

Memorandum on the time limit for
objections under section 63 of the
Danish Payment Services Act

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The Danish Consumer Ombudsman

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Memorandum prepared by the Danish Consumer Ombudsman

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Memorandum on the time limit for objections under section 63 of the Danish Payment Services Act

The Danish Consumer Ombudsman and the relevant interest groups have reached an agreement as to when the time limit for objections against unlawful withdrawals from accounts should be counted from. This increases the protection of consumers who have had money unlawfully withdrawn from their account.

1. INTRODUCTION

This memorandum, which applies to consumer affairs only, was prepared following discussions between the Consumer Ombudsman, the Danish Consumer Council, the Danish Bankers Association and Finance and Leasing, the Association of Danish Finance Houses about the detailed content and the scope of section 63 of the Payment Services Act, which regulates the payer's time limit for objections against unauthorised or incorrectly executed payment transactions.

The memorandum is aimed at determining when the deadline for objections under section 63 of the Payment Services Act expires and whether – and if so, when – failure to act may be said to apply.

In that connection, the underlying article 58 of the Payment Services Directive will be discussed in paragraph 2 below, while the implementation of the Directive in section 63 of the Payment Services Act and the legislative material to the provision will be discussed in paragraph 3 below, including issues relating to the commencement of the time limit for objections and the interpretation of the term “actual knowledge” and the time indication “as soon as possible”. Finally, section 4 discusses the issue of whether failure to act may result in the forfeiting of rights. The memorandum reflects the Consumer Ombudsman's interpretation of the rules.

In the memorandum, the consumer will generally be termed the “payer”, the card issuer/the bank will be termed the “provider”, as this is the terminology used in the Payment Services Act and the Directive.

2. ARTICLE 58 OF THE PAYMENT SERVICES DIRECTIVE

It is the intention of section 63(i) of the Payment Services Act (in the following referred to as PSA) to implement article 58(ii) of the Payment Services Directive (in the following referred to as the Directive).

Article 58 of the Directive reads:

“The payment service user shall obtain rectification from the payment service provider only if he notifies his payment service provider without undue delay on becoming aware of any unauthor-

ised or incorrectly executed payment transactions giving rise to a claim, including that under Article 75, and no later than 13 months after the debit date, unless, where applicable, the payment service provider has failed to provide or make available the information on that payment transaction in accordance with Title III.” [Our emphasis]

The Directive thus lays down regulations governing the consumer’s ability to obtain rectification of unauthorised or incorrectly executed payment transactions, including an absolute time limit for objections of 13 months.

3. SECTION 63 OF PSA

Section 63 of PSA regulates the time limit for objections against unauthorised or incorrect payment transactions. See PSA, section 61 (on unauthorised payment transactions), section 62 (on unauthorised use of payment instruments) and section 68 (on non-execution or defective execution of payment transactions).

Section 63 of the Payment Services Act reads:

“Objections against unauthorised or incorrect payment transactions shall be received by the provider as soon as possible and no later than 13 months after debiting the payment transaction in question. For objections from the payee, the time limit shall be 13 months after the date of crediting. If the provider has not notified information or made information available pursuant to part 5, the time limit shall be calculated from the date on which the provider notified the information or made it available.” [Our emphasis]

It appears from the special explanatory notes to the provision (iii) that:

*“...
Under section 63 of the bill, any objections should be submitted to the provider as soon as possible after the payer becoming aware of an unauthorised or incorrect transaction having been made.”
...
Section 63 of the bill implements article 58 of the Directive.
...”*

It is thus the intention with the provision to implement the time limit pursuant to article 58 of the Directive.

3.1. Commencement of time limit for objections

As regards the commencement of the time limit for objections, the wording of section 63 of PSA deviates from the wording of the Directive, which may give rise to doubt as to how the provision is to be understood.

According to the Directive, the payment service user must notify the payment service provider *without undue delay on becoming aware of any unauthorised or incorrectly executed payment transactions and no later than 13 months after the debit date.*

The underlined part of the text is not reflected in the wording of section 63 of PSA, which simply states that the objection shall be received by the provider as soon as possible and no later than 13 months after debiting.

However, the explanatory notes to the bill state, as quoted above, that objections should be submitted to the provider *as soon as possible after the payer becoming aware of an unauthorised or incorrect transaction having been made*.

Accordingly, the legislators' intention with the provision in section 63 of PSA was to implement the directive correctly, and the wording of the section should thus be construed in light of the legislative material and the wording of the Directive.

Consequently, the Consumer Ombudsman takes the view – in accordance with the recent decisions of the Danish Financial Institutions' Complaints Board (see the Complaints Board's case no. 307/2012) – that the time limit according to section 63 of PSA commences from the time when the payer becomes aware, i.e. has *actual knowledge* of the unauthorised or incorrect transaction.

By comparison, section 74 of PSA, which concerns payment transactions in connection with agreements on purchases of goods or services through distance sales, expressly states that objections shall be submitted as soon as possible after the payer becomes aware of, or *should have become aware of*, the fact that the debit is unlawful. Such "presumed knowledge" is not reflected in section 63.

3.2. Cardholder's actual knowledge

In relation to the term actual knowledge, it is reasonable to ask *what is required* for it to be applied that the user has actual knowledge of an unauthorised or incorrect transaction.

