

TRANSATLANTIC CONSUMER DIALOGUE

BRUSSELS MEETING, 2-4 MAY 2001

**TACD RESOLUTIONS ON
TRADE AND ELECTRONIC COMMERCE**

AND

EUROPEAN COMMISSION SERVICES' RESPONSES

TACD RESOLUTION ON GLOBAL ACCESS TO HEALTH CARE

- 1. The United States and the European Union have both undertaken serious and constructive reviews of trade policy as it relates to access to medicines, and these reviews have produced many important and beneficial changes in trade policy, as well as increased attention to problems of access to medicines, and the need to enhance research and development on important public health concerns.**
- 2. The United States and the European Union and its member countries should enter into agreements with the World Health Organization, UNAIDS, UNICEF and other global public health organizations, to enable these organizations to use patents that were developed with public support, to expand access to health care in poor countries.**
- 3. The US and the EU should communicate to the WTO TRIPS council that they will support policies to ensure that compulsory licensing of medicines will also benefit small market countries. Specifically, that mechanisms to enable production of medicines for export markets will be supported where such exports benefit public health and where the legitimate rights of patent owners are protected in the markets where the products are used.**
- 4. The US and the EU should communicate to the WTO TRIPS Council that they support an exemption from the TRIPS obligation to provide patents on medicines for the least developed countries, as is permitted under the TRIPS agreement.**
- 5. The US and the EU should ask the World Health Organization to report on the capacity of poor countries to evaluate patent claims on medical inventions, the costs of doing so, the costs of patent litigation in poor countries, and the policy implications of the capacity of poor countries to examine and litigate patent claims.**
- 6. The US and the EU should support the NGO call for a global convention on supporting Research and Development (R&D), including support for AIDS and malaria vaccines, low cost diagnostic technologies and other appropriate technologies, new drugs for tuberculosis, malaria and other neglected diseases, as well as other global R&D efforts, such as basic research, development of drugs for severe illnesses, and other research that benefits public health. Such a convention should include agreements to provide public funding for such research and development, as is appropriate given the immense suffering and economic costs of these diseases. Also, the inventions from such funding should be licensed in a manner consistent with the greatest global public health benefit.**
- 7. The US and the EU should ask WIPO, WHO and the WTO to propose alternative methods of burden sharing for R&D for poor countries that cannot effectively manage a European and US patent system.**
- 8. The US and the EU should ask the G7 countries to support sufficient levels of donor support for health care needs in poor countries, and that this donor support not be tied to country policies on patents or other intellectual property concerns.**

9. In expanding access to medicine, the U.S. and the EU should avoid patent extensions, corporate subsidies and other donor programs that have anticompetitive consequences, lack transparency, and are not economically efficient.

10. The US and the EU should support true technology transfer policies with the developing countries, and not undermine national efforts to develop domestic pharmaceutical and biotechnology industries.

11. The US should withdraw its WTO action against Brazil on the Brazil compulsory licensing legislation. If the US wants to test local working issues in the context of the TRIPS it should address this issue in disputes with OECD member countries that have such provisions in their own national laws.

12. The US and the EU should not insist that countries adopt protections under Article 39.3 of the TRIPS that would be anticompetitive or undermine compulsory licensing.

13. The US and the EU should report to the TACD on the efforts that are being undertaken to improve the quality of generic drugs in poor countries.

EUROPEAN COMMISSION SERVICES' RESPONSE

- Lack of affordable and appropriate pharmaceuticals is a serious problem in many developing countries especially for the poorest. To increase access to health and medicines is a complex matter that needs to be addressed in a broad context.
- The EC and its Member States in conformity with Article 35 of the Charter of Fundamental Rights recognise that more efforts should be put into increasing access to health, medicines and vaccines. This work should include efforts to ensure affordable prices of essential pharmaceutical products and to support development of new medicines and vaccines through innovative approaches and partnerships. Effective solutions require international co-operation and the participation of both public and private sectors in developed and developing countries.
- The EC and its Member States call for a broader application of effective global tiered pricing on all essential medicines needed for the benefit of the poorest countries. This requires close cooperation with all interested parties, including the pharmaceutical industry and governments of the developing countries, international organisations as well as the support of developed countries. It should be ensured that the lowest possible prices are offered to the poorest countries as a rule.
- The EC and its Member States also underline the importance of intellectual property protection rights in promoting and securing investments in research and development of new medicines and vaccines. It is clear, however, that for diseases, such as malaria, which are prevalent in developing and the least developed countries where the purchasing power is too low to achieve the economy of scale necessary to break even, IPR protection alone is insufficient to encourage such research and development and that additional incentives and arrangements have to be provided.

