

The Financial Ombudsman

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The hereby submitted article deals with the Financial Arbiter (Ombudsman) and the payment systems regulation in the Czech Republic. The article focuses mainly on the proceeding before the Czech Financial Arbiter. However, the author also deals with the Financial Ombudsmen in Europe, especially those who are the members of FIN-NET (the Cross-Border Out-of-Court Complaints Network for Financial Services).

The legal regulation this work describes covers up (between others) the Payment Systems Act and the Act on the Financial Arbiter, both effective from 1 January 2003. These acts were adopted by the Czech Parliament under the harmonization of the Czech law with the European Community law standards, e.g. with the European Community Directive No. 97/5/EC, on cross-boarder transfers, which requires the possibility for consumers to settle disputes in an efficient and appropriate manner with transfer institutions through out-of-court procedures.

Keywords: *Financial Arbiter (Ombudsman), Cross-Border Out-of-Court Complaints Network for Financial Services, Payment Systems Act and the Act on the Financial Arbiter, cross-boarder transfers.*

Pagridninės sąvokos: *finansinis ombudsmenas (arbitras), mokėjimo sistema, tarptautiniai apmokėjimai bei pavedimai.*

1. Introduction

The principal legal regulation stipulating in the field of the payment system in the Czech Republic is the Act No. 124/2002 Coll., concerning transfers of funds, electronic payment instruments and payment systems (*the Payment System Act*). This act was adopted by the Czech Parliament as a reaction to the increasing importance of the non-cash payment operation and to the process of passing the European law standards¹. In this sense there has to be outlined e.g. the European Community **Directive No. 97/5/EC**, on cross-boarder transfers, which requires the possibility for consumers to settle disputes in an efficient and appropriate manner with transfer institutions through out-of-court procedures.

For further explanation the most convenient clue for determination of the payment system regulation shall be the § 1 of the Payment System Act. According to this provision this act regulates:

- Transfers of funds in the Czech currency within the territory of the Czech Republic and cross-border transfers;
- The issuing and use of electric payment instruments;
- The payment systems:
 - the establishment and operation of payment systems in any currency and the rights and obligations of the participants in such systems and
 - certain obligations of the participants in the payment systems operated under the laws of the member states of the European Union and of the other states constituting the European Economic Area.

Pursuant to the Payment System Act, the missing comprehensive legal regulation of this area had been nearly completed in the Czech Republic. However, there was still a need to complement it by a particular legislation, including the Act on the Financial Arbiter. The institute of the Financial Arbiter represents the aim this article is focused on.

2. The Czech Financial Arbiter in General

“It has to be stressed that the Financial Arbi-

¹ For more details see Mrkývka P. Právní regulace platebního styku v České republice se vstupem do Evropské unie / collective of authors: Výsledky aproximace českého práva ve srovnání se standardy EU před vstupem do EU. Sborník výzkumných prací. Ostrava, Vysoká škola báňská – technická univerzita Ostrava, 2003, page 132 and following.

ter is a natural person. Neither an authority nor a state institution was established, but rather the “institution” of the Financial Arbiter, which is closest to a public official, although the Act does not explicitly stipulate that.” That is a part of the Introductory Word by the Czech Financial Arbiter in his Annual Report 2003².

The right of damages in system of payment follows the Czech Commercial Code if the payment is effected through the bank transfer. In other cases it follows either the Commercial Code or the Civil Code. Before the establishment of the **Czech Financial Arbiter** there was no other legal possibility for discontented clients except of taking a legal action against the institution (bank).

Now there exists a new alternative way of settling disputes by a person that is empowered to make binding decisions about complaints of the clients of banks and other institutions executing transfers of funds and issuers of electronic payment instruments³. This option was given to the clients as the result of their consumer protection against the financial service providers.

The Financial Arbiter⁴ and his **Deputy**⁵ are elected in a public vote by the Chamber of Deputies of the Parliament of the Czech Republic for 5-year term of office from the candidates, who are fully competent to perform legal acts, are of good reputation and have sufficient qualifications and experience. The right to propose the candidates to the Speaker of the Chamber of deputies was given only to:

- the institutions⁶;
- their professional associations and
- professional consumer protection associations.

