who needs protection from fraudulent card transactions. The *consumer* in fraudulent card transactions, as defined by the directive, is the person who has committed the fraud. And he is a third-party to the card master agreement.

Also art. 10º of Portuguese Decree-Law n. 143/2001 recognized *the consumer*, not the cardholder, as having the right to cancel the fraudulent payment made with the card in distance contracts. Wisely, Spanish legislators conferred the same right to *the cardholder* in Law 7/1996 (LOCM), art. 46. Nevertheless, art. 106 of Spanish Real Decreto Legislativo 1/2007 (TRLGDCU), that replaced former art. 46 LOCM, took a step backwards by declaring that “the consumer and card holder” had the right to cancel the debit<sup>22</sup>.

Once again, European legislation has failed to recognise the difference between the master card agreement and the single transaction during which the card was used. The party that concluded the first contract, the cardholder, is not, in these fraudulent transactions, the same person that acted in the distance contract. Giving the right to request the cancellation of a fraudulent payment to the person that acted fraudulently in the distance contract is the result of a misunderstanding of the card’s contractual complexity.

However, this provision on “payment by card” included in the 1997 distance contracts directive, as was already mentioned, was replaced in 2007 by Directive 2007/64/EC on payment services, and so have national provisions on the same matter been replaced by the respective payment services laws.

### 3.3. The credit card framework contract and Directive 2007/64/EC on payment services

Directive 2007/64/EC on payment services in the internal market<sup>23</sup> has introduced the “framework contract” concept into payment services. Consequently, the “framework contract” concept was also introduced in national laws on payment services.

Accordingly to the payment services directive:

“‘framework contract’ means a payment service contract which governs the future execution of individual and successive payment transactions and which may contain the obligation and conditions for setting up a payment account” [art. 4(12).]

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<sup>21</sup> See art. 2(2), Directive 97/7/EC.

<sup>22</sup> GUIMARÃES (2007), pp. 191-193.

<sup>23</sup> In Portugal, Directive 2007/64/EC was transposed to national law by Decree-Law n. 317/2009, 30.10, and, in Spain, by [Law 16/2009, de 13 de noviembre, de Servicios de Pago](#) (BOE núm. 275, 14.11.2009; LSP).

The European legislator has adopted the expression “framework contract” in the English version of the Directive. This is a direct translation of the German “Rahmenvertrag” and the French “contrat-cadre” and is known in Portugal and Spain as “contrato-quadro” and “contrato marco”, respectively. These terms are used extensively in the legal texts and doctrine of European countries but with less frequency in Anglo-American legal literature, where expressions like master contract or master agreement are more commonly used<sup>24</sup>.

This directive has also defined, in detail, the rules

“(…) concerning transparency of conditions and information requirements for payment services, and the respective rights and obligations of payment service users and payment service providers in relation to the provision of payment services as a regular occupation or business activity” [art. 1(2)].

Debit and credit card payments are “payment instruments”<sup>25</sup> and are therefore included in the directive provisions. This directive has adopted previous solutions to debit and credit card payments already tested by former commission recommendations in 1987, 1988 and 1997. At the same time, it has significantly increased cardholder protection and established a single, uniform, and more complete and certain legal framework.

- The principles of transparency and gratuity of the information provided by the payment service provider (art. 30 to art. 32) are expressly set out and is also established that Member States may stipulate that the burden of proof of the compliance with the information requirements shall lie with the payment service provider (art. 33).
- Any changes in the framework contract must be proposed by the provider no later than *two months* before their application [art. 44(1)], *two times* the period specified by Commission Recommendation 97/489/EC concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder<sup>26</sup>.
- The payment instrument user shall use it in accordance with the terms settled in the framework contract and shall “take all reasonable steps to keep its personalised security features safe”. Consequently, he must “notify the payment service provider, or the entity specified by the latter, without undue delay on becoming aware of loss, theft or misappropriation of the payment instrument or of its unauthorised use” (art. 56).
- The payment service provider has to make sure that “the personalised security features of the payment instrument are not accessible to parties other than the payment service user entitled to use the payment instrument”, and he must “refrain from sending an unsolicited payment instrument”.

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<sup>24</sup> See TREITEL (2003), p. 192; GOODE (1995), pp. 79-80; ELLINGER *et al.* (2006), pp. 585-587. More imaginative expressions like “umbrella agreement” or “skeleton contract” have also some tradition in England: see MOUZAS (2006), p. 279, and GRAUPNER (1969), p. 884.

<sup>25</sup> See art. 4(23).

<sup>26</sup> OJ L 208, 2.08.1997, p. 52, art. 7(1).

It is also said that the payment service provider is the one who bears “the risk of sending a payment instrument to the payer or of sending any personalised security features of it”. Finally, he must prevent all use of the payment instrument once notification of loss, theft or misappropriation of the payment instrument or of its unauthorised use has been made by the user (art. 57).

- PSD also establishes the *irrevocability* of a payment order once it has been received by the payer's payment service provider (art. 66), which means that the payer cannot “change his opinion” on the agreement made with a third party by revoking the payment order, namely on the basis of the counterparty noncompliance – except in the cases the law gives him the right to withdraw from the agreement<sup>27</sup>.