- The EC and its Member States believe that the TRIPs Agreement provides the WTO Members with substantial discretion to address national health concerns and policies. However, discussions between WTO Members are currently taking place at the TRIPs Council at the initiative of the Africa Group to examine the relation between the TRIPs Agreement and access to medicines. The EC and its Member States are committed to the discussions with a view to reaching a consensus on the most important issues that have already been tabled at the TRIPs Council.
- The EC and its Member States are not of the opinion that the implementation periods set out in the TRIPs Agreement for developing and least developed countries are in need of interpretation. They are sufficiently clear. As for the Least Developed Countries the general deadline set at 2006 could be extended upon specific request from a member country.
- In this context, the EC and its Member States are ready also to look to what extent technical assistance can take into account health concerns and expresses its willingness to increase significantly the financial support for research and development in neglected diseases.
- In the opinion of the EC and its Member States, much could be done to improve capacity building and human resources development in developing countries in the context of intellectual property. Co-operation between national governments and international organisations needs to be improved. Assessment and patent systems, evaluation of the costs involved in the policy implications and of the capacity of poor countries to examine and litigate patent claims could be carried out under programmes of technical assistance.
- The EC and its Member States support initiatives on strengthening research and development of new medicines and vaccines. Whether or not there is need for an international convention will have to be evaluated. What is clear, however, is that more resources, including private funding, will have to be allocated to this area of activities to increase results on new medicines against TB, malaria, diarrhoea and other such neglected but serious diseases, as well as HIV/AIDS.
- Each WTO Member has to ensure that a minimum set of intellectual property protection provisions as set forth in the TRIPs Agreement are in effect in its jurisdiction within the stipulated implementation periods. The EC and its Member States are not requesting developing countries to implement higher levels of protection than set out in the TRIPs Agreement.
- The EC welcomes the creation of a global health fund as an additional mechanism to channel support to the people and countries most in need and is actively engaged in preparatory discussions on the creation of the Fund, and in particular to ensure that it will operate in accordance with EC policies and activities already in place. The EC has called for initial extensive consultations with all stakeholders and especially with the beneficiary countries. The EC believes that the Fund's efforts should be seen as additional to ongoing, and future, investment in improving health systems. An effective Fund must deliver greater resources faster, through simpler co-ordinated mechanisms, with reduced transaction costs for both donors and beneficiaries. Resources should be linked to the achievement of defined health outcomes. The EC will spare no effort to bring this about in partnership with the global community.

- The EC and its Member States have adopted decisions to untie all aid support with regard to pharmaceutical products to strengthen competition and reduce prices. Other donors should be encouraged to do the same.
- The EC and its Member States agree with the TACD that competition should be increased as far as possible in the sector of medicines. Transfer of technology and local production of essential medicines is one way to do so on long term basis. To ensure high standards and efficient control of already existing production facilities is another field where additional support will need to be provided. To harmonize and facilitate national registration procedures seems to be yet another field that will have to be looked into to encourage fair competition.

