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CONSUMER PROTECTION IN THE ELECTRONIC MARKETPLACE

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FOREWORD

The background document on “Consumer Protection in the Electronic Marketplace” was submitted to the Ottawa Ministerial Conference held on 7-9 October 1998, in connection with the Declaration on Consumer Protection in the Context of Electronic Commerce [DSTI/CP(98)12/FINAL].

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CONSUMER PROTECTION IN THE ELECTRONIC MARKETPLACE

Digital computer and network technologies play an increasingly important role in the everyday lives of people around the world, changing the way they learn, communicate and do business. The explosive growth of global networks -- in particular the Internet -- has made the transmission of all kinds of digitised data fast, cheap and simple, forming the basis for electronic commerce and creating new forms of communication. The global nature of the online environment eliminates some of the constraints of distance and time zones, and invites consumers to participate in an international marketplace that is generally accessible twenty-four hours a day, seven days a week. The growing popularity of this new media is driving the development of new kinds of information-based products and services, and attracting businesses and consumers alike to the electronic marketplace.

The vast amount of information available online has the potential to influence commercial sales both online and in the "real world" by increasing consumers' ability to easily access and compare business and product information from around the world and by providing businesses a unique opportunity to provide one-on-one marketing and customer services. Although a broad range of products and services are currently available for sale in the electronic marketplace, consumers have not fully embraced the idea of buying online. The most common online shopping experiences consist of consumers using the technologies to research products and services and then turning to more traditional methods, such as phone, fax or local retail outlets to make their actual purchases. Faced with questions about the accuracy of information, contract formation, the availability of redress and dispute resolution mechanisms, the potential for fraud, and privacy issues, consumers are concerned about the practicalities and the safety of the electronic environment and are reluctant to fully participate in electronic commerce. Direct business-to-consumer electronic commerce will only be embraced when its value is greater than the perceived risks. Consumers need assurances that the electronic marketplace provides a safe and predictable place for them to do business.

Potential Market Access and Growth

Consumer interest in computer technologies and graphic-based Internet applications is growing as innovation and market competition are working to create more powerful, less expensive and easier to use devices and applications. At the same time, global networks and network applications (like the World Wide Web), hardware and software innovations (including interactive television, wireless personal computing devices, touch screens, voice and optically activated software), and information sorting and filtering tools are all part of an evolving technological environment that makes it easier for users to operate computers and access the online environment. In addition, network connected pay phone units, computer terminals and public access kiosks are increasingly found in airports, shopping malls, libraries and "cybercafes" and can offer consumers Internet and e-mail access and the ability to conduct other online business away from the home or workplace environment. Consumers are growing more accustomed to the convenience that technology adds to their daily lives. For some time, banks and other financial institutions have been using proprietary networks and interfaces, such as automatic teller machines, to offer consumers accessible and efficient self-service options like information and account

inquiries, electronic forms and bill payment. This experience is helping consumers become comfortable with electronic assistance and access to information and may help increase confidence in electronic transactions as these and other services begin to migrate to global networks and the Internet.

The growing consumer interest in the electronic marketplace is also due, in part, to the media interest and speculation centred around the potential of the business-to-consumer online market. Online sales statistics for items such as books, travel and computers, and profiles of companies selling on the Web are making headlines around the world. While the potential problems and pitfalls of the online marketplace receive as much attention as the stories of its promise and success, there is evidence that the number of consumers online and their interest in shopping online is growing. In 1996, there were fewer than 40 million people connected to the Internet world-wide; by December 1997, that number grew to approximately 96 million, and growth projections for 2005 predict there will be nearly one billion users online. In addition, surveys of the more than 58 million online users in North America suggest that more than 70% had searched the Internet for product information and that 10 million of those users had actually made a purchase online.¹ So far, however, electronic commerce has primarily been a tool for business-to-business transactions and, while consumers are beginning to buy a range of products and services online, direct business-to-consumer sales remain a small percentage of the total. Near-term (2000-02) growth estimates for electronic commerce as a whole vary widely with a median estimate of \$154.5 billion US dollars.² Online retail shopping for that same period is predicted reach \$4.65 billion.³

Building Consumer Trust

Direct business-to-consumer electronic commerce will not reach its full potential until consumers are assured that the online environment is a safe and predictable place for them to do business. Consumer laws, policies and practices exist to help build consumer trust by protecting consumers from unfair or deceptive acts or practices and helping to establish a more balanced relationship between sellers and consumers in commercial transactions. In the real world, domestic retail markets offer consumers assurances that their interactions and purchases are covered by national legal and private sector consumer protection. However, in the global electronic marketplace such protections cannot necessarily be presumed. Limited or non-existent face-to-face contact between businesses and consumers exacerbates the need for a predictable and trustworthy electronic marketplace. Businesses and consumers alike must be aware of the legal and self-regulatory rules and practices that apply to them online. In the inherently international online environment, an effective global approach to consumer protection is an important element of a transparent and predictable legal and self-regulatory framework for electronic commerce. Working together, governments, businesses and consumer representatives can help to enhance consumer confidence in electronic commercial transactions while encouraging the development of the global marketplace.

While there are generally broad areas of international agreement on consumer protection practices and standards, there continue to be significant differences as well, many of which involve the regulation of commercial communications. Governments are faced with questions about how best to protect their citizens without inhibiting the growth of the evolving electronic marketplace. They must determine whether current rules and practices are applicable and sufficient to protect consumers online and, if not, how to proceed in developing and implementing effective and practicable consumer protections. While this is not likely to require the development of an entirely new set rules for the online environment, it will require governments and the private sector to review, clarify and adjust existing laws and self-regulatory codes to accommodate the special circumstances of electronic commerce. Addressing these challenges requires an understanding of the advantages and limitations of the technology and the

existing consumer protection framework, as well as a determination of the appropriate balance between government intervention and industry self-regulation in achieving market goals.

i. Accurate Information

Advertising and product information are essential elements of the electronic marketplace. Without the ability to physically hold and inspect merchandise consumers must rely on the information they find and an electronic “view” of the products and services being offered. However, the abundance of information available online can serve to empower consumers and help them protect themselves by giving them wider and more flexible access to and detail about products and services. Business and product information can be organised in a way that allows consumers to choose what information and how much detail they would like, while sophisticated search software can automatically identify relevant data according to consumer-defined criteria. Armed with accurate business and product information and comparisons, consumers are able to make better informed purchasing decisions. In some instances, however, this flood of information can be confusing and frustrating, consumers can find themselves overwhelmed and have no effective means to verify the accuracy of what they see and read. The relative ease of adding, deleting and revising information online also carries a risk that the failure to do so will mislead consumers. For businesses, maintaining a current and accurate Website requires diligence and may be more expensive than an occasional physical publication or broadcast in another medium.

ii. Electronic Contract Formation

At one time, cross-border transactions and electronic contracts were solely the realm of businesses and wholesalers providing products and services internationally. Electronic commerce is changing that dynamic as direct international business-to-consumer transactions are increasingly concluded on global networks as a matter of course. Consumers are making purchases and entering into contracts electronically, often meeting, negotiating and completing transactions with little or no face-to-face contact and without the exchange of paper-based documents and hand-written signatures. While the protections provided by commercial contracts are intended to help give consumers more equal footing in their dealings with business, the use of electronic contracts raises new issues and questions. International consumer transactions may be subject to varying legal and self-regulatory standards, including commercial codes for advertising, marketing, and sales disclosure requirements, which raises questions about the condition and requirements for contract formation, execution, and enforcement. Technological solutions may help to resolve some of the questions related to “consent” and the conditions for “written” confirmation of transactions. For example, the use of a “clickwrap” process for online purchases, where a consumer is guided through the online purchasing process through the use of a series of hyper-linked steps that could include viewing a screen or a succession of screens stating the terms and conditions of the contract and allowing consumers to confirm their acceptance on each successive screen. In addition, authentication and certification techniques could also be used to identify and verify the parties in an electronic transaction and could be recognised in the same way as a signature at the bottom of a page.

However, the patchwork of commercial standards, practices and national laws potentially applicable to electronic commerce, and uncertainties over which jurisdiction's regulations will apply to a particular commercial transaction make it difficult for businesses and consumers alike to benefit from a predictable commercial environment. Work is currently underway to extend and adapt commercial codes and contract requirements to address the unique aspects of electronic contracts.⁴

iii. Consumer Redress

Just as they do in the real world, consumers in the electronic marketplace will face situations where products arrive broken, defective or in some way simply do not meet expectations, and they will need to have access to effective complaint and redress mechanisms to help resolve disputes. However, the global nature of the online environment may make efforts to resolve disputes between consumers and businesses located in different parts of the world time-consuming, expensive and difficult. Responding to consumer problems and providing online information and effective means to resolve differences quickly, easily and fairly can reduce costs, increase productivity and help engender a feeling of confidence about an online business and its practices. In addition, just as in the real world, the development and promotion of voluntary alternative dispute resolution mechanisms can help to avoid more formal and costly legal options.

iv. Online Fraud

Much of the fraudulent conduct surfacing online is not new: the same deceptions and problems that arise in more traditional commercial media are occurring online, including pyramid schemes, fraudulent business opportunities and products that either don't arrive or fail to meet consumer expectations. What is new is the relative ease and reach of these activities when conducted online. Fraudulent operators are taking advantage of the novelty of the online environment through the media and its marketing capabilities to reach millions of consumers world-wide. Moreover, the potential for anonymity and the transitory nature of the environment make it likely that the fraudulent offer itself may not be found from one moment to the next. Fighting fraud online is a formidable task given the size of the electronic marketplace. However, co-operative law enforcement efforts like Internet "Sweep Days" in which agencies world-wide join forces to "surf" the Internet for specific schemes and other targeted national law enforcement actions, coupled with business and consumer education about the risks of fraudulent behaviour and how consumers can best protect themselves online, are proving to be effective consumer protection strategies against online fraud.

v. Privacy Protection

The growth of electronic commerce and the global expansion of digital and network technologies encourage information exchange, increase consumer choice, and facilitate the ways in which data can be generated, accessed, compiled, processed, linked and stored on global networks. While this data processing offers benefits, it also allows the creation of detailed online user profiles that track online activities and electronic transactions that threaten privacy. As consumers become increasingly aware and concerned about the potential online threats to personal privacy, they need assurances about the fair collection and use of their personal data.

The interactive characteristics of digital and computer network technologies can help consumers to develop skills to protect themselves and exercise choice with respect to privacy protection online. However, technology alone will not provide consumers with sufficient online privacy protection. Both governments and the private sector have an important role to play to ensure that consumers benefit from effective privacy protection on global networks. Governments, the private sector and consumer representatives should work to ensure that commercial activities conducted over global networks are at least consistent with the effective implementation of the 1980 OECD Privacy Guidelines.⁵

vi. *Security and Authentication Mechanisms*

Consumers and businesses alike need assurances that the electronic marketplace is secure and reliable, and effective mechanisms to ensure information security is a key element of building trust in electronic transactions. Security and authentication mechanisms can help to verify user identity and other information about transactions and transacting parties and ensure information integrity. While establishing trust in economic transactions has traditionally been a role for government, the importance of technological solutions for security and authentication and their rapid evolution increasingly requires the private sector to play a leading role.

vii. *Consumer Education*

Education is an essential aspect of consumer protection, and electronic networks are well suited to help provide comprehensive and up-to-date information and advice. It may not be possible to definitively address some of the problems inherent to the electronic marketplace by legislative or self-regulatory means, and consumers may need to accept some of the risks that shopping online entails. It is important that consumers are aware of these risks and how best to avoid them. Co-ordinated efforts among governments, the private sector and consumer representatives can provide user education about the rights, obligations and the potential risks of doing business online. Digital computer and network technologies can be used to help fight fraud and educate consumers and business. The technologies can be used as tools to distribute information to develop innovative methods to provide information, for example by providing hyper-links to consumer-related Websites and information or providing public service announcements through online “banner ads”⁶.

The Role of Business and Consumer Representatives

The changing online environment makes it difficult to anticipate all of the potential consumer protection problems and solutions. Businesses have a vested interest in helping to create and promote a safe environment for consumers. Self-regulatory efforts may offer some of the most promising avenues for consumer protection in this new and evolving medium, without inhibiting its growth and development.

Business and consumer groups can work together to develop and implement voluntary self-regulatory codes that establish effective and enforceable consumer protection mechanisms; this could go a long way toward building consumer confidence and trust. Individual businesses who adhere to the codes might display an “icon” that signifies their compliance, and consumers could be encouraged to search out businesses displaying the icon and to avoid or take extra precautions when doing business with sellers that do not. Both government and non-governmental organisations can facilitate the development of voluntary self-regulatory consumer protection codes and initiatives by providing guidance for the basic elements of global consumer protection online. Governments also have an ongoing role in enforcing laws to back-up self-regulatory plans where a business that claims to comply with the private sector standards fails to do so.

The Role of Government

The global network environment challenges the abilities of the traditional geographically based jurisdictional structures to adequately address issues related to consumer protection in the context of electronic commerce. Disparate national policies may impede the growth of electronic commerce, and as

such, these consumer protection issues may be addressed most effectively through international consultation and co-operation. Member governments have recognised that internationally co-ordinated approaches may be needed, to exchange information and establish a general understanding about how to address these issues. The OECD can play a role in this regard by bringing government, business and consumer representatives together to clarify specific policy and regulatory issues relating to consumer protection in the context of electronic commerce.

Governments are challenged to strike the right balance between the desirability of social development and economic growth based on emerging network technologies, and the necessity to provide their citizens with effective and consistent consumer protection. Many OECD Member countries have begun to review existing consumer protection laws and practices to determine whether or not changes need to be made to accommodate the unique aspects of electronic commerce. These efforts should be part of a global framework for electronic commerce and a co-operative effort between governments, business, consumers and their representatives.

The Role of the OECD

For 28 years, the OECD's Committee on Consumer Policy has provided a forum for international co-operation and interaction between governments, business and consumer representatives. The current focus of the Committee's work is to help meet the challenges posed by the evolving online environment and working to establish a safe and predictable global marketplace for consumers. The Committee's position within the Directorate for Science Technology and Industry unites two distinct but complementary areas of expertise -- consumer protection and electronic commerce and the network environment -- allowing for a balanced and in-depth discussion of consumer related issues in the electronic marketplace.

The Committee has begun to develop a set of guidelines to help protect consumers participating in electronic commerce. A co-operative dialogue and drafting process is underway and Member countries have voiced support for the progress that has been made to date. The Committee will continue to work closely with business and consumer representatives in the year ahead to complete its work to develop guidelines that effectively protect consumers and help to enhance consumer confidence in electronic commerce while encouraging the development of the global marketplace.

NOTES

1. CommerceNet and Nielsen Media Research, "CommerceNet/Nielsen Media Demographic and Electronic Commerce Study, Spring '97",
http://www.commerce.net/work/pilot/nielsen_96/press_97.html
2. OECD "The Economic and Social Impact of Electronic Commerce: Preliminary Findings and Research Agenda", Chapter 3, 1998
3. CommerceNet and Nielsen Media Research, "CommerceNet/Nielsen Media Demographic and Electronic Commerce Study, Spring '97",
http://www.commerce.net/work/pilot/nielsen_96/press_97.html
4. UNCITRAL Model Law on Electronic Commerce (1996), and current activities of the UNCITRAL Working Party on Electronic Commerce to examine legal issues related to digital signatures, electronic signatures and certification authorities.
5. *Recommendation Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data* (23 September 1980).
6. See US Federal Trade Commission site at <http://www.ftc.gov/ftc/consumer.htm>