Concerning the contractual complex that supports a payment transaction, Directive 2007/64/EC has clearly specified the information that must be provided to a payment service user before and after ordering a single payment transaction not covered by a framework contract (art. 35 to art. 38) both before a *framework payment contract* is concluded (art. 40 to art. 43) and after a *individual payment transaction covered by the framework contract* is ordered (art. 47). The information demanded of the payment service provider before a framework contract is concluded is much more detailed than when a single operation (not covered by a framework contract) is involved.

Significantly, derogations from information requirements for low-value payment instruments are established by the directive. The European legislator has identified “*low-value payment instruments*” according to the framework contract as payment instruments that include only individual payment transactions that do not exceed 30 euros or that have a spending limit of 150 euros<sup>28</sup>. This text is clearly a step forward from the derogations from consumer credit's Directive [art. 2(2), Directive 2008/48/EC]. The reference to the framework contract that identifies excluded operations *before* they are actually made, avoids the problems of interpretation that arise from consumer credit directives.

However, Directive 2007/64/CE establishes the necessity of the payer's consent to execute a payment transaction<sup>29</sup>. In other words, the first (general) consent, given on the framework contract, is not enough to authorise a payment transaction. A single consent given by the payer is required to execute each payment operation. The payer must express his consent not only to the master contract made with his bank but also to every single payment order given to the bank.

The payment service provider, in turn, “shall not refuse to execute an authorised payment order...in cases where all the conditions set out in the payer's framework contract are met”<sup>30</sup>.

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<sup>27</sup> See art. 14, Directive 2008/48/EC on credit agreements for consumers.

<sup>28</sup> Or store funds that do not exceed 150 euros at any time: art. 34(1), Directive 2007/64/EC.

<sup>29</sup> *Idem*, art. 54(1)(2).

<sup>30</sup> *Idem*, art. 65(2).

Consequently, whenever he refuses to execute a payment order, “the refusal and, if possible, the reasons for it and the procedure for correcting any factual mistakes that led to the refusal shall be notified to the payment service user”<sup>31</sup>. Despite the obligation to perform the orders given by his client that emerge from this disposition, the 2007 directive establishes the possibility to refuse to execute a payment order in cases where the conditions set out in the framework contract *are not all met*. In other words, every time the payment service provider receives a payment order given by the service user he must verify the compliance of all the conditions set out in the framework contract, even electronically, before deciding to execute that order. The fact that he is urged to agree again with every payment ordered by his client is an indication that the payments are considered several different contracts linked by a first preparatory master contract.

Nevertheless, PSD has not taken the step forward to identify single payment orders given by a payment service user as independent contracts rather than compliance acts of a previous contract. It is also true, however, that such an analysis largely exceeds the mission assigned to the legislator.

However, it should be within the European legislator’s authority to distinguish the master agreement and the subsequent mandates when an unauthorised payment order is given by a third party. The confusion regarding the two operations did not allow for the legislator to maintain the necessary separation already traced in the matter of information requirements:

According to art. 60(1) on payment service provider's liability in the case of an unauthorised payment transaction, “the payer's payment service provider refunds to the payer immediately the amount of the unauthorised payment transaction”. However, as has previously occurred with the “consumer” in Directive 97/7/EC, in the PSD the “payer” is

“(…) a natural or legal person who holds a payment account and allows a payment order from that payment account (…)” [art. 4(7)].

As stated above, a person cannot allow a payment order and, at the same time, be the “victim” of an unauthorised payment ordered fraudulently by an unknown person. The PSD has again confused the parties in the framework contract with the parties on the mandate to pay when a payment order is given by an unauthorised person. Obviously, it is the counterparty of the payment service provider in the framework contract that must be immediately refunded the amount of the unauthorised payment. Is the person named in art. 59 the “payment service user [who] denies having authorised an executed payment transaction”, erroneously referred to as “the payer” on art. 60.

The same confusion has affected national laws on payment systems. In Spain, art. 31 of Law 16/2009 (LSP) and, in Portugal, art. 71º/1 of Decree-Law n. 317/2009, both refer to *the person who has given the payment order* (“ordenante”) as the one entitled to a refund in case of an unauthorised

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<sup>31</sup> *Idem*, art. 65(1).

payment.

The same critique can be made on art. 61 of PSD (“Payer's liability for unauthorised payment transactions”) regarding the use of a lost or stolen payment instrument or, if the payer has failed to keep the personalised security features safe, the misappropriation of a payment instrument:

“(…) *the payer* shall bear the losses relating to any unauthorised payment transactions, up to a maximum of 150 euros, resulting from the use of a lost or stolen payment instrument or, if *the payer* has failed to keep the personalised security features safe, from the misappropriation of a payment instrument” [art. 61(1)].

“*The payer* shall bear all the losses relating to any unauthorised payment transactions if *he* incurred them by acting fraudulently or by failing to fulfil one or more of his obligations under Article 56 with intent or gross negligence” [art. 61(2)].

“*The payer* shall not bear any financial consequences resulting from use of the lost, stolen or misappropriated payment instrument after notification in accordance with Article 56(1)(b), except where he has acted fraudulently” [art. 61(4)].

Again, national laws inspired by the PSD have inherited the same error, as can be demonstrated by art. 32 of Spanish LSP and by art. 72º of Portuguese Decree-Law n. 317/2009.

The problem here is the question of who bears the losses relating to unauthorised orders made by a third person that has found or stolen a payment instrument, namely a payment card, or has anyhow used a misappropriated a payment instrument. Should the payment system user or the payment system provider bear those losses? In these cases, the PSD has distributed the losses between the parties in the payment framework contract, taking into account the moment the notification of the loss, theft or misappropriation of the payment instrument takes place as well as the degree of negligence of the user. Clearly, the legislator didn't want to name on art. 61 the unknown person who ordered a payment from someone else's account using a misappropriated instrument, the person who was a party, with the bank, on the mandate to pay<sup>32</sup>, as he effectively has performed, but the “purported payer” instead<sup>33</sup>.

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<sup>32</sup> Authors like STEENNOT (2008) had no doubts when interpreting these PSD provisions in the sense that the European legislator has distributed liability for unauthorized operations between the *user* and the provider of the payment services (see 2.2.). Nevertheless in any occasion the author makes a reference to the PSD text and to the *payer* there mentioned, as it is defined on art. 4(7). Also LÓPEZ JIMÉNEZ (2011), p. 576, commenting on art. 31 of Spanish LSP, uses, apparently indistinctly, the terms *payer* (*ordenante*) – adopted by the LSP –, *user* (*usuario*) and *user-payer* (*usuario ordenante*), leaving no doubts that's the user of the payment service who is entitled to the immediate refund but without making any critical remark to the law's text. The same acritical mentions to the payer happen with the author comments on art. 32 LSP (pp. 598-602).

<sup>33</sup> Curiously, the reference to the “purported payer” is made by a Canadian author, GEVA (2008-2009), p. 728 (note 87), when making a comparative analysis between the PSD and the U.S. legislation on payment transactions. GEVA points out, wisely, that “the reference in Article 61(1) to the “payer” should have been to the “purported

In summary, in 2007, the European legislator adopted the previous solution that was in place ten years previously on Directive 97/7/EC and, in doing so, did not distinguish the different contractual levels involved in electronic payment transactions. The same fate was dictated to national laws in different European countries.

Despite having separated the framework contract from the subsequent payment orders, the 2007 directive has not clarified that it is the payment service user who is entitled to an immediate refund of an unauthorised payment. However, this is the only possible interpretation of the law. The service provider does not comply with the framework contract when he executes an unauthorised payment order. At the same time, the payment service user must bear the losses relating to these fraudulent orders by failing to fulfil his obligations set out in the framework contract.

#### 4. Final remarks

The importance of the “contractual embroidery” of payment card transactions is not merely academic; its complete comprehension is essential for effective legal solutions. In fact, the lack of understanding of this contractual duality has led to several problematic clauses found in the European directives and in national laws that require corrective interpretations.

The existence of a second agreement between the consumer and issuer, in addition to the master contract, is revealed in the renewal of their declarations with each payment transaction. The master long-term card agreement contains the mandate for single payment but lacks the details concerning when, how much, and to whom the payment should be made. This master or framework contract, to use PSD language, is not itself a simple mandate to pay. This first contract is a much more complex mechanism known in German literature as a *Geschäftsbesorgungsvertrag*<sup>34</sup>. This contract fulfils several different interests of the parties, including the possibility for a “last resource” credit facility for credit card users, even if the holder never really uses it.

The desire to order a cashless electronic transaction, eventually associated with a deferred payment facility, is only verified through the performance of a single card operation and not before. As far as the master contract is concerned, the subsequent card transactions are merely eventual. However, the promise to pay accepted by the card issuer upon signing the master contract is revaluated every time a payment is solicited. While these mandates to pay are unique in that they are exchanged electronically, it should not change the essence of the agreement.

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payer” because he did not “allow... a payment order from [the] payment account” nor gave a payment order, which is required to meet the definition for a “payer” under Directive Article 4(7)”.

<sup>34</sup> See, among others, CANARIS (1981), p. 835, KIENHOLZ (2000), p. 109 *et seq.*, MARTINEK (1993), pp. 66, 136, and SCHWINTOWSKI/SCHÄFER (2004), pp. 425, 434 *et seq.*

Another peculiarity of the mandates to pay behind each credit card transactions is that they are part of a larger group of consecutive transactions, performed identically but involving different monetary values and different suppliers/beneficiaries. The master card contract is ideal for large group of single deals. The anticipation of a complex contractual program and the simplification of the subsequent card operations are very appealing to the users and encourage future payments.

The legal fragmentation of a single economic card payment operation is a “magic formula” that helps to explain the impressive expansion of electronic payments operations in the last decades. Its complete understanding by the legislator and the interpreter is a crucial factor for the effectiveness of European protective measures on the electronic payments market.

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