

E-Payment Gateway Service in Malaysia and the Analysis of its Legal Framework

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Abstract: Electronic payment has emerged in the past decade as an alternative of payment system between business-to-business as well as when involving individuals. Electronic payment is made much easier and affordable today by the emergence of products and services offered by various parties including financial institutions and web-based online portals. There is a need to relook at the provision of legal basis for such services and products in order to ensure all the interests of the users (in both ends) are legally and effectively protected. This paper looks at the legal framework of e-payment gateway services in Malaysia, in particular on the primary legislation on e-payment services in the form of the Payment Services Act 2003.

Key words: Electronic commerce, electronic payment, Internet banking, accountability and enforceability, power of the Central Bank

INTRODUCTION

The growth of the technology, in particular the Information and Communications Technology (ICT), had been the most powerful driver for today's economy and commercial activities, including the banking and payment system. Internet banking and e-payment system are not separable because one compliments the other; both systems are critical in establishing the trust mechanism, which is the main foundation required in a successful business and commercial activities.

Electronic payment (e-payment) is a subset of an electronic commerce transaction that includes electronic payment for buying and selling goods or services whether or not they are offered through the Internet. While the forms and types of e-payment continue to grow and evolve (Hartmann, 2006:1), the most recognized methods today include cards (both credit and debit cards), ATM-based payment and the Internet-based payment. Internet banking, on the other hand, is among the latest transformation of "electronic banking" and is the use of the Internet as a delivery channel for the provision of financial services (Abu BakarMunir, 2004: 2). Internet banking allows interactive communication between banks and their customers, where an extensive amount of information can be exchanged electronically. Other than that, Internet banking also includes other related activities such as online deposit and account management, electronic bill presentment and payment, as well as other non-payment but banking-related activities. It has been widely known that e-payment method is far cheaper than the dead-tree method of mailing out paper invoices and then later processing received payments. Indeed, as Schneider and Perry (2001: 239) reckon, e-payment method is a win-win situation: They are convenient for customers and save the company a lot of money.

The provision of legal basis of electronic payment and Internet banking is crucial for the nature of the systems itself. Being novel (if not revolutionary), the technological innovation on payment system could raise many issues and challenges, among others the legality and validity of the transactions upon which the payment is made; the integrity and confidentiality of the payment and the set of data attached to; as well as the clarity of legal redress, both for the service providers and the consumers at large. On macro level, certain laws or policies are required to make sure the development of electronic payment and Internet banking systems is parallel to the national development objectives and strategies.

This paper is looking at the nature of the e-payment and Internet banking, amid at the surface level, and then is zooming into the policies and laws provided in Malaysia that seek to ensure that e-payment and Internet banking systems develop to support the Malaysian national objectives in terms of economy, commercial as well as financial sectors. Those legal bases serve all the stakeholders: the law provides clear, predictable and protected business environment for the industries; establishes public trust required by consumers; and support the development objectives for the nation.

E-Payment and Internet Banking Systems in Malaysia:

E-payment and then online payment are now closer to become the primary payment methods in many parts of the world due to a better network connection and higher consumer awareness. According to a 2009 report titled "US Electronic Bill Payment and Presentment Forecast, 2009 to 2014" by Forrester Research, the number of US households paying bills online will grow from 48 million this year to 63 million by 2014. A 5.4 percent

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compound annual growth rate reflects a maturing market where growth rates will shrink in the years ahead, but it also reflects a market that is not yet saturated.

In Malaysia, the Central Bank (“Bank Negara Malaysia” or “BNM”) reported that the growth in e- in Malaysia has been encouraging with notable growth registered across all e-payment methods (BNM, 2011: 145). E-payments usage per capita doubled from 22 in 2005 to 44 in 2010, with substantial growth in the usage of debit cards which increased by 8.2 times, Internet banking by 6.3 times and Interbank GIRO by 4.5 times. In the next 10 years, the Bank aims to increase the number of e-payment transactions per capita from 44 transactions in 2010 to 200 transactions by the end of 2020, which is comparable to the e-payment transactions per capita of the more developed countries. The vision is to make e-payments the preferred medium for economic transactions in Malaysia.

