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ON THE LEGAL PERMISSIBILLITY AND ECONOMIC JUSTIFICATION OF AMENDMENTS TO BANKS' GENERAL TERMS AND CONDITIONS THROUGH THE FICTION OF DECLARATION OF INTENT

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Abstract: *This paper examines the economic justification and legal permissibility of amendments to banks' general terms and conditions implemented through clauses based on the fiction of declaration of intent. First, the authors outline the key economic arguments supporting this method of modifying banks' general terms and conditions, emphasizing considerations of efficiency, cost reduction, and operational flexibility. The paper then provides an overview of the legal framework in Germany prior to the Postbank decision of the Federal Court of Justice, followed by an analysis of the new legal situation established after that ruling. Finally, instead of a traditional conclusion, the authors offer a critical reflection on the current legal position in Serbian law concerning the same issue.*

Keywords: *general terms and conditions, banks, consumers, clauses based on the fiction of declaration of intent, economic justification, legal permissibility*

1. INTRODUCTION

In banking practice, the use of clauses based on the fiction of declaration of intent as a mechanism for amending general terms and conditions has become widespread. Specifically, banks' general terms and conditions regularly contain clauses under which a proposal to amend the existing terms is deemed accepted unless the client explicitly rejects the proposed amendment within a specified period. The legal fiction of a declaration of intent enables contracting parties to relax the requirement of actual consensus when modifying a contract, allowing contractual amendments to rest on a fictitious consensus. In this context, the client's silence, contrary to the general rule that silence does not constitute acceptance, is treated as consent to the proposed amendment. Consequently, unlike the general rules of contract formation, under which the offeree must actively accept the offer in order for a contract to be concluded, clauses based on the fiction of declaration of intent reverse this logic: the offeree must take action in order to prevent the contract [1, p. 40], or, in the present case, to prevent the amendment of an already existing contractual relationship with the bank.

Legal scholarship has therefore not without reason described clauses based on the fiction of declaration of intent as a so-called "Trojan horse" within contractual arrangements [2, p. 1]. Clauses in banks' general terms and conditions that enable amendments through the fiction of declaration of intent are no less problematic than clauses granting banks an unrestricted right to unilaterally modify their general terms and conditions e.g., provisions stating that "the bank reserves the right to amend its general terms and conditions at any time and to notify the client accordingly [ibid, 6]." Such clauses are generally regarded as unfair and, as such, invalid. Although clauses based on the fiction of declaration of intent formally provide clients with the opportunity to oppose the proposed amendments, thereby suggesting a choice between the existing and the amended terms, this choice is largely illusory. In practice, if a client rejects the proposed amendments, banks will, as a rule, terminate the contractual relationship [ibid, 6-7].

Against this background, the paper examines whether amendments to banks' general terms and conditions effected through the legal fiction of a declaration of intent are legally permissible. The legal analysis is primarily based on German law, the case law of the German Federal Court of Justice, as well as the jurisprudence of the Court of Justice of the European Union. In addition, the paper addresses the question of the economic justification of such amendment mechanisms. Finally, instead of a conventional conclusion, the authors provide an overview of the relevant solutions adopted in Serbian law with regard to the same issue.

2. ECONOMIC JUSTIFICATION OF AMENDING BANKS' GENERAL TERMS AND CONDITIONS THROUGH FICTIONS OF DECLARATION OF INTENT

From an economic perspective, the use of clauses based on the fiction of declaration of intent for amending banks' general terms and conditions is highly justified, particularly in the context of mass transactions. Banking relationships are typically long-term, often lasting for decades, and are characterized by a large number of clients and standardized contractual frameworks. Requiring individual, explicit consent from each client for every contractual adjustment entails significant transaction costs, including administrative expenses, communication costs, delays, and legal uncertainty. These costs are ultimately transferred to consumers in the form of higher fees or reduced service quality. In this sense, fiction-of-consent mechanisms serve as an instrument of cost internalization and operational efficiency, enabling banks to adapt contractual terms to changing legal, regulatory, and economic conditions in a timely and economically sustainable manner [3, str. 48].

Moreover, fiction-of-consent clauses help to address collective action and rational apathy problems commonly observed in consumer behavior. In practice, a large proportion of bank clients are indifferent to minor contractual amendments or lack the incentives to actively respond to proposed changes, even when such changes are economically neutral or beneficial. Requiring explicit consent in such cases forces both parties into a suboptimal equilibrium, where the absence of response leads not to the continuation of the existing contractual framework, but to contractual paralysis. Fiction-of-consent clauses, by contrast, allow contracts to evolve while preserving the consumer's right to object and to terminate the contractual relationship. From a welfare-economic standpoint, such clauses can therefore be regarded as Pareto-efficient, provided that adequate safeguards against abuse are in place [4, str. 163].

Finally, the economic rationale for fiction-of-consent clauses is particularly strong in highly regulated sectors such as banking, where contractual amendments are often driven by exogenous regulatory changes rather than by opportunistic behavior on the part of banks. In such cases, the prohibition of fiction-of-consent mechanisms may produce system inefficiencies, including delayed compliance with regulatory requirements, increased operational risk, and fragmentation of contractual frameworks [5, str. 114]. A balanced legal approach should therefore aim not at the categorical exclusion of fiction-of-consent clauses, but at their targeted limitation and precise formulation, ensuring both economic efficiency and effective consumer protection [6, str. 13]. This perspective supports the view that the problem identified by the German Federal Court of Justice lies not in the economic logic of fiction-of-consent mechanisms as such, but in the excessive breadth and indeterminacy of the specific clause examined in the Postbank case.

3. THE SITUATION UNDER GERMAN LAW PRIOR TO 27 APRIL 2021

Given the specific characteristics of mass transactions, particularly in the banking sector, the German legislator did not impose a general prohibition on clauses based on the fiction of declaration of intent in general terms and conditions. Instead, their validity was made conditional upon compliance with certain substantive and formal requirements [7, p. 878]. The provision of the German Civil Code (hereinafter: GCC) relevant to such clauses is Section 308 No. 5. This provision stipulates that a clause in general terms and conditions is, in particular, invalid if it provides that a declaration by the contractual partner of the user of the general terms and conditions is deemed to have been made or not made depending on the performance or omission of a specific act, unless the contractual partner is granted an appropriate period for submitting an express declaration and the user of the general terms and conditions undertakes to specifically inform the contractual partner, at the beginning of that period, of the significance of their conduct [8, art. 308, num. 5].

Accordingly, the requirement to grant an appropriate period for submitting an express declaration is intended to place the contractual partner of the user of the general terms and conditions in a position to prevent the occurrence of the fiction of declaration of intent by expressing their actual will [1, p. 225-226]. At the same time, for a clause based on the fiction of declaration of intent to be valid, the user of the general terms and conditions is obliged to draw the contractual partner's attention to the fact that their silence cannot prevent the incorporation of the new general terms and conditions into the contract. This duty to inform must be expressly stipulated within the clause itself [7, p. 878]. Thus, the granting of an appropriate period for submitting an express declaration, together with the duty to inform imposed on the user of the general terms and conditions is intended for the purpose of protecting the contractual partner to ensure that the latter is aware of the legal significance of their conduct, is able to prepare for it, and is afforded sufficient time to decide how to act and, if necessary, to submit an express declaration. Ultimately, it may be concluded that a user of general terms and conditions who has a legitimate interest in the occurrence of legal effects through the fiction of declaration of intent must ensure that the contractual partner is able to prepare for those legal effects and is not taken by surprise by their occurrence. This objective is served precisely by granting an appropriate period for submitting an express declaration and by fulfilling the duty to inform [9, p. 1241].

Banking contracts with clients are, as a rule, concluded for an indefinite period and often last for many years, sometimes even decades. If, during the course of such a contractual relationship, the legal and/or economic framework conditions change, it becomes necessary to adjust the relevant general terms and conditions accordingly [10, p. 2]. For more than seventy years, specifically since the first unification of banks' general terms and conditions in 1937, German banks relied on clauses based on the fiction of declaration of intent more precisely, the fiction of consent as a mechanism for amending their general terms and conditions [11, p. 2].

This mechanism of amending banks' general terms and conditions also received statutory recognition with the implementation into German law of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market (hereinafter: the Payment Services Directive) [12], specifically in Section 675g GCC. According to this provision, which governs amendments to framework contracts for payment services, an amendment initiated by the payment service provider requires that the intended changes be offered to the payment service user no later than two months before the proposed date of their entry into force. The payment service provider and the payment service user may agree that the consent of the payment service user to the amendment of the framework contract for payment services is deemed to have been given if the user does not notify the provider of their rejection prior to the proposed date of entry into force of the amendments. In such a case, the payment service user is entitled to terminate the framework contract for payment services without notice and free of charge before the proposed date of entry into force of the amendments. The payment service provider is obliged, when submitting the proposal to amend the framework contract, to inform the payment service user of the consequences of their silence as well as of their right to terminate the contract without costs and without a notice period [8, art. 675g].

The advantage of this method of amending the framework contract for payment services for the payment service user is evident: the user was required to take action only if they did not agree with the proposed amendments [10, p. 3]. In German legal scholarship, this method of amending banks' general terms and conditions namely through clauses based on the fiction of consent was, in light of Sections 308 No. 5 and 675g GCC, almost unanimously regarded as permissible. Only in isolated cases were such clauses considered impermissible, due to a lack of sufficient specificity regarding the grounds and scope of the amendments [1, p. 231-232].

4. THE LEGAL POSITION UNDER GERMAN LAW AFTER 27 APRIL 2021

Then came a turning point brought about by the German Federal Court of Justice, which caused considerable controversy. In its so-called Postbank decision [13], relying on the DenizBank judgment of the Court of Justice of the European Union [14] of 11 November 2020, the Court declared invalid the mechanism for amending banks' general terms and conditions through clauses based on the fiction of consent a mechanism that banks had used for decades and that had generally been regarded as legally permissible.

Article 54 of the Payment Services Directive provides that any amendments to a framework contract for payment services must be proposed by the payment service provider two months before the proposed date of their application at the latest. The payment service user may accept or reject the amendments before the proposed date of their entry into force. The payment service provider must inform the payment service user that the amendments are deemed accepted if the user does not notify the provider, before the proposed date of entry into force, that they reject them. The payment service provider must also inform the payment service user that, in the event of rejection, the user has the right to terminate the framework contract free of charge and with effect at any time up to the date on which the amendments would have been implemented [12, art. 54].

In the DenizBank case, the Court of Justice of the European Union had to clarify whether clauses that strictly comply with the requirements of Article 54 of the Payment Services Directive may nevertheless, in the context of consumer contracts, be classified as unfair under Article 3(1) of Council Directive

93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (hereinafter: the Unfair Terms Directive) [15]. Article 3(1) provides that a contractual term which has not been individually negotiated is to be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer [15, art. 3 para. 1]. The Court of Justice held that standard terms allowing for unilateral contract adjustments must also comply with the requirements of Article 3 of the Unfair Terms Directive with regard to good faith, balance, and transparency [16, p. 48].

When applied to German law, this means that even if clauses in general terms and conditions based on the fiction of declaration of intent comply with the requirements of Sections 308 No. 5 and 675g GCC, this does not imply that, in contractual relationships with consumers, they are exempt from substantive control under Section 307 GCC. Under this provision, clauses in general terms and conditions are invalid if, contrary to the principle of good faith, they unreasonably disadvantage the contractual partner of the user of the general terms and conditions. Such unreasonable disadvantage may arise, in particular, from a lack of clarity and comprehensibility. In cases of doubt, an unreasonable disadvantage is presumed if the clause is incompatible with the essential fundamental principles of the statutory provisions from which it deviates, or if it restricts essential rights and obligations arising from the nature of the contract in such a way as to jeopardize the achievement of the contractual purpose [8, art. 307].

Accordingly, even where a clause based on the fiction of declaration of intent satisfies the requirements of Sections 308 No. 5 and 675g GCC, it may nevertheless, from a substantive perspective, cause an unreasonable disadvantage to the contractual partner within the meaning of Section 307 GCC. In summary, while Section 308 No. 5 GCC establishes the formal minimum requirements applicable to all types of fictions of declaration of intent, their actual effects and their appropriateness must be assessed under Section 307 GCC.

More specifically, for a clause based on the fiction of declaration of intent to pass substantive control under Section 307 GCC, the user of the general terms and conditions must have a legitimate interest in the occurrence of the fiction of declaration of intent. According to the case law of the German Federal Court of Justice, such a legitimate interest exists where it is necessary for a legal relationship to be easily adaptable and where the declaration attributed to the other contractual party does not cause that party any unreasonable disadvantage. More specifically, a legitimate interest exists in using clauses based on the fiction of declaration of intent that enable the efficient handling of mass transactions, which is precisely the case with clauses based on the fiction of consent for amendments to banks' general terms and conditions. Due to the need to rationalize banking operations, such clauses were therefore, in principle, regarded as permissible [1, p. 227-228].

The decision of the German Federal Court of Justice caused a tectonic shift in practice, since almost all private banks in Germany use the same general terms and conditions. From that point onward, bank clients were required to give explicit consent to amendments to the general terms and conditions. Thus, the system shifted from a fiction of consent to express consent, which in practice led to significant costs and frustration not only for banks, but also for their clients. The legal uncertainty created by the decision resulted in banks having to obtain explicit consent from clients in more than 100 million ongoing contractual relationships in order to close contractual gaps arising from the ruling of the German Federal Court of Justice [10, p. 3].

The disputed clause in banks' general terms and conditions read as follows: "Amendments to the general terms and conditions shall be offered to the client in text form two months before the proposed date of their entry into force at the latest. The client may accept or reject the proposed amendments before the proposed date of their entry into force. The client's consent to the amendments shall be deemed to have been given if the client does not notify the bank of the rejection of the proposed amendments before the proposed date of their entry into force. The bank shall expressly draw the client's attention, in its offer, to the approving effect of the client's silence." e

In the reasoning of the judgment, the Court stated the following: the above-mentioned clause in banks' general terms and conditions deviates from the essential fundamental principles of Section 305(2) GCC (according to which general terms and conditions become part of a contract only if the contractual partner of the user agrees to their applicability) [8, art. 305, para. 2] and Section 311(1) GCC (which requires an agreement between the parties both for the establishment of an obligation through a legal transaction and for any amendment of its content) [8, art. 311, para. 1], in that it qualifies the bank client's silence regarding the proposed contractual amendments as acceptance. Such a deviation unreasonably disadvantages the bank client. An unreasonable disadvantage is presumed where a clause deviates from the essential fundamental principles of statutory law. This presumption could be rebutted if, following a comprehensive balancing of the interests of the bank and the client, the deviation from the statutory model were objectively justified and the achievement of the statutory protective purpose ensured by other means. This was not the case here, since the clause allows, through the fiction of consent, the complete restructuring of the contractual framework if the client does not reject the proposed amendments. The consumer would have to take action not in favor of, but against, the amendment of the contract. The reasons for the consumer's inactivity whether lethargy, lack of interest, cognitive overload, helplessness, illness, or even actual consent to the proposed amendments are irrelevant to the legal effect of the clause. As a result, the clause effectively grants the bank an unlimited substantive right to amend an existing contract with the consumer. However, for far-reaching amendments affecting the foundations of the legal relationship between the parties, and which in fact approach the conclusion of a new contract, an agreement amending the existing contract is required in accordance with the requirements of Sections 305(2) and 311(1) GCC [17, str. 11-12].

5. A BRIEF COMMENTARY ON THE REASONING OF THE GERMAN FEDERAL COURT OF JUSTICE

The German Federal Court of Justice declared the contested clause in banks' general terms and conditions invalid in consumer contracts. However, the Court did not generally invalidate clauses based on the fiction of consent as such. Instead, its objection was directed at the unlimited scope of the specific clause at issue. The Court was concerned that banks could use such a clause to alter the legal nature of the contract, substantially restructure an existing contractual relationship, or introduce new fees that had not previously been agreed upon.

Although clauses based on the fiction of consent are explicitly permitted under Section 675g GCC, they nevertheless remain subject to substantive judicial review under Section 307 **GCC** [11, str. 1]. The argument that Section 675g GCC precludes such substantive review was expressly rejected by the German Federal Court of Justice, which relied on the DenizBank judgment of the Court of Justice of the European Union. According to the Court, Section 675g GCC constitutes a special provision applicable exclusively to framework contracts for payment services. From this special rule, it cannot be inferred that banks generally have an unrestricted right to employ clauses based on the fiction of consent in their general terms and conditions [18, str. 2]. Outside this narrowly defined exception, consumer protection takes precedence, which includes the courts' authority to review clauses based on the fiction of consent in general terms and conditions [ibidem].

Pursuant to Section 307 GCC, clauses in general terms and conditions are invalid if they unreasonably disadvantage the contractual partner of the user of those terms. Such disadvantage is presumed where a clause deviates from the statutory model and is incompatible with its essential fundamental principles. Clauses based on the fiction of consent fail to withstand substantive review under Section 307 GCC because they deviate from the core principles of Sections 305(2) and 311(1) GCC, which require explicit consent for contractual amendments. Silence does not constitute a declaration of intent and, as a general rule, indicates neither approval nor rejection of proposed contractual changes. Where silence is nevertheless attributed legal effect, this constitutes a deviation from the fundamental statutory principle. By employing clauses based on the fiction of consent, banks created an instrument that allowed them, through a fictitious declaration, to fundamentally reshape the contractual structure [ibid, p. 1].

In consumer contracts, such clauses effectively amount to a unilateral and substantively unrestricted right of the bank to amend the contract, since the consumer is required to take action not in favor of, but rather against, a contractual amendment desired by the bank. This deviation from the statutory model also results in an unreasonable disadvantage for the client, as it cannot be justified by the banks' interests, even after a comprehensive balancing of interests [ibid, str. 1]. While banks may legitimately seek simplified contract execution, this objective can be achieved through restrictively and precisely formulated clauses. Accordingly, the German Federal Court of Justice did not entirely exclude the possibility of sufficiently specific clauses based on the fiction of consent [11, str. 3].

The Court further criticized the indeterminate scope of the clause at issue, noting that it could, in extreme cases, enable banks to alter the nature of the contract itself or to completely restructure the pricing system. Thus, in the Postbank decision, the German Federal Court of Justice identified a violation of Section 307 GCC in the overly broad formulation of the clause, as it did not merely allow for the amendment of individual details, but rather permitted any amendment to existing contracts without substantive or subject-matter limitations. In doing so, the clause deviated from the essential fundamental principles of Sections 305(2) and 311(1) GCC by qualifying the client's silence as acceptance of the proposed contractual amendment.

Such an excessively broad clause consequently results in an unreasonable disadvantage for the client, as it enables the bank, through the fiction of declaration of intent and in the absence of an explicit rejection by the client, to disturb the contractual equilibrium between performance and counter-performance in its own favor. Therefore, even in the context of mass transactions, fictions of declaration of intent lose their justificatory basis and unreasonably disadvantage clients if they lack any discernible limits and thus permit unrestricted amendments, including amendments affecting the core contractual obligations [1, p. 232].

6. IN LIEU OF A CONCLUSION: A PROPOSAL FOR GERMAN LAW AND A BRIEF REFLECTION ON SERBIAN LAW

The economic justification for amending banks' general terms and conditions through fictions of declaration of intent is beyond dispute. Nevertheless, the legal permissibility of clauses based on such fictions in banks' general terms and conditions is, at the very least, debatable. While a significant part of German legal scholarship considers such clauses to be permissible, the German Federal Court of Justice has taken a contrary view. Regardless of this divergence, the Postbank decision has generated substantial legal uncertainty and practical difficulties that remain unresolved to this day.

One possible solution to the newly emerged situation is legislative intervention in the form of an amendment to Section 675g GCC. Specifically, Section 675g GCC should be supplemented by the following rule: an agreement within the meaning of Section 675g GCC does not constitute an unreasonable disadvantage within the meaning of Section 307 GCC, provided that the requirements of Section 308 No.

5 GCC are satisfied and that the contractual relationship cannot be substantially restructured through amendments to the general terms and conditions. The initial introduction of any fee should, however, require the explicit consent of the payment service user [11, p. 23]. This proposal incorporates the limitations demanded by the German Federal Court of Justice, adequately takes into account consumer interests, and is suitable to provide German banks with a statutory basis for a legally certain and mass-transaction-compatible mechanism for amending their general terms and conditions [10, str. 5].

As regards Serbian law, the Law on Payment Services [19], in Article 18, provides a solution identical to that set out in Article 54 of the Payment Services Directive and Section 675g GCC. The modest contribution of this paper primarily aimed at the domestic legal community lies in its informative character. In the event of disputes concerning the application of Article 18 of the Law on Payment Services, Serbian courts will be required to take into account the DenizBank judgment of the Court of Justice of the European Union and to subject clauses based on the fiction of amendment in banks' general terms and conditions although compliant with the requirements of Article 18 of the Law on Payment Services to additional substantive review in consumer contracts. This approach is particularly warranted given that the Republic of Serbia, pursuant to Article 72 of the Law on the Ratification of the Stabilisation and Association Agreement between the European Communities and their Member States, on the one hand, and the Republic of Serbia, on the other, is obliged to harmonize its legislation with the acquis communautaire [20, art. 72].

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О ПРАВНОЈ ДОПУШТЕНОСТИ И ЕКОНОМСКОЈ ОПРАВДАНОСТИ ИЗМЕНА ОПШТИХ УСЛОВА ПОСЛОВАЊА БАНАКА ПУТЕМ ФИКЦИЈА ИЗЈАВЕ

Резиме: *Аутори се у раду баве питањем економске оправданости и правне допуштености измена општих услова пословања банака путем фикција изјаве. Најпре, аутори наводе економске разлоге који иду у прилог таквом начину измене општих услова пословања банака. Затим, дају аутори приказ правне ситуације у Немачкој пре Постбанк одлуке немачког Савезног врховног суда, азатим приказ новонастале правне ситуације у Немачкој након те одлуке. На крају, уместо закључка, аутори дају осврт на правну ситуацију у српском праву о истом правном проблем.*

Кључне речи: *општи услови пословања, банке, потрошачи, клаузуле са фикцијом изјаве, економска оправданост, правна допуштеност*