The Arbiter shall perform his duties independently and impartially. He is answerable for the performance of his duties to the Chamber of Deputies. The Act on the Financial Arbiter

expressis verbis defines the list of the positions and activities which are incompatible with the performance of the position of Arbiter and Deputy Arbiter.

The material support and information technologies including premises for the performance of the Arbiter’s work provides the Czech National Bank⁷. CNB provides this administrative support for the Arbiter’s activities to a reasonable extent at its own expense⁸.

3. The Financial Ombudsmen in Europe

Though the institution of the Financial Arbiter was established in the Czech Republic only few years ago, in other countries similar institutions are well-known. The Cross-border Out-of-Court Complaints Network for Financial Services (FIN-NET) brings together Financial Ombudsmen from different countries⁹. The Czech Financial Arbiter has entered into negotiation with the FIN-NET about its possible accession to the network.

In the following table are listed some European Financial Ombudsmen and their basic characteristics¹⁰.

The FIN-NET has been designed particularly to facilitate the out-of-court resolution of disputes between consumers and banks, insurance companies and building and loan associations.

Objectives of the FIN-NET complaints network are:

- firstly, to help consumers resolve disputes out of court in a rapid and efficient way, mainly by providing information about disputable cross-boarder cases,
- secondly, to ensure an efficient exchange of information among European national financial dispute settlement bodies and
- lastly, to ensure minimal common standard for out-of-court resolution of consumer disputes

² See: www.finarb.cz.

³ For more details see Mrkývka P. Menové právo / Mrkývka P. a kol.: Finanční právo a finanční správa. Díl I. Masarykova univerzita Brno, 2004, page 202 and following.

⁴ The first Czech Financial Arbiter JUDr. Ing. Otakar Schlossberger was elected on 10 December 2002. His term of office started on 1 January 2003 (it is the same date when the Act on the Financial Arbiter became effective).

⁵ The Deputy Arbiter, JUDr. Petr Scholz was elected on 4 March, 2003. His term of office started on 5 March, 2003.

⁶ For the purpose of the Act on the Financial Arbiter the “institution” shall mean the transfer institution and the issuer of electronic payment instruments.

⁷ Hereinafter referred to as “CNB”.

⁸ The overall costs of the performance of the work of the Arbiter’s office stood at CZK 6.199 mil. in the year 2003 and at CZK 8.1 mil. in the year 2004. The income side comprises only income from imposed penalties, which were imposed and paid in the amount of CZK 0.5 mil. in 2003 and 0.57 in 2004. For more details see the Annual Reports 2003, 2004. See www.finarbitr.cz

⁹ There are also some other countries with the out-of court ombudsmen who are not members of the FIN-NET, e.g. Australia, Canada or USA.

¹⁰ For the list of all members of FIN-NET including the contacts see: <http://www.finarbitr.cz/index.php?rubrika=6>.

Financial Ombudsmen of various European countries

Financial Ombudsmen FIN-NET			
Country	Authority	Binding effect of ombudsmen decision	
		for the client	for the institution
Belgium	Ombudsdienst voor de financiële sector	No	No
Finland	Consument Complaint Board	No	No
France	Médiateur de l'ASF ¹¹	No	No
Germany	Der Ombudsmann der öffentlichen Banken ¹²	No	Yes
Great Britain	Financial Ombudsman Service	No	Yes
Greece	Hellenic Banking Ombudsman	No	No
Ireland	The Ombudsman for the Credit Institutions	No	Yes
Italy	Ombudsman Bancario	No	Yes
Norway	The Norwegian Banking Complaints Board	No	No
Portugal	Consumer Disputes Arbitration Centre	Yes	Yes
Spain	Servicio de Reclamaciones Banco de España	No	No
Sweden	Konsument Europa Allmänna reklamationsnämnden	No	No

in the European Economic Area.

To improve out-of-court settlement of cross-border disputes members of FIN-NET have agreed on the recommendation in which seven main principles have been set: independence, transparency, (suitable) course of action, efficiency of the proceedings, legal moderation, freedom of action and the possibility of legal representation. The basic idea behind the FIN-NET is that in a case of financial dispute between the consumer and the foreign financial service provider, the consumer can contact the out-of-court complaints body in his own country of residence. This body will give him all the necessary and appropriate information about the FIN-NET complaints network and about the competent scheme and the Financial Arbiter in the country of the financial service provider.

4. Proceedings before the Financial Arbiter in the Czech Republic

The financial arbiter is according to the amended provision¹³ § 1 of the Act on the Financial Arbiter competent **to settle disputes** be-

tween persons who:

- execute transfers of funds¹⁴ and their clients, arising during the execution of:
 - transfers of funds pursuant to the Payment System Act;
 - corrective settlement pursuant to a special legal rule governing the business of banks;
 - direct debits within the territory of the Czech Republic;
 - provided that the disputed amount does not exceed EURO 50,000 as of the date of filing of the petition;
- issue electronic payment instruments and holders of these instruments, arising during the issuance and use of them.

The competence of the Financial Arbiter (as it was described above) is optional. It means that the Arbiter is empowered to settle such a dispute insofar as the competence has otherwise been given to a court of law¹⁵.

The disputes which refer Act on the Financial Arbiter can be settled not only by the Arbiter himself, but in many cases also by the Deputy Arbiter. The Deputy Arbiter shall also deputize

¹¹ Ombudsman of the French Association of Finance Companies

¹² Der Ombudsmann der öffentlichen Banken, Der Ombudsmann der privaten Banken, Cooperative Banks Ombudsman.

¹³ The Act on the Financial Arbiter was amended by the Act No. 558/2004 Coll., for more details see e.g. Schlossberger, O.: Novela zákona o finančním arbitrovi přináší rozšíření jeho kompetencí. Bankovníctví, 12/2004. P. 26.

¹⁴ Hereinafter referred to as "transfer institutions".

¹⁵ See: Act No. 99/1963 Coll., Code of Civil Procedure or Act No. 97/1963 Coll., on International Private and Procedural Law, as amended.

for the Arbiter if he absents to the full extent of his powers and responsibilities.

The proceedings are opened upon the petition of the plaintiff. The plaintiff may be the client of the institution or the holder of the electronic payment instrument. From the Act on the Financial Arbiter results the protection of the consumer as the interest protected by the Act herein. Therefore the institution may not be in that position.

The plaintiff may contact the Financial Arbiter through the Proposition on opening of proceedings. The petition may be submitted in writing in the form of letter or in the form issued by the Financial Arbiter¹⁶ and it can be sent by post, by e-mail or by fax¹⁷. The plaintiff has to challenge the other party to take corrective measures before the proposition is filed. The document proving that the institution was unsuccessfully called upon to make remedies is one of the formal elements of the proposition.

The other obligatory elements the petition has to contain are¹⁸:

- the identity of the parties to the proceedings;
- a complete and clear representation of the significant facts;
- the evidence or its specification¹⁹;
- a specification of what the plaintiff is seeking;
- a declaration that the plaintiff has not in the same matter filed an action with a court of law or a court of arbitration or with the Arbiter, nor has he entered into any out-of-court settlement agreement with the institution, and that he is aware of binding effect of the award (see below);
- the date and the plaintiff's signature.

If the plaintiff is a legal entity the petition shall contain also the declaration made by the person who has signed the petition that he is authorized to act on behalf of the plaintiff. If

the plaintiff is being represented under power of attorney there is a letter of attorney needed too²⁰.

Should the petition contain shortcomings, the Financial Arbiter shall notify the plaintiff of the defects and how to eliminate them. In this case the Arbiter calls upon the plaintiff to eliminate the defects within a set time limit. If the plaintiff has not provided the necessary cooperation despite being requested by the Arbiter to do so the Arbiter shall discontinue the proceedings²¹.

The petition shall be inadmissible if²²:

- the dispute does not fall within the competence of the Financial Arbiter;
- the dispute is or has been the subject of proceedings before the Financial Arbiter;
- a court of law has adjudicated on the merits of the case or if a judicial proceedings on the merits of the case have been opened;
- the dispute is or has been the subject of arbitration proceedings.

The examples of disputes beyond the authority of the Financial Arbiter come from the field of the incompetence rather than matter adjudged (*res iudicata*). Unfortunately nearly 40% of the petitions submitted in the first year after the effectiveness of the Act on the Financial Arbiter must have been rejected for those reasons²³.

After the petition has been submitted the Financial Arbiter shall call upon the institution to comment upon it within 15 days. In justified cases the time limit may be extended (repeatedly) by further 15 days. Thanks to amendment of the Act on the Financial Arbiter proceedings before the Arbiter became even more efficient and speedy since the time limit for the institution to make a statement had been reduced from 30 to 15 days²⁴. Before the amendment became effective the proceedings were slower than expected because of the bank's insufficient cooperation. It caused the breach of one of the main

¹⁶ See <http://www.finarbitr.cz/index.php?rubrika=3&podrubrika=6>.

¹⁷ The plaintiff is entitled to have the proceedings held in the language in which his agreement with the institution is written or in which he usually communicates in writing with the institution.

¹⁸ See: § 10 of the Act on the Financial Arbiter.

¹⁹ The Arbiter is not bound by the petition and actively acquires evidence. However, he is entitled to solicit from the parties to the proceedings the submission of all evidence in support of their allegations.

²⁰ It was surprising that the majority of the petitions submitted by the attorneys at law in 2003 have legal defects. Moreover, in some cases the petition concerned disputes beyond the authority of the Financial Arbiter. See Schlossberger O. *Neznalost zákona neomlouvá!* Bankovníctví – Newsletter No. 30. 2004.

²¹ Other reasons for discontinuance of the proceedings are filing a petition against the institution with a court of law in the matter in question and withdrawing the plaintiff's petition.

²² See: § 9 of the Act on the Financial Arbiter.

²³ See: Patáková O. *K čemu je nám finanční arbitř.* Finanční noviny, 2004.

²⁴ See: e.g. Schlossberger O. *Novela zákona o finančním arbitrovi přináší rozšíření jeho kompetencí.* Bankovníctví, 12/2004, page 26 and followings.

principles of the proceedings, according to the § 12 par. 1 of the Act on the Financial Arbiter: *The Arbiter shall adjudicate to the best of his knowledge and belief, impartially, justly and without delay...*

The subjects affected by the proceedings are the participants in proceedings and also other subjects, whose rights or duties are determined according to the proceedings, namely:

- The Financial Arbiter, his Deputy or another person (employee) authorized by the Arbiter;
- The plaintiff;
- The institution whose action is contested;
- The requested institution (as an “indirect” participant, e.g. the owner of ATM).

The Financial Arbiter shall adjudicate on the merits of the case at the earliest opportunity by means of an award, which consists of a verdict, a justification and an advice of objections. Within 15 days of the date of delivery of the written award the parties may file substantiated objections to the award. Objections filed in time have suspensory effect. The Arbiter either confirm or amend the award by means of a resolution on the objections, this resolution is final.

A delivered award which can no longer be contested by means of objections is in legal force. The award is judicially enforceable pursuant to the Code of Civil Procedure as soon as the term of execution has expired. If the award does not set any term of execution, the award is enforceable as soon as it comes into legal force.

It is necessary to emphasize that the Financial Arbiter imposes a fine of either 10% of the disputed amount or CZK 10,000 whichever is the larger on any institution which (concluding to the final and conclusive award) has breached the obligations laid down by the Payment System Act.

It is clear from the presented figures²⁵ that the existence of the Financial Arbiter plays a preventive role which is reflected in the fact that the institution indemnifies its client even before the Financial Arbiter issues a decision on the merits in the form of finding. In 2004 there were 18 disputes discontinued upon a settlement between the institution and the petitioner out of the total number of 74 justified and opened ones. It can be said that some institutions value a good relationship with their clients (petitioners), goodwill of the institution and they do not wish to be subject to a penalty.

However, there are also institutions that are not interested in a friendly settlement of a dispute with their clients. The Act on the Financial Arbiter allows the possibility of settling a dispute decided by the Financial Arbiter subsequently in court of law. After the court delivers its judgment, the Financial Arbiter’s finding loses its validity and effect. It is true that this fulfils the principle of legality, but sometimes there can be seen a form of pressure on the petitioner according to the demanding of the payment for the court fees the institution seeks. Although such behaviour is mostly in compliance with law, sometimes it may be consider at least unethical²⁶.

5. Conclusion

There is a well-known saying “Who does not do anything does not make any mistake.” And it is true. The Financial Arbiter is here mainly to “remedy” from time to time something that goes wrong every now and then. The remedy should be relatively quick and sufficient for the petitioner. I will be very glad if the role of the Financial Arbiter, who started his work in the year 2003, succeeds in increasing the prestige and confidence in our banking.

General information about disputes settled by the Financial Arbiter in 2003 and 2004

General Information about Settled Cases		
	2003	2004
Overall suggestions and petitions sent	170	269
The number of settled cases	66	130
The number of justified cases	27	74
The number of unjustified cases	39	56
The number of issued findings (legally effective)	11	42
The amount of imposed and paid penalties (in million CZK)	0.5	0.57

²⁵ For more details see the Annual Reports 2003, 2004 – www.finarbitr.cz

²⁶ See the Annual Report 2004 – www.finarbitr.cz

Otakar Schlossberger (The first Czech Financial Arbiter)

Although there are some disadvantages concerning the proceeding before the Financial Arbiter, the conclusion will be focused on summary of the main advantages of settling disputes by the Financial Arbiter. In comparison to the “traditional” taking a legal action it covers:

- More “informal”, efficient and speedy proceedings;

- Freedom of charges (no fees shall be charged for the proceedings, but each party to the proceedings bears his own costs in respect of the proceedings);

- Right to the working language (the plaintiff is entitled to have the proceedings held in the language in which his agreement with the institution is written or in which he usually communicates in writing with the institution);

- Enforceability of the award (the award is judicially enforceable pursuant to the Code of Civil Procedure as soon as the term of execution has expired. If the award does not set any term of execution, the award is enforceable as soon as it comes into legal force);

- “Guarantee” of the uniform decision-making (the disputes are settled by the Financial Arbiter himself or by the Deputy Arbiter, moreover once a year the Arbiter discloses an annual report on his activities including a description of selected disputes without providing any identification data of the plaintiffs);

- Motivation of the institutions to co-operate with the Financial Arbiter (otherwise the Arbiter may impose a fine upon the institution of up to CZK 1 million and yet can do so repeatedly).

Literature

1. The Act No. 124/2002 Coll., *concerning transfers of funds, electronic payment instruments and payment systems* (the Payment System Act).
2. The Act No. 229/2002 Coll., *on the Financial Arbiter*.
3. The European Community Directive No. 97/5/EC, *on cross-boarder transfers*.
4. www.finarb.cz
5. Mrkývka P. Právní regulace platebního styku v České republice se vstupem do Evropské unie / collective of authors: Výsledky aproximace českého práva ve srovnání se standardy EU před vstupem do EU. Sborník výzkumných prací. Ostrava, Vysoká škola báňská – technická univerzita Ostrava, 2003.
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Finansų ombudsmenas

Santrauka

Šiame straipsnyje autorė nagrinėja finansinio arbitro (ombudsmeno) ir mokėjimo sistemų reglamentavimo raidą Čekijos Respublikoje. Straipsnyje daugiausia dėmesio kreipiama proceso, kuris vyksta prieš prasidedant Čekijos finansų ombudsmenui, analizei. Autorė taip pat gretina finansinio ombudsmeno procesą su panašiais procesais Europoje, ypač – tų arbitrų, kurie yra FIN-NET (Tarpvalstybinio pobūdžio finansinių paslaugų teikiamų ne ginčo tvarka tinklo) nariai.

Šiame darbe teisiškai nagrinėjami mokėjimų sistemos bei finansų arbitrų aktai, įsigalioję nuo 2003 m. sausio 1 d., priimti Čekijos Parlamente, siekiant suderinti Čekijos Respublikos ir Europos Sąjungos teisės standartus. Kaip pavyzdys, nagrinėjama Europos Sąjungos direktyva Nr. 97/5/EC dėl tarptautinių pavedimų, reikalaujanti suteikti vartotojams galimybę naudotis neteisinėmis procedūromis ginčiuose su pavedimus atlikusių institucijų darbuotojais.

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