



## **Groningen, Ghent, Uppsala, Turku & Göttingen Annual Legal Research Network Conference 2009**

2009, hosted by Ghent University

### **Allocation of liability in case of fraudulent use of an electronic payment instrument: the Directive on payment services in the internal market**

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#### **Abstract**

Every year the electronic payment instrument, such as the credit card, of thousands of consumers is used fraudulently. For instance, if one looks only at payment cards, there are 10 million fraudulent transactions in the SEPA area per year, representing roughly €1 Billion losses. In most cases it is not possible to identify the person who has committed the fraud. In such situation the question arises whether the issuer of the instrument or the consumer should be held liable for the unauthorized transactions. The aim of this paper is to address the liability of the holder and the issuer of an electronic payment instrument, as incorporated in the European Directive on payment services in the internal market.

The importance of the liability regime incorporated in the Directive should not be underestimated. It is indeed the first time that the European legislator enacted binding rules concerning the allocation of liability in case of fraudulent use of an electronic payment instrument. Before the Directive, there was only a non-binding Recommendation which has not been very successful in Europe. Only Belgium formally transmitted the Recommendation into legislation. Denmark already had similar rules before the Recommendation was enacted. By the end of 2009, the situation will have changed dramatically, since all Member States will have to incorporate the same rules on liability into their national legislation. Since the Directive is based upon the principle of maximum harmonization, the Member States are not allowed to incorporate more stringent provisions, offering a higher level of protection to the holder of an electronic payment instrument, into their national legislation.

First I will examine which kind of protection the new European Directive offers to the holder of an electronic payment instrument. Further, I will discuss the liability regime incorporated in the United States Truth in Lending Act and the United States Electronic Funds Transfer Act. I will investigate whether the regime which is incorporated in the Directive is the most appropriate to deal with problems of fraudulent use of electronic payment instruments and finally propose an alternative solution, taking into account the United States legislation and the criticism that has been formulated by European scholars in the past

regarding the European Recommendation, that contained provisions similar to the ones laid down in the new Directive.

Financial Law – Payment transactions - Liability