TACD RESOLUTION ON TRADE IN SERVICES

- 1. The right of governments to provide and regulate basic services in the consumer interest should be broadly asserted in a new article included in the body of the agreement.**
- 2. The right of governments to provide access to basic services must be recognised in the agreement. The right of governments to assure the provision of critical services - health, education, telecommunications, water and energy utilities - should be protected by revising the governmental exemption in the agreement to make it self-defining. The rights of governments to provide universal access and affordability should be assured.**
- 3. The imposition through the GATS of “necessity tests” or requirements to only implement measures that are “the least trade restrictive” should be rejected. Existing WTO regulatory disciplines are sufficient. The EU principle of proportionality may not be appropriate in the WTO context.**
- 4. The GATS articles on market access and national treatment should be amended to clearly state that they do not apply to non-discriminatory domestic regulations.**
- 5. Key GATS documents should be made public. Consumer groups and other civil society groups need to be consulted on a regular basis on the GATS, particularly in regards to the negotiations on domestic regulation and professional standards.**
- 6. The “bottom up” architecture of the GATS should be maintained and the needs of developing countries should be given special consideration in the negotiations. For example, the US and EU should provide funding for capacity building.**
- 7. US and EU governments should support a full, complete and independent assessment of the impacts of the current GATS regime and the implications of the proposed GATS 2000 rules on domestic social, environmental and economic laws, policies and programs drawing on the expertise of citizens groups in member countries.**

EUROPEAN COMMISSION SERVICES’ RESPONSE

- 1. No assertion of this kind is required. The General Agreement on Trade in Services (GATS) already recognises explicitly the “right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives”. The GATS does not oblige any Member to deregulate nor to privatise any services activities. These fundamental rules are recognised in various parts of the Agreement. They have also been confirmed by WTO members in the Negotiating Guidelines that were unanimously adopted by the WTO Council for Trade in Services on 28 March 2001.**
- 2. The GATS does not prevent WTO Members from providing access to basic services, in particular in sectors like health, education or culture. It guarantees the right of Members to regulate services markets and to pursue domestic policy objectives, including the right to define universal service obligations. It does not force Members to open any**

particular service sector to foreign competition nor to privatise any service activity. The GATS also does not prevent Members from subsidising public services. Where Members are prepared to negotiate commitments on market access and national treatment, they can apply appropriate limitations and conditions. In fact, many have done so in the past.

The EU, like others, will continue using its right to regulate services markets and to pursue domestic policy objectives as appropriate. Following the decision of the European Council of November 1999, the EU will also preserve its capacity to maintain and develop its cultural and audio-visual policies with a view to preserving cultural diversity.

The EU's policy for public services, as it is reflected in the 1996 and 2000 Communications on Services of General Interest and confirmed in the recent Commission report on Services of General Interest for the Laeken European Council, is to ensure public services that are economically affordable, of good quality and available to the entire population. This is also reflected in the Article 36 of the Charter of Fundamental Rights.

3. The GATS mandates work to develop any necessary multilateral disciplines with a view to ensuring that government measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services.

Ongoing WTO work on the “necessity” of domestic regulation does not concern services regulation in general, but only the regulation areas mentioned above. In that respect, the objective is to develop ways and means to ensure that commitments made are not undermined by licensing and qualification requirements or technical standards. In this context, the term “necessity” may not be the most appropriate as it has given rise to misunderstandings. Indeed, it is not questioned whether a measure is necessary or not, but whether the measure is proportionate to the objective it is supposed to achieve. The validity of the policy objective is not under question. This should remain under the sovereign decision of governments. The EU has no intention to establish rules in the GATS that “all domestic regulation has to be the least restrictive to trade.”

4. The GATS does not impose on any Member an obligation to grant market access (Article XVI) or national treatment (Article XVII) in a particular sector. The granting of both is a negotiated commitment undertaken voluntarily by individual Members in specific sectors. Moreover, Members are entitled to make the granting of market access and national treatment subject to limitations, conditions and qualifications as foreseen in the GATS. Members are thus free to tailor the extent of the commitments they wish to take so as to avoid commitments that they consider too demanding.

In any services sector which a Member includes in its schedule of specific commitments, a Member is obliged to grant foreign services and service suppliers treatment no less favourable than that extended to its own like services and service suppliers. The key requirement is to abstain from measures which are liable to modify, in law or in fact, the conditions of competition in favour of a Member's own service industry.

However, this does not jeopardise Members' ability to regulate services in the interest of consumer protection, e.g. in the area of building regulations.

5. The WTO makes publicly available the records of all meetings, the texts of all decisions and the proposals made by governments. They are posted on the WTO website (<http://www.wto.org>). This documentation includes all negotiating proposals made by the EU, Japan, the US and others, including proposals and communications on domestic regulation, technical standards etc.

