

## COMMISSION RECOMMENDATION

of 17 November 1988

concerning payment systems, and in particular the relationship between card-holder and card issuer

(88/590/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular the second indent of Article 155 thereof,

Whereas one of the main objectives of the Community is to complete not later than 1992 the internal market, of which payment systems are essential parts;

Whereas paragraph 18 of the Annex to the Council resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy<sup>(1)</sup>, indicated that the protection of the economic interests of consumers should be based on the following principles<sup>(2)</sup>: (i) that purchasers of goods and services should be protected against standard contracts, and in particular against the exclusion of essential rights in contracts, (ii) that the consumer should be protected against damage to his economic interests caused by unsatisfactory services, and (iii) that the presentation and promotion of goods and services, including financial services, should not be designed to mislead, either directly or indirectly, the person to whom they are offered or by whom they have been requested; whereas paragraph 24 in the Annex to the said preliminary programme specified that the protection of the consumer against unfair commercial practices, *inter alia*, as regards terms of contracts, is to be given priority treatment in implementing that programme;

Whereas the Commission's White Paper on 'Completing the Internal Market'<sup>(3)</sup>, communicated to the Council in June 1985, referred in paragraph 121 to new technologies which will transform the European marketing and distribution system and engender a need for adequate consumer protection, and further referred in paragraph 122 to electronic banking, payment cards and videotex;

Whereas the Commission's policy document entitled 'A New Impetus for Consumer Protection Policy', communicated to the Council in July 1985<sup>(4)</sup> which was the subject of a Council resolution adopted on 23 June 1986<sup>(5)</sup> referred in paragraph 34 to electronic fund transfer and announced in the timetable contained in the

Annex thereto a proposal for a directive on that matter, for adoption by the Council in 1989; whereas it is appropriate to accelerate financial consumer protection in the field of payment systems and certain other services available to consumers; whereas the forms of financial service, including financial self-service, and the means of purchasing goods and services which are now in use in market places in Member States (some of them even in the homes of consumers) are furnished upon divergent terms of contract and of consumer protection from one Member State to another;

Whereas there has been much change in recent years in the types of financial service available to and used by consumers, particularly as regards payment methods and as regards the purchasing of goods and services; whereas new forms thereof have emerged and are continuing to develop;

Whereas the various terms of contract currently used in this field in Member States are not only divergent from one to another (and indeed within any one Member State) but also in some cases disadvantageous to the consumer; whereas more effective protection of consumers can be achieved by the use of common terms which are to apply to all these forms of financial service;

Whereas the consumer should receive adequate information concerning the terms of contract, including the fees and other costs, if any, payable by the consumer for these services, and concerning his rights and obligations under the contract; whereas this information should include an unequivocal statement of the extent of the consumer's obligations as holder (hereinafter called 'contracting holder') of a card or other device enabling him to make payments in favour of third persons, as well as to perform certain financial services for himself;

Whereas the protection of the consumer as a contracting holder is further improved if such contracts are made in writing and contain certain minimum particulars concerning the contractual terms, including an indication of the period within which his operations will normally be credited, debited or invoiced;

Whereas no payment device, whether in the form of a plastic card or otherwise, should be dispatched to a member of the public except in response to an application from such person; whereas the contract concluded between that person and the issuer of the payment device should not be binding before the applicant has received the device and also knows the applicable terms of contract;

<sup>(1)</sup> OJ No C 92, 25. 4. 1975, p. 1.

<sup>(2)</sup> Confirmed in paragraph 28 of the second programme (OJ No C 133, 3. 6. 1981, p. 1).

<sup>(3)</sup> COM(85) 310 final, 14. 6. 1985.

<sup>(4)</sup> COM(85) 314 final, 27. 6. 1985.

<sup>(5)</sup> OJ No C 167, 5. 7. 1986, p. 1.