Is it sufficient for the provider, by sending out an account statement, to have given the user the means to become aware of the transaction? Or must the user have specific knowledge of it? And may the user remain deliberately ignorant without the time limit commencing?

According to section 59(1)(ii) of PSA, the payer shall use the payment instrument in accordance with the terms governing the *issue and use of the payment instrument*.

Further, the *card terms* typically require the user to review and check account statements from the bank on receipt, typically monthly. See section 53(2) of PSA.

This raises the question whether there is a statutory requirement for the user to check account statements received.

The Consumer Ombudsman takes the clear view that this is not the case. According to the wording of section 59(1)(ii) of PSA, this section relates solely to the issue and use of the payment instrument and not the *subsequent* action of checking a statement of account. Moreover, it follows from section 5 of PSA that section 63 may not be derogated from by agreement to the detriment of the payment services user, including, for example, under the bank's card conditions.

According to the decisions of the Danish Financial Institutions' Complaints Board, it will thus not generally be sufficient to establish actual knowledge that the payer has received account statements or payment overviews from which the unauthorised or incorrect payment transaction can be seen, if the payer has not specifically discovered the transaction (see, for example, the Complaints Board's case no. 307/2012).

This should not, however, be confused with a situation where the payer remains *deliberately ignorant*. This is assumed to be the case if the provider has specifically informed the payer of a suspicious payment transaction, for example by blocking the payer's card or by specifically notifying the payer of the suspicious unauthorised payment transaction, and it must be as-

sumed that such notice has come to the attention of the payer without the payer subsequently having looked into the matter.

If it is found, based on an individual assessment, that the payer has remained deliberately ignorant, the Consumer Ombudsman takes the view that deliberate ignorance in relation to the time limit for objections is to be equated with actual knowledge of the unauthorised or incorrect transaction. In relation to this, see paragraph 3.3 below on the time indication *as soon as possible*.

Based on the above, whether actual knowledge can be said to exist is subject to an individual assessment of the specific circumstances, but it will normally be the case if the payer has become specifically aware of an unauthorised or incorrect transaction.

It is in everyone's interest that unauthorised transactions be discovered and stopped as soon as possible in order to prevent further misuse. The Consumer Ombudsman therefore recommends the industry to find practical solutions to ensure that the payer gains specific awareness of incorrect or unauthorised transactions, but is aware that such practical solutions available to the industry.

3.3. As soon as possible

When the payer has become aware that an incorrect or unauthorised transaction has taken place, he or she must notify the provider *as soon as possible*.

This raises the question of what the time indication *as soon as possible* may be understood to mean. Neither the Directive nor PSA, including the explanatory notes, explain this further, however.

Generally, this means that determining at what time objection has been made as soon as possible after an unauthorised or incorrect transaction has been identified is subject to a specific assessment of each individual case. This also follows from the decisions of the Danish Financial Institutions' Complaints Board.

Linguistically, the time indication *as soon as possible* would seem to denote a longer time limit than, for example, *immediately* or the like.

In relation to the time limit for objections in section 63 of PTA, the Consumer Ombudsman takes the view that objections made until two weeks after the unauthorised or incorrect transaction having been identified will in any event meet the criterion of *as soon as possible*.

4. FAILURE TO ACT RESULTING IN FORFEITING OF RIGHTS

It follows from the legislative material to section 63 of PSA (iv), that the general rules on failure to act apply *pari passu* with the absolute time limit for objections of 13 months.

The special explanatory notes to section 63 of the Payment Services Act provide as follows:

"Whereas the provision specifies a time limit for objections of no more than 13 months, payment service users may forfeit this right before such time as a result of failure to act."

Failure to act (or *failure to act resulting in the forfeiting of rights*) on a non-statutory basis is understood to mean that a right is forfeited before expiry of a statutory or contractual limitation period or time limit for objections.

It is then reasonable to raise the question of *when* the provider can invoke failure to act on the part of the payer.

Section 63 of PSA should be interpreted consistently with the Directive. Accordingly, the Consumer Ombudsman takes the view – in accordance with the latest decisions of the Danish Financial Institutions’ Complaints Board (see the Complaints Board’s case no. 307/2012) – that, in relation to section 63 of PSA, failure to act can be established only after the payer having identified the unauthorised or incorrect transaction (actual knowledge).

In other words, a payer generally cannot forfeit the right to object as a result of failure to act because he or she ought to have identified the unauthorised transaction sooner, for example when receiving statements of account or payment overviews (presumed knowledge).

Moreover, to invoke failure to act is in any event subject to the user having created a legitimate expectation for the provider that the claim will not be asserted. Elapsed time is not generally sufficient grounds for establishing failure to act.

In case no. 396/2010, the Danish Financial Institutions’ Complaints Board describes the principle of failure to act in that the complainant had not given the bank reason to believe that she would not raise an objection to the transaction in question or that she had otherwise forfeited her right to object due to failure to act.

Similarly, according to literature, the party having the right has given the party having the obligation cause to believe that the right has been forfeited. (v)

In relation to section 63 of PSA, the Consumer Ombudsman takes the view that, as a general rule, the payer can only forfeit the right to object if the payer has not reacted as soon as possible after gaining *actual knowledge*.