The European Commission, for its part, maintains a continuous dialogue and provides comprehensive information on GATS negotiations to representatives of civil society. The Commission's "DG Trade Website" (<http://www.trade.cec.eu.int/intra/index.htm>) is providing its visitors with basic, concise and direct information on trade developments and negotiation issues. Moreover, the Commission has established an intensive Civil Society Dialogue, through its electronic Service Information System and a special Issue Group on GATS. This dialogue aims at discussing civil society's views on trade issues and assessing how they can be taken into account in the EU's policy-making. In fact, the level of detail of the public debate shows just how much public information is available.

Moreover, the European Commission fully supports the current debate on WTO reform with a view to make WTO work more transparent and accountable, including the establishment of a parliamentary dimension. The Commission's ideas in this respect follow four main lines:

- Improve the WTO decision-making system by enhancing and clarifying the role of informal consultations;
- Foster the flow of information and participation by all Members, in particular of those developing countries that have no resident representatives in Geneva,
- Improve the functioning of Ministerial meetings and of the General Council;
- Enhance external transparency.

The goal is to ensure immediate derestriction of most WTO documents, facilitate the dialogue with civil society and to hold an annual WTO open meeting.

The European Commission also seeks greater involvement of national Parliaments, which could meet alongside the annual open meeting, and which should at time lead to the establishment of a WTO Parliamentary Consultative Assembly.

6. In the Negotiating Guidelines adopted by the WTO Council for Trade in Services in March 2001, WTO Members have decided that the services negotiations shall take place within and shall respect the existing structure and principles of the GATS, including the right to specify sectors in which commitments will be undertaken and the four modes of supply. One of the EU's main negotiating objectives is to make progressive liberalisation of trade in services not only consistent with, but also supportive of, sustainable development. The GATS is particularly relevant to development, because it provides a key opportunity for all countries to attract stable long-term investment and to improve the related infrastructure (e.g. transport,

telecommunications, financial services), fostering long-term growth. These objectives have also been endorsed in the Negotiating Guidelines.

Many developing countries are indeed facing problems with regard to participating in the ongoing negotiations under GATS. This problem needs to be addressed.

Technical assistance programmes in services are one avenue through which know-how and technological capabilities can be transferred to developing countries. In the Negotiating Guidelines, WTO Members have confirmed that, in accordance with Article XXV of the GATS, technical assistance shall be provided to developing country Members, on request, in order to carry out national/regional assessments.

The commitments of the EC and the Member States to provide technical assistance in trade-related areas are widely recognised. A large component of actions financed by the EC and its Member States are devoted to capacity-building in sectors conducive to better conditions for trade development. Specific technical assistance programmes have been established in a number of WTO related areas, including services. Part of this assistance has been channelled through WTO trust funds in favour of developing countries. Other donors and international organisations are also involved in trade related technical assistance. There is therefore a clear need to explore ways to enhance the co-ordination of the various actors and programmes in order to maximise their efficiency, avoid duplications and overlappings, and enhance the benefits for developing countries.

7. WTO Members have agreed that the Council for Trade in Services in Special Session shall continue to carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of the GATS and of Article IV (increasing participation of developing countries) in particular. This shall be an ongoing activity of the Council, and negotiations shall be adjusted in the light of the assessment.

The European Commission currently prepares for assessing the potential sustainability impact of trade liberalisation in different areas, including services. The potential environmental, social and developmental impact of further liberalisation in sectors such as transport services, tourism services, distribution or energy-related services will require particular attention in such an assessment, but it should not be restricted to it. For instance, the liberalisation of trade in environmental services can play a crucial role in spreading the use of state-of-the art environmental technology. Similarly, engineering services, modern transport infrastructure, and others can all contribute to sustainable development.

TACD RESOLUTION ON UNSOLICITED COMMERCIAL EMAIL

TACD calls upon the US government and the European Commission to develop rules to ensure that commercial electronic communications can only be sent out with prior affirmative consent of the consumer addressed.