Whereas, given the nature of the technology currently used in the field of payment devices, including both the manufacture and use of them, it is essential that operations effected by means of them should be the subject of records in order that operations can be traced and errors can be rectified; whereas the contracting holder has no means of access to those records, and consequently the burden of proof to show that an operation was accurately recorded and entered into the accounts and was not affected by technical breakdown or other deficiency should lie upon the person who under a contract furnishes the payment device to him, namely the issuer;

Whereas payment instructions communicated electronically by a contracting holder should be irrevocable, so that a payment made thereby shall not be reversed; whereas the contracting holder should be supplied with a record of the operations he effects by means of a payment device;

Whereas common rules need to be specified concerning the issuer's liability for non-execution or for defective execution of a contracting holder's payment instructions and allied operations, and for transactions which have not been authorized by the contracting holder, subject always to the contracting holder's own obligations in the case of lost, stolen or copied payment devices;

Whereas common terms of contract need also to be specified concerning the consequences to the contracting holder if he loses his payment device or it is stolen from him or copied;

Whereas for the purpose of ensuring that electronic payment networks can function and payment devices be

used internationally, it is necessary that certain minimum data relating to a contracting holder can be transmitted across frontiers, but subject to certain conditions;

Whereas the Commission will monitor the implementation of this recommendation, and if, after 12 months, it finds the implementation unsatisfactory, the Commission will take appropriate measures,

#### RECOMMENDS:

That not later than 12 months after the date hereof:

1. issuers of payment devices and system providers conduct their activities in accordance with the provisions contained in the Annex hereto;
2. Member States ensure, in order to facilitate the operations referred to in the Annex, that data relating to contracting holders may be transmitted, but that the data transmitted shall be kept:
  - to the requisite minimum, and
  - confidential by all persons to whose knowledge they are brought in the course of such operations.

Done at Brussels, 17 November 1988.

*For the Commission*

Grigoris VARFIS

*Member of the Commission*

## ANNEX

1. This Annex applies to the following operations :
  - electronic payment involving the use of a card, in particular at point of sale,
  - the withdrawing of banknotes, the depositing of banknotes and cheques, and connected operations, at electronic devices such as cash dispensing machines and automated teller machines,
  - non-electronic payment by card, including processes for which a signature is required and a voucher is produced, but not including cards whose sole function is to guarantee payment made by cheque,
  - electronic payment effected by a member of the public without the use of a card, such as home banking.
2. For the purposes of this Annex the following definitions apply :

'Payment device' : a card or some other means enabling its user to effect operations of the kind specified in paragraph 1.

'Issuer' : a person who, in the course of his business, makes available to a member of the public a payment device pursuant to a contract concluded with him.

'System provider' : a person who makes available a financial product under a specific trade name, and usually with a network, thus enabling payment devices to be used for the operations aforesaid.

'Contracting holder' : a person who, pursuant to a contract concluded between him and an issuer, holds a payment device.

'Company-specific card' : a card issued by a retailer to his client, or by a group of retailers to their clients, in order to allow or facilitate, without giving access to a bank account, payment for purchases of goods or services exclusively from the issuing retailer or retailers, or from retailers who under contract accept the card.
- 3.1. Each issuer shall draw up full and fair terms of contract, in writing, to govern the issuing and use of the payment devices he issues.
- 3.2. Those terms of contract shall be expressed :
  - in easily understandable words and in so clear a form that they are easy to read,
  - in the language or languages which are ordinarily used for such or similar purposes in the regions where the terms of contract are offered.
- 3.3. The terms of contract shall specify the basis of calculation of the amount of the charges (including interest), if any, which the contracting holder must pay to the issuer.
- 3.4. The terms of contract shall specify :
  - whether the debiting or crediting of operations will be instantaneous and, if not, the period of time within which this will be done,
  - for those operations which lead to invoicing of the contracting cardholder, the period of time within which this will be done ;
- 3.5. The terms of contract shall not be altered except by agreement between the parties ; however, such agreement shall be deemed to exist where the issuer proposes an amendment to the contract terms and the contracting holder, having received notice thereof, continues to make use of the payment device.
- 4.1. The terms of contract shall put the contracting holder under obligation *vis-à-vis* the issuer :
  - (a) to take all reasonable steps to keep safe the payment device and the means (such as a personal identification number or code) which enable it to be used ;
  - (b) to notify the issuer or a central agency without undue delay after becoming aware :
    - of the loss or theft or copying of the payment device or of the means which enable it to be used ;
    - of the recording on the contracting holder's account of any unauthorized transaction ;
    - of any error or other irregularity in the maintaining of that account by the issuer.
  - (c) not to record on the payment device the contracting holder's personal identification number or code, if any, nor to record those things on anything which he usually keeps or carries with the payment device, particularly if they are likely to be lost or stolen or copied together ;
  - (d) not to countermand an order which he has given by means of his payment device.

- 4.2. The terms of contract shall state that provided the contracting holder complies with the obligations imposed upon him pursuant to subparagraphs (a), (b) first indent, and (c) of paragraph 4.1, and otherwise does not act with extreme negligence, or fraudulently, in the circumstances in which he uses his payment device he shall not, after notification, be liable for damage arising from such use.
  - 4.3. The terms of contract shall put the issuer under obligation *vis-à-vis* the contracting holder not to disclose the contracting holder's personal identification number or code or similar confidential data, if any, except to the contracting holder himself.
  5. No payment device shall be dispatched to a member of the public except in response to an application from such person; and the contract between the issuer and the contracting holder shall be regarded as having been concluded at the time when the applicant receives the payment device and a copy of the terms of contract accepted by him.
  - 6.1. In relation to the operations referred to in paragraph 1, issuers shall keep, or cause to be kept, internal records which are sufficiently substantial to enable operations to be traced and errors to be rectified. To this end, issuers shall make the requisite arrangements with the system providers, as necessary;
  - 6.2. In any dispute with a contracting holder concerning an operation referred to in the first, second and fourth indents of paragraph 1 and relating to liability for an unauthorized electronic fund transfer, the burden of proof shall be upon the issuer to show that the operation was accurately recorded and accurately entered into accounts and was not affected by technical breakdown or other deficiency.
  - 6.3. The contracting holder, if he so requests, shall be supplied with a record of each of his operations, instantaneously or shortly after he has completed it; however in the case of payment at point of sale the till receipt supplied by the retailer at the time of purchase and containing the references to the payment device shall satisfy the requirements of this provision.
  - 7.1. *Vis-à-vis* a contracting holder the issuer shall be liable, subject to paragraphs 4 and 8 :
    - for the non-execution or defective execution of the contracting holder's operations as referred to in paragraph 1, even if an operation is initiated at electronic devices which are not under the issuer's direct or exclusive control,
    - for operations not authorized by the contracting holder.
  - 7.2. Save as stated in paragraph 7.3 the liability indicated in the paragraph 7.1 shall be limited as follows :
    - in the case of non-execution or defective execution of an operation, the amount of the liability shall be limited to the amount of the unexecuted or defectively executed operation,
    - in the case of an unauthorized operation, the amount of the liability shall extend to the sum required to restore the contracting holder to the position he was in before the unauthorized operation took place.
  - 7.3. Any further financial consequences, and, in particular, questions concerning the extent of the damage for which compensation is to be paid, shall be governed by the law applicable to the contract concluded between the issuer and the contracting holder.
  - 8.1. Each issuer shall provide means whereby his customers may at any time of the day or night notify the loss, theft or copying of their payment devices; but in the case of company-specific cards these means of notification need only be made available during the issuer's hours of business;
  - 8.2. Once the contracting holder has notified the issuer or a central agency, as required by paragraph 4.1 (b), the contracting holder shall not thereafter be liable; but this provision shall not apply if the contracting holder acted with extreme negligence or fraudulently.
  - 8.3. The contracting holder shall bear the loss sustained, up to the time of notification, in consequence of the loss, theft or copying of the payment device, but only up to the equivalent of 150 ecus for each event, except where he acted with extreme negligence or fraudulently.
  - 8.4. The issuer, upon receipt of notification, shall be under obligation, even if the contracting holder acted with extreme negligence or fraudulently, to take all action open to him to stop any further use of the payment device.
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