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COMMITTEE ON CONSUMER POLICY

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CHARGEBACKS: EXECUTIVE SUMMARY OF OECD EXECUTIVE COMMITTEE DISCUSSIONS

OECD, Paris, 23-24 March 1999

The draft Recommendation "Consumer Redress in a Global Marketplace - Principles for Chargebacks" (C(98)102) was presented for consideration to the OECD Executive Committee at its 624th Session in June 1998. During the discussions of the Recommendation, a number of Delegations raised concerns about the text as drafted.

To assist the Committee on Consumer Policy in its review of this issue, the Secretariat has prepared the attached summary of the substantive comments raised during the Executive Committee discussions. In addition, France and the United States have submitted further information regarding some of their concerns with the text as submitted to Council, copies of which are attached as an Annex to this summary.

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CONSUMER REDRESS IN THE GLOBAL MARKETPLACE – PRINCIPLES FOR CHARGEBACKS

Summary of OECD Executive Committee Discussions

The draft Recommendation “Consumer Redress in a Global Marketplace – Principles for Chargebacks” (C(98)102) submitted to the OECD Council in June 1998 had been discussed and approved by the Committee on Consumer Policy at its meeting in September 1997 subject to ad-referendum statements by the Delegates for France, Germany, Italy, Mexico and Spain.

In the months that followed, minor revisions were made to the text to address the specific concerns expressed by these Delegations during the meeting. At the March 1998 meeting of the Extended Bureau of the Committee, Delegates reaffirmed their interest in having the draft Recommendation submitted to the OECD Council for consideration and instructed the Secretariat to send the document forward once the last reserve had been lifted. Four of the five countries subsequently lifted their reservations with the remaining country (France) indicating its intention to abstain.

The draft Recommendation was then presented for consideration to the OECD Executive Committee at its 624th Session in June 1998. During the discussions of the Recommendation, a number of Delegations raised concerns about the text as drafted. In light of these comments, the Executive Committee requested that the Committee on Consumer Policy re-examine the proposal with a view to its revision and eventual re-submission to and adoption by the Council.

To assist the Committee in its review of the issue, the Secretariat has prepared the attached summary of the substantive comments and concerns raised at the meeting of the Executive Committee. In addition, France and the United States have submitted further information regarding some of their concerns with the text as submitted to Council, copies of which are attached as an Annex to this summary.

624th Session of the Executive Committee held on 29 June and 1,2,7 and 10 July 1998***Discussion of the Draft Council Recommendation Consumer Redress in a Global Marketplace – Principles for Chargebacks***

1. The draft Council Recommendation *Consumer Redress in a Global Marketplace – Principles for Chargebacks* (C(98)102) was listed as Item 5 on the Agenda of the 624th Session of the OECD Executive Committee.
2. The discussion of the Recommendation began with a short presentation by the Secretariat to introduce the proposal and provide a general overview of the text. The Secretariat noted that all Member countries had expressed support for the proposal with the exception of France which, while not intending to block the adoption of the Recommendation, did intend to abstain because of conflicts with its existing national and regional regulations.
3. **France** confirmed its intention to abstain from approval of the draft, explaining that, in certain respects, the proposal was contrary to current French laws. France noted that the text as drafted is based on the principle of binding payment agreements, whereas French law is based on the principle of the irrevocability of payments. From a technical perspective, the binding payment agreements called for in the draft would require the development of “chip cards” which could threaten the highly secure bank card system in operation in France.
4. In addition, France did not view the draft Recommendation as contributing to its existing consumer protection laws which include provisions related to distance selling that do not necessarily comport with the terms set forth in this document. In particular, French law does not require card providers to establish a submission period for a reimbursement claim, nor are claims subject to a minimum reimbursement level.
5. France would have preferred that the text more clearly distinguish between consumer protection and secure payment systems for bank cards, which France believes are two very useful, but distinct objectives. France stated that, at this stage, it would prefer not to abstain from the Recommendation, but would rather further examine and discuss the issue with a view to reaching a full consensus.
6. The French Delegation offered to put forth specific amended formulations it would like to see added to the text and suggested they could be submitted at a later date. (See attached Annex I.)
7. The **United States** confirmed its support for the proposal in principle, but expressed certain specific qualifications. First, the United States was concerned about the undue burden placed on the cardholder. The draft Recommendation requires the cardholder to make the first attempt to resolve the dispute with the merchant directly. The United States expressed concern that a cardholder may have difficulties contacting a merchant located in a foreign country, a situation that could be exacerbated in situations where the merchant is not acting in good faith.
8. Second, the United States was concerned that the proposal allows issuers a 180 day period for dispute resolution, but does not require the issuer to grant the cardholder a provisional credit for the disputed amount pending resolution of the dispute. This could allow card issuers to compel consumers to make payments on disputed amounts. Under US law, credit card companies are prohibited from compelling payment on charges placed in dispute, until the dispute has been settled. Finally, the United

States noted that the proposal's coverage of debit card transactions may be controversial since debit card transactions have traditionally been treated the same as cash.

9. In light of these concerns and the issues raised by France, the United States expressed its agreement with the suggestion that the issue needed further examination before agreeing to a text.

10. While **Belgium, Switzerland, and Canada** did not raise any specific questions about the text of the proposal, the Delegations agreed that the issue warranted further discussion and should be returned to the Committee on Consumer Policy for further examination.

11. The **Chairman** concluded that the Committee should be further consulted, with a view to preparing a revised proposal and re-submitting it to the Council after achieving the Committee's full approval.

ANNEX

Additional National Comments Regarding the Draft Council Recommendation Consumer Redress in a Global Marketplace – Principles for Chargebacks*Comments submitted by France*

This draft Recommendation is aimed at offering consumers who use bank cards to pay for international distant transactions scope for obtaining redress through chargebacks for failure to execute the transaction. We have major problems with this draft, as it stands, since it calls into question the organisation of the bank-card system in France without providing the consumer with any additional guarantees.

1. This Recommendation is no improvement on French legislation with regard to consumer protection.

Current French legal provisions on distance sales already guarantee a general right to consumer redress on the sole condition that the good be returned, this right being quite independent of payment for transactions.

Moreover, consumers are covered by ordinary contract law in case of default or non-conformance, and by the penal code in case of theft or unauthorised use.

The “framework” Directive 97/7/EC, to be transposed into French law in 1998, takes the same approach.

The draft Recommendation is no improvement on these provisions, since it puts the onus of redress on the card issuer who, in return, imposes a number of conditions.

For instance the card issuer may set a minimum threshold amount for chargeback (although this is not actually specified in the draft Recommendation) and establish a reasonable time-limit for the submission of chargeback claims.

Similarly, chargebacks proceed if the card issuer determines the cardholder’s claim to be “legitimate”.

These conditions place singular restrictions on consumer redress, while at the same time making the card issuer a judge of the contract. While the Recommendation sets out rules applicable to chargebacks in general, it fails to make clear that the onus for enforcing these rules is placed solely on the card issuer. This ambiguity is highly detrimental to consumers.

For that reason, the Recommendation does nothing to improve consumer protection.

The contractual obligations on the card issuer might be acceptable, in particular inasmuch as they allow Member States to maintain stricter provisions, if they did not at the same time seriously upset the French bank-card system.

2. The draft Recommendation brings a serious threat to bear on the general organisation of France's bank-card system.

The French billing system for bank cards is largely centred around merchants, who pay commission on each payment. This makes the use of such cards particularly attractive to consumers, and has accordingly done much to develop them in France.

In return for this commission, merchants enjoy a very high level of security on such payments, and this has two practical outcomes.

From a technical standpoint, the widespread use of smart cards has reduced credit-card fraud to a particularly low level.

From a legal standpoint, the irrevocability of bank-card payments is guaranteed under Article 57-2 of the Statutory Order of 30 October 1935 and gives merchants the certainty of being paid, unlike payment by banker's cheque, for instance.

The OECD draft Recommendation demolishes this key principle of the French bank-card system, since it paves the way for an increase in the number of chargebacks.

This system is now operating smoothly—it is no longer contested by merchants now that commission rates have been lowered, and the banks are breaking even on it—and it has substantially boosted the use of smart cards in France, which is now the market leader.

This gives our country a particularly strong industrial advantage, in a world where the development of smart cards is now inevitable. The fact that payments can now be made over the Internet, where smart cards could play a key role, raises the industrial stakes even higher. It is in this climate of competition that the OECD draft Recommendation, were it to be adopted as it stands, could upset the economic equilibrium of the French bank-card system.

That being so, the Ministry of Economic Affairs, Finance and Industry cannot but oppose most strenuously the adoption of this draft Recommendation, which does nothing to improve consumer protection and in fact directly harms our industrial interests.

The representative for France may, if necessary, use the attached terms of reference to justify France's opposition or, at the very least, its abstention with regard to the draft Recommendation.

The ministerial departments concerned will, over the coming weeks, be forwarding a draft note to the Secretary-General of the OECD, together with proposed amendments.

Annex

Terms of reference

1. The draft Recommendation is no improvement on consumer protection in countries, like France, with their own consumer legislation on distance sales.

French legislation gives consumers a general right to redress with regard to distance sales.

This legislation is not subject to the conditions mentioned in the draft Recommendation, in particular the fact that the card issuer may:

- set a minimum threshold amount for chargebacks;
- establish a time limit for the submission of chargeback claims;
- determine the legitimacy of consumer claims.

The Recommendation, which places the card issuer at the centre of contractual relations, thus confers excessive responsibilities and powers on the issuer, particularly in a system where the standard contract prevails.

2. The Recommendation is detrimental to the introduction of a highly secure card-payment system.

Such a system is essentially based, in technical terms, on the development of the smart card and, in legal terms, on the guarantee of payment irrevocability.

Furthermore, the principle of guaranteed payment contributes towards the introduction of a financing method covering the development of a very high level of security, such as that found in France.

Calling this into question might therefore upset the balance of highly secure bank-card systems that give full satisfaction both to consumers (who see them as a simple, inexpensive means of payment that is compatible with good consumer protection) and merchants (for whom they are a highly secure mode of payment).

From that standpoint, France cannot but regret that the draft Recommendation confuses consumer protection (particularly with regard to contractual relations between merchant and consumer) and payment security.

3. France may, however, decide to endorse the goals pursued in this draft Recommendation on certain conditions.

France acknowledges that the goals are beneficial, provided that they do not ultimately challenge the economic equilibrium of highly secure bank-card systems.

It would like to see a clearer distinction between consumer protection and payment security which are two different but worthwhile goals when it comes to developing international distance transactions, in particular via electronic commerce.

It could probably endorse a draft Recommendation that offers scope to maintain card systems guaranteeing payment irrevocability, an indispensable condition for the introduction of genuinely secure payment systems.

To that end, France will be submitting proposals to the Committee Secretariat during the coming weeks.

Informal Comments Submitted by the United States

The following are some examples of the US concerns with the current text:

1. The Principles would require a major change in US law by extending the concept of chargebacks beyond credit cards to make it applicable to debit cards as well. Current US law and financial practice treat the use of debit cards in a manner similar to checks and do not confer the same rights upon consumers using debit cards as those using credit cards. For example, if debit cards conferred dispute rights, as is the suggested approach in the draft Recommendation (DSTI/CP(98)11), the cost structure of the debit card industry in the US would have to be significantly altered.
2. Footnote 1 on page six of the draft Recommendation excludes the SmartCard system from coverage on the grounds that it does not have the same record-keeping capabilities. This conclusion should be further investigated as it may be possible to construct an audit trail for some such cards.
3. Principle 2 of the Recommendation places the initial burden on the consumer to attempt to resolve disputes with merchants. This requirement may highly burdensome on consumers; particularly in the context of international transactions where contacting merchants in other countries and time zones may be difficult, expensive, and further compounded by language differences.
4. Principle 4 discusses “card issuer” liability for consumer billing disputes. In the United States, the card issuer may not always be liable, depending on certain separate agreements the merchant may be liable. What the law does make clear is when the consumer is not liable.
5. The Principles provide for the possibility of minimum levels of chargebacks. This concept is not currently found in US law and could be troubling. For example, it could result in widespread fraud for goods that fall just short of the minimum amount. In addition, the potential for such minimum level protections for consumers could be problematic with the growth of consumer transactions over the Internet where an increasing number of purchases could involve small dollar or even micro transaction amounts.
6. As a general matter, in the United States, questions concerning the contractual obligations of buyers and sellers of goods, as opposed to merely the economic payment system involved in a transaction, are subject to state (not Federal) laws. To the extent the chargeback documents purport to alter American principles of contract law, they may require review from individual state legal authorities.