EUROPEAN COMMISSION SERVICES' RESPONSE

In July 2000, the Commission has proposed a harmonised opt-in approach to unsolicited commercial e-mail throughout the EU. The proposal is currently being discussed by the European Parliament and the Council. Within these two institutions it proves to be difficult to find agreement on the right policy approach. Nevertheless, the Commission still hopes that a generally acceptable solution can be found on the basis of an opt-in before the end of 2001.

TACD RESOLUTION ON THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGEMENTS IN CIVIL AND COMMERCIAL MATTERS

The proposed Hague Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters should promote and protect the consumer interest in access to justice. Specifically:

- 1. Consumers who transact from their home jurisdictions should not be denied the right to litigate disputes regarding those transactions in the courts of their home jurisdictions.**
- 2. Claims by businesses against consumers should always be brought in the courts of the consumers' home jurisdiction.**
- 3. There should be no "prior resort" conditions (e.g., prior resort to ADR) for the application of jurisdiction in the case of consumer contracts.**
- 4. Non-negotiable choice of forum clauses in standard form contracts should never be enforced against consumers.**
- 5. Consumers should be able to have local judgements against foreign businesses easily recognized and enforced in foreign jurisdictions.**
- 6. Intellectual property should be excluded from the Convention.**

EUROPEAN COMMISSION SERVICES' RESPONSE

1. The Commission has made and will make all efforts to include in a Hague Convention specific rules on consumer disputes that ensure adequate protection of consumers. The Commission would favour provisions governing jurisdiction over consumer contracts as similar as possible to those Chapter II, Section 4 of Council Regulation (EC) No 44/2001 ("Brussels I") that satisfy all the requirements as spelled out in points 1 to 5 of the TACD resolution.

In any case, once a consolidated draft text is on the table, it will have to be thoroughly assessed if the impact of a Hague Convention in general and on consumers in particular is be positive enough to make it worthwhile to accede to it. In order to do so, the Commission considers essential to gather the views of civil society in Europe. To that end, a wide public consultation was held in October 2001 on the results of the June meeting of the Hague Conference that will allow all interested parties to express their positions on the options considered in the negotiations and the Commission is at present receiving answers in writing to a questionnaire posted on its website.

2. The Hague Convention will have to contain appropriate rules on jurisdiction, recognition and enforcement to provide legal certainty on jurisdiction and reduce the danger of undesired forum shopping for all disputes and notably those concerning IPRs. Furthermore, it will have to provide appropriate safeguards to secure the procedural rights of all parties involved. The chance to achieve a Convention providing these general advantages and safeguards justifies not only further negotiations on the Convention in general, but also a

constructive but cautious approach with regard to the inclusion of judgements in intellectual property matters under its scope.

Whereas the current draft text which forms the basis for negotiations is centred on the European Brussels Convention, which includes IPR disputes without any major problems in practice so far, the Commission is well aware that solutions found and working well at European level might have different results if applied at the international level. Thus, all necessary safeguards have to be considered carefully and take into account all interests (including those of consumers) involved. As regards intellectual property rights, consideration needs to be given to their special features so as to ensure that any appropriate safeguards are put in place if they are to be included in the Convention.

TACD RESOLUTION ON PAYMENT CARD REDRESS AND PROTECTIONS

INTRODUCTORY COMMENTS FROM THE EUROPEAN COMMISSION SERVICES

The Commission services share TACD's analysis according to which consumer confidence in making on-line purchases depends partly on the limits of the consumer's liability and of the refunding procedures in the event of problem. This is why in its Communication on e-commerce and financial services, the Commission proposes to look at the legislative assurances that European consumers receive when paying on-line. Legislative backing is needed for a refund system that establishes rights for consumers in the event of payment problems or non-delivery of services.

There needs to be greater transparency about cardholder protection rules that currently exist. Similar protection should be developed for emerging payment methods. The same protection should exist when paying cross-border within the European Union as when paying nationally.

The legal refund framework will cover the situations in which the issuer of the payment instrument intervenes to refund the consumer. Indeed, refunding is closely tied to the payment instrument used and cannot be dissociated from the rules governing the latter. The Community text which will govern refund will therefore be distinct from the Directive 97/7 of the European Parliament and the Council of 20 May 1997 on the protection of consumers in respect of distance contracts which defines, inter alia, the merchants obligations.

Before answering point by point the proposals of the TACD, it is worth highlighting some existing differences between the American card system and the European system.

European culture is more a « debit » than a « credit » culture, this is why we will speak of “payment cards” rather than “credit cards”. Payment cards are issued in Europe mainly by financial institutions primarily for domestic purposes. European payment cards use the major “credit card” scheme brands to make cross-border transactions (payments or withdrawals).

Though carrying « credit » brands, they can be « charge cards » or « debit cards ». The future European legal framework for refund will apply to all payment cards without reference to the fact that they are linked to a credit account or to a bank account. We will use the concept of «card issuer» which better corresponds to this context, instead of «card company ».

The American consumer certainly recognises the word « chargeback » the technical term used by the international card schemes. But the European consumer does not know it. This is why we will use the word « refund » instead of « chargeback ». There are indeed numerous cases in Europe where the payment card issuers refund the cardholders without using the technical systems of « chargeback », in particular if the amount of the transaction is lower than the cost of the procedure.

RESOLVED:

The European Union and the United States should strengthen and harmonize payment card consumer protection to improve consumer confidence in cross-border electronic commerce, to engage the influential card companies in improving the security and reliability of payment mechanisms online, and to use payment card protections to redress online disputes.

1. **Payment card protections should be a matter of law or regulation to provide legal certainty and consistent minimum rights for all consumers.**
2. **The EU and the US should work with the OECD to adopt Guidelines for Payment Card protections to guide countries of the world in establishing baseline legal protections and redress rights for consumers.**
3. **Payment card redress protections should be comprehensive and provide for liability limits for unauthorized use, correction of billing errors, recourse for late delivery or non-delivery of goods and services, and a framework for asserting claims and defenses when purchases are unsatisfactory.**
4. **Payment card protections should be consistent across card types, including credit cards, debit cards, stored value cards and other forms of electronic payment. Inconsistent laws should be harmonized upward; for example, the US \$50 liability limit on credit cards should apply to debit cards. Chargeback regulations should protect consumers in both domestic and cross-border transactions.**
5. **The US and the EU should require payment card companies to conspicuously disclose to consumers their rights and the procedures to be used in disputing any payment card transaction. Notices to consumers should be required when cards are issued, on monthly statements and annually in a form consumers can keep, and should be posted on company web sites.**
6. **The US and the EU should collect information from banks, card companies, merchants and consumers about the use of payment card redress protections with e-commerce disputes to determine whether current law and/or industry practice is effective; to gauge whether consumers are well informed about their rights and the methods to dispute transactions; and to identify security and risk-reduction steps needed to protect all parties to the payment system in e-commerce.**

EUROPEAN COMMISSION SERVICES' RESPONSE

1. The Commission supports this approach and will soon propose a legislative framework for refund by the payment instrument issuers for purchases carried out remotely in the event of problem.
2. The Commission supports this approach. The electronic commerce issue is global just as the use of the majority of payment cards.
3. The Commission can generally endorse this recommendation but 2 situations must be considered:
 - 1) The situation in which the payment order was not given by the legitimate holder of the payment instrument. This is **the alleged fraud** of which the holder is informed only when reading his statement. This fraud occurs when the data of the instrument or the instrument itself was used without knowledge of the legitimate holder or in case of billing errors.

2) The case of **distance selling**. The holder of the instrument gave the payment order, but something wrong happened with the ordered goods or services.

With regard to the different cases enumerated in the text, there are already rules in place at the level of the European Union.

- a) **Liability limit for unauthorised transactions** : the Commission¹ Recommendation 97/489 stipulates:

Article 6.3: « the holder is not liable if the payment instrument has been used, without physical presentation or electronic identification (of the instrument itself). The use of a confidential code or any other similar proof of identity is not, by itself, sufficient to entail the holder's liability. ».