Indeed, Malaysia views both electronic payment and Internet banking as a critical infrastructure that underpins its economy. The recently issued Malaysia’s Financial Sector Blueprint 2011-2012 (“Blueprint”) published by the Central Bank (Bank Negara Malaysia or BNM) reinforces that it requires certain key enablers for the development of the financial system, including the good and sound electronic payments system to push for greater economic efficiency (BNM, 2011: 140). This statement is understandably true because payment system is a critical component of the economic and financial infrastructure of a country, including Malaysia. Payment system is important to facilitate the circulation of money in the economy, and to enable the conduct of trade, commerce and other economic activities. Having a payment system that facilitates the efficient movement of funds is therefore highly important for financial development and the growth of the economy.

The Central Bank (2011: 141) views that e-payment, which offers a more expedient, secure and cost-effective means of moving funds over paper-based payments, is one of the strategic tools for achieving greater economic efficiency, productivity and growth as Malaysia transitions towards a high value-added, high-income economy. This is likely based on the presumption that increasing the offering and adoption of e-payments would allow businesses and society at large to enjoy greater convenience and higher operational efficiency from expedient payments and receipts of funds. This in turn contributes towards improving the competitiveness of the economy and the quality of life of its citizens. In short, the benefits of migrating to e-payments are not only limited to financial efficiency gains as it also promotes a more eco-friendly environment.

In 2011, through its Financial Blueprint, the Central Bank (BNM, 2011: 145) outlines some recommendations in relation to electronic payment, among others:

- To enhance the e-payments infrastructure by introducing improvements and new services that will significantly improve user convenience and access to payment services to further facilitate the adoption of e-payments.
- Enhance the mobile banking channel by driving the adoption of the mobile phone as a simple and convenient channel to conduct banking and payment transactions, by encouraging greater participation of financial service providers and merchants in the mobile banking and payments ecosystem. Efforts would be taken to ensure payments can be made and received easily and at affordable charges.
- On top of that, other features and new value-added services will be introduced to promote the safety of the mobile channel and enhance user convenience, including (1) the implementation of a strong and secure authentication method that is simple and cost-effective to instill user confidence in mobile banking and payments; (2) the introduction of the Electronic Bills Payment Portal to offer consumers and billers the efficiency and convenience of having one portal to pay all their bills from various channels; and (3) leveraging on Near Field Communication (NFC) technology to offer convenient mobile payment services.

With those actions and initiatives, the BNM wishes to widen the payment card infrastructure with the aim of increasing the use of debit cards from 0.6 transactions per capita in 2010 to 30 transactions per capita by 2020 (Which means, thirty e-payment transactions per person by year 2020). In view of the above, it is considered urgent and necessary to enhance awareness and promote user confidence in using e-payments to encourage higher usage of e-payments, as awareness and confidence are very crucial components to ensure the success of the e-payment agenda (BNM, 2011: 150).

The Legal Framework for the Provision of E-Payment Systems:

Given its criticality, and as part of the National critical infrastructure, the electronic payment system in Malaysia has to have a strong legal basis. Not only such legal basis would create an environment of trust between the providers and genuine users, but also at the same time it prevents potential abuses and crimes to interrupt with the functionality of e-payment. As Chissik and Kelman (2000: 8) already reckoned more than a decade ago, these attempts to regulate e-payment will be the major changes happening on the regulatory landscape in many countries in many years to come. This cannot be truer in the case of Malaysia.

Of paramount importance would be to ensure the safety, security and reliability of the payment services are maintained and the business model is sustainable, efficient and fair, particularly in terms of pricing and access. In addition, the focus of priorities in the next ten years would include improving cross-border payments and

settlements (BNM, 2011: 145). Deitel (2000: 92) had much earlier reminded that a secure and trustworthy electronic payment is crucial to e-commerce. There is a variety of products and services that seek to provide secure processing of electronic payment, such as credit cards, digital currency, e-wallets, and so on. Strong systems of Internet banking and e-payment must be supported not only with the sophisticated technology, but also a strong legal basis.

Legal Basis on the Provision of E-payment Services:

The new Central Bank of Malaysia Act 2009 outlines in section 5 that the principal objects of the Bank Negara Malaysia as the Central Bank shall be to promote monetary stability and financial stability conducive to the sustainable growth of the Malaysian economy. Meanwhile the principal functions of the Bank includes to formulate and conduct monetary policy in Malaysia; to regulate and supervise financial institutions which are subject to the laws enforced by the Bank; and to exercise oversight over payment systems. Therefore it is very clear that the authority on the payment systems in Malaysia lies with the Central Bank.

This oversight over payment systems cannot be successfully executed if the BNM does not do it in collaboration and harmony with the financial institutions who own or operate the system itself. Therefore in this context the provision of section 45 of the Central Bank of Malaysia Act 2009 is very important as a legal basis. It provides that the Central Bank “shall use its best endeavours in co-operation with financial institutions in Malaysia to (a) promote and maintain banking and financial services for the public; and (b) to foster high standards of banking and finance in Malaysia. In this light, one could see the background of the issuance of the BNM Blueprint 2011.

The primary legislation on electronic payment system in Malaysia is found in the Payment Systems Act (‘PSA’) 2003 (Act 627), which came into force on 1st November 2003. It is meant to provide for the framework for the regulation and supervision of the payment systems and payment instrument in Malaysia. When anticipating the birth of this law, the Central Bank Governor (Aziz, 2003) emphasized that the study on the legal and regulatory framework was undertaken “to enhance the efficiency of payment system and to specifically provide the mandate to the Central Bank of Malaysia to effectively oversee and facilitate greater development of such system in the country.”

The ultimate objectives of PSA 2003 are reflected in its preamble as “to promote monetary stability and a sound financial structure.” This was meant to promote a reliable, efficient and smooth operation of the national payment and settlement systems and for ensuring that the national payment and settlement systems policy is directed to the advantage of Malaysia. This noble task is spearheaded by the Central Bank or Bank Negara Malaysia or BNM (Bank Negara Malaysia, 2007).

This task of the Central Bank is not only important but is also very urgent. As digital transactions have become widespread, alternative payment methods would essentially be issued and used by variety of institutions. Some would even extend beyond the reach of national boundaries. The Central Bank Governor noted that e-cash and e-commerce will make it increasingly difficult to define and measure monetary aggregates, national income and wealth (Aziz, 2001). Thus, it was noted that capacities and capability of institutions need to be enhanced, financial infrastructure needs to be put in place and consumers and markets educated accordingly. This Payment Systems Act, it is argued, would provide essential remedies to offer in this new financial environment.

The PSA 2003 applies to two categories of system providers, namely the operator of designated payment system (DPS) and the operator of designated payment instrument (DPI). The PSA 2003 imposes certain obligations these two classes of e-payment system operators, most prominently are (i) the obligations in relation to governance requirements, (ii) obligations on operational requirements; and (iii) obligations of secrecy and confidentiality. In terms of application, it is noteworthy that the PSA 2003 by virtue of section 3 “shall apply to a person outside Malaysia who is an operator of a payment system if such payment system accepts payment or settlement instructions from participants in Malaysia unless otherwise prescribed by the Bank”. With this provision, the interests of Malaysian payers are legally protected.

Legal Basis on the Oversight of E-payment Services:

In Part Two, the PSA 2003 elaborates the designation, requirements and finality of a payment system. Part Three subsequently provides for the designation and requirements of payment instrument. Meanwhile, Part Four of the Act deal with the powers of the Bank, i.e. the Central Bank (BNM). It includes the General Power of the Bank such as to require payment operator to establish itself as a legal corporate entity under the corporate law in Malaysia (section 30). And in order to ensure effective oversight, the Bank by virtue of section 31 may also require the payment operators to submit certain documents and information as may be required by the Bank.

The Central Bank (“BNM”) also reserves a crucial powers over designated Payment Systems and designated Payment Instruments. In section 32, the Bank may, by written notice, require an operator of a designated payment system or issuer of a designated payment instrument to make modifications or alterations to— (a) the designated payment system or designated payment instrument including governance arrangements

referred to in section 13 or 27; (b) operational arrangements referred to in section 14 or 28; (c) documents and information submitted under subsection 5(3) or 25(1); and (d) any other documents relating to the designated payment system or designated payment instrument. These powers are so crucial so as to enable the Bank to ensure the efficiency, operation and accountability of the payment operators.

Therefore, in exercising its powers above the Bank shall have regard to few crucial factors, namely (a) systemic risk; (b) the object of the Bank to promote monetary stability and a sound financial structure; (c) the interest of the public including market conditions and behaviour; (d) the safety, integrity, efficiency or reliability of the designated payment system or designated payment instrument including security and operating standards and infrastructure arrangements; (e) the interests of the current participants of the designated payment system or users of the designated payment instruments; or (f) the interests of persons who, in the future, may want access to the designated payment system or may want to use the designated payment instrument.

The Oversight of Central Bank and Its Administrative Power during “Financial Contingencies”:

In section 33 of the PSA 2003, the role of Central Bank is prescribed to safeguard the public interest from any potential disaster or contingencies that may be caused by the irregularities in the e-payment system. Thus the Act provides that where the Bank is of the opinion that an operator or a participant of a designated payment system or issuer of a designated payment instrument:

- is engaging or is about to engage, in any act, or course of conduct or has omitted any act or is about to omit any act that results or is likely to result in systemic risk being inadequately controlled, or that is detrimental to the interests of its participants, users or creditors or the public generally;
- has contravened any provision of this Act, whether or not there has been no criminal prosecution in respect thereof, or any guideline issued under section 70; or
- has become or is likely to become unable to meet all or any of his obligations,

the Bank may issue a directive in writing requiring the operator or participant of the designated payment system or issuer of the designated payment instrument to take certain actions, namely:

- to take any steps deemed by the Bank necessary to remedy the situation;
- to cease the operation of the designated payment system or the issuance of the designated payment instrument.

In giving any directive above, the Bank may include requirements of a consequential, ancillary or incidental nature to be complied with by the operator or participant of a designated payment system or the issuer of a designated payment instrument and the Bank may impose such terms, conditions and requirements as it deems necessary or expedient. If issued a directive, an operator or participant of a designated payment system or an issuer of a designated payment instrument shall comply with it within such time as the Bank may specify. And those operator or issuer would be given an opportunity to make representations before making a decision to issue a directive under that subsection.

It is argued that this provision of section 33 is very crucial for the Bank in playing its role in the supervision, monitoring and enforcing the efficiency and smooth-running of the electronic payment. The Bank is also given enough authority to basically decide the nature of catastrophe or exigencies the occurrence of which would empower them to take important administrative measures against the errant operators. This is a serious issue which is also accompanied by harsh punishment for its violation. Such offence could trigger a maximum amount of fine of RM5million or a maximum imprisonment of 5 years or both upon being found guilty.

The Power of Examination and Assuming Control by Bank:

According to section 34 of the PSA 2003, the Bank may, where it is of the opinion that it is necessary for the purposes of carrying out its functions under this Act, examine, with or without any prior written notice, the premises, apparatus, equipment, machinery, books or other documents, accounts or transactions of an operator or issuer and any of his offices in or outside Malaysia. Thus in order to compliment this power, the Bank is also entitled under section 35 to examine any necessary books, documents, accounts and information required for the purpose of section 34.

Another set of crucial powers prescribed by the PSA 2003 for the purpose of protecting public interest is laid down in sections 36-40. With these provisions, there is an obligation for any operator of a designated payment system who is insolvent or likely to become insolvent, or has become or likely to become unable to meet all or any of his obligations, or has suspended payments or compounded with his creditors to immediately inform the Bank of that fact.

Upon this information, and upon satisfactory finding of the situation of the operators, section 37 grants the Bank to issue a directive in writing, exercising any one or more of the following powers, as it deems necessary:

- remove from office any director or chief executive officer of the operator of the designated payment system;
- appoint any person as a director or chief executive officer of the operator of the designated payment system; or
- appoint a person to advise the operator of a designated payment system in relation to the proper conduct of its business.

Where any of the circumstances set out above exist in respect of an operator of a designated payment system, the Bank may, whether or not the Bank has exercised any of its powers under section 37, order for the Bank to assume control of the whole of the property, business and affairs of the operator of a designated payment system, and carry on the whole of its business and affairs, or to assume control of such part of its property, business and affairs, and carry on such part of its business and affairs, as may be set out in the order under section 38. When this takes place, the Bank becomes the effective controller of the designated payment system. The objective is obviously to avoid messes and to control any possible damage to the public who use or rely on such payment system whose operator had become potentially insolvent as indicated above.

On top of that, it is provided in section 40 that where control of an operator of a designated payment system has been assumed by the Bank, the operator of the designated payment system and its directors and officers shall provide the Bank or the person appointed by the Bank with such facilities, documents and information as may be required to carry on its business. The Bank would in turn control and carry on the property, business and affairs of the operator of the designated payment system as the case may be, in the name and on behalf of that operator of the designated payment system until the directive issued under section 37 or order made under paragraph 38(1)(a) is revoked.

Unless there is revocation, the Act reiterates that no director or chief executive officer of the operator of the designated payment system shall engage in any activity in relation to the designated payment system, directly or indirectly, except as may be required or authorized by the Bank or the person appointed by the Bank. Furthermore, the Bank or the person appointed by the Bank shall be vested with all the powers of the operator of a designated payment system, and its board of directors, under its constituent documents, or exercisable by the operator of a designated payment system or its board of directors under any written law regardless whether such powers are exercisable by resolution.

Conclusion:

The discussion in the preceding passages shows that the regulatory landscape involving financial services as well as payment and settlements services have changed tremendously. The Malaysian Central Bank had in many provisions of the PSA 2003 reinforced its crucial role in safeguarding the financial and payment services in Malaysia. This is because financial industry is now considered as part of the critical infrastructure in Malaysia, hence worthy of protection and effective control.

Therefore it is also worthy to mention here that the PSA 2003 is not the only legislation that provide necessary legal basis for e-payment industry in Malaysia. There are in fact other laws, not particularly passed to deal with specific financial sectors, which are crucial to support the industry in the country. Among those laws would be the law that protects the security and privacy of information and information system. The Computer Crimes Act 1997 and the Personal Data Protection Act 2010 are those laws that primary deal with the issues of security and privacy of data in the commercial transactions. Besides, the “twin-legislation” of Electronic Commerce Act 2006 and the Electronic Government Activities Act 2007 are also providing the legal basis required to ensure that electronic payments are legally enforceable, admissible and binding, in the private and government transactions respectively. All these laws, together with the Payment System Act 2003 and the Central Bank of Malaysia Act 2009 would nicely compliment the framework of legal basis of electronic payment and Internet banking systems in Malaysia.

Having said that, it is also reiterated here that any attempts to regulate the technology (be it in financial services or other sectors) should be done with a great caution. While a clear regulation on this is desirable, over-regulation is not. And it is for the Central Bank of Malaysia as the spearhead of this industry to make sure such regulatory landscape does not turn to be a blunder for the ever-growing technologies and commerce.

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