This provision is reinforced for payment cards by article 8 of Directive 97/7 of the European Parliament and the Council of 20 May 1997 on the protection of consumers in respect of distance contracts:

“Payment by card:

Member States shall ensure that appropriate measures exist to allow a consumer:

- to request cancellation of a payment where fraudulent use has been made of his payment card in connection with distance contracts covered by this Directive,
- in the event of fraudulent use, to be recredited with the sums paid or have them returned.”

It should be mentioned that the introduction of effective systems of identification and authentication when paying over the Internet will have two effects. It should help eliminate fraud in the cases when the transaction has not been carried out by the legitimate cardholders but also in the cases of “bad faith” cardholders. It should therefore reduce many chargebacks of the type « I did not do it » which represents about 50% of all chargebacks processed by card schemes.

- b) Regarding **correction of billing errors**, Recommendation 97/489 also indicates in its Article 8 :

“The issuer is liable:

- (b) for transactions not authorized by the holder, as well as for any error or irregularity attributable to the issuer in the maintaining of the holder's account.”

- c) **Regarding non or late delivery and unsatisfactory purchases**

As explained previously, the Commission is currently considering a legislative framework for “refund” still to be discussed by the Member States.

The distance selling situations which are considered are twofold:

- Goods or services are not delivered (“I did not get it”) or direct or on-line consumption could not take place, but the payment is carried out. This situation also takes into account late delivery.
- Goods are not appropriate (“I do not want it”) because they are defective or do not correspond to the description of the catalogue. In the case of on-line consumption, it may be a remotely-loaded software which does not function or a piece of music

¹ COMMISSION RECOMMENDATION of 30 July 1997 concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder (97/489/CE)

which is not complete. In this situation, it is the quality of the goods which is questioned.

First of all, it is worth recalling that whichever way an order is placed - through mail, telephone, Internet or from a mobile telephone reaching Internet (WAP) - the rules governing distance payment apply.

It is mainly Directive 97/7/CE on distance contracts which answers this problem by imposing obligations on the merchant (but not on the issuer of the payment instrument).

In the event of non-delivery (or late delivery), it is conceivable that the issuer of the payment instrument intervenes actively in refunding. It is through the issuer's system that the payment passed. The issuer has therefore the ability to rapidly refund the holder. It is appropriate, however, that the customer provides any necessary information to enable the issuer to check the absence of delivery. The measures taken lately by VISA stipulate that the card issuer has to determine if the holder made the efforts necessary to solve the dispute with the merchant in good faith. The solution to this issue could be to allow payment revocability when the period agreed upon or required for the supply of goods or services was not respected. Although it should be noted that payment revocability may cause problem in certain jurisdictions.

The Commission considers that the legal framework governing refunds by the issuer should not deal with unsatisfactory purchases. Indeed, when the quality of the goods is questioned, the tangible elements of the dispute can hardly be taken into account by the issuer of the payment instrument. His role is not to be an arbitrator of the dispute. The Commission considers that this issue is a matter to be solved between the consumer and the merchant.

However, the issuer of the payment instrument may have a role to play in the situation where the goods have been returned to the merchant but no exchange or refund has been made by the latter. This issue needs to be studied further.

4. The Commission supports this approach, while noting the following:
 - The same degree of consumer protection should apply generally whatever the payment instrument, i.e. the issuer intervenes to make a refund. There are nevertheless cases where the issuer will not be able to intervene because he does not have the knowledge of or a link with the customer.

For example, prepaid scratch card systems are being developed. A scratch card is bought from a merchant for a defined amount. It gives access (account number + PIN code) to an on-line anonymous payment. Or another example is, at the time of the use of an electronic purse (e-purse), the application of which is contained in a micro processor, it is not possible for reasons of security, to physically reload the card with the amount to be refunded from a reader connected to a PC (different specific systems - ATM or special « loading devices » - are used for the e-purse loading). If the e-purse is linked to an account (for reloading), the issuer will be able to carry out the refund on this account. If the e-purse is anonymous (no link to an account), the issuer will not know on which account to place the refund.

The refund possibilities will consequently have to be limited to the situations where the issuer has an account link with the customer.

➤ **The US \$50 liability limit on credit cards should apply to debit cards**

It seems that this issue is largely an American concern. As a matter of fact, the distance selling contract European Directive 97/7/EC (mentioned previously) specifies that in the event of fraudulent transaction carried out with a payment card, without reference to its debit or credit nature, refund has to be made for the total amount of the transaction. This corresponds to a zero liability for the consumer. This measure has to be consolidated for all the other means of payment used remotely.

In case of a face to face payment at a point of sale, Recommendation 97/489/EC envisages a liability limited to 50 Euro before blocking the card. This type of payment is not covered in the current discussion.

5. The Commission also supports this requirement. It is pointless developing refund procedures if consumers are not correctly informed about them. The Commission feels that these transparency measures are all the more necessary for the new payment instruments which develop on the Internet. The consumer must fully understand his rights and obligations when he uses a remote payment instrument.
6. The Commission agrees that the effectiveness of the payment card redress protection should be monitored and evaluated. After the issuing of a Directive, the Commission would normally monitor how that Directive was implemented in the Member States both at the legislative level and in the practice. However, the Commission would be rather reluctant to make the collection of such information a permanent exercise as it would create an additional burden and cost on market participants.

TACD RESOLUTION ON IMPLEMENTATION OF THE SAFE HARBOR AGREEMENT

- 1. TACD calls upon the US Department of Commerce to instruct private companies on how to comply with either Safe Harbor or the EU Data Protection Directive in order to facilitate their legal obligations to protect personal information transferred from the EU.**
- 2. TACD calls upon the US to develop legal means to safeguard the privacy of US consumers based on Fair Information Practices as articulated in the 1980 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.**
- 3. TACD calls upon the EU to report annually on the implementation of the EU Data Protection Directive, the various means undertaken within the EU to safeguard privacy, and the level of oversight on transborder data flow.**
- 4. Pursuant to the TACD resolution Ecom-20-00, adopted in July of 2000, TACD calls upon the European Parliament to hold hearings on the operation of the Safe Harbor arrangement.**

EUROPEAN COMMISSION SERVICES' RESPONSE

The European Commission's services welcome the TACD's recognition that the Safe harbor arrangement can provide for an adequate level of protection for personal data.

The Commission has undertaken to do a first assessment of the way the Safe harbor works and to provide an interim report to the European Parliament in the course of 2001. To this end, it will collect factual information from a number of EU and US sources, with a view to determining whether all the elements foreseen in the arrangement are in place and whether there is any evidence that the Safe Harbor is either not providing the level of protection foreseen for data subjects or not providing the security and simplifying effect that it should for those involved in making data transfers.

After this first interim report, the next review of the Safe harbor arrangement will take place in July 2003 (i.e. after 3 years) in accordance with the established practice for all Commission decisions on adequacy.

The Commission will also be reviewing the situation this year with the US Department of Commerce, as foreseen in the exchange of letters between Mr Mogg and Mr LaRussa which closed the Safe Harbor talks. This will allow the two sides to consider whether experience so far indicates that any action is necessary to improve the way in which the Safe Harbor is contributing to the protection of Trans-Atlantic data flows.

As regards the implementation of the Directive as a whole, the Directive requires the Commission to present a report on its application three years after its entry into effect. In view of the delay in transposing the Directive in some Member States, the Commission will report only in the first half of 2002. It commends to TACD the annual reports of the national authorities charged with supervising the implementation of data protection laws in the Member States and of the Article 29 Working Party, the advisory group established by the Directive which brings together those national authorities.

TACD RESOLUTION ON GLOBAL CONVENTION ON THE PROTECTION OF PRIVACY

TACD calls upon the US and the EU to endorse the call for a global convention on the protection of privacy. To this end, TACD asks that the US and the EU co-sponsor, with TACD, a meeting in the Spring of 2002 to discuss the possible scope and nature of such a convention, and to solicit public views on the need for such a convention and the issues that a convention should address.

EUROPEAN COMMISSION SERVICES' RESPONSE

The services of the European Commission, taking into account Articles 6 and 7 of the Charter of Fundamental Rights, encourage the TACD to work towards a set of common binding rules based on the 1980 OECD guidelines for transborder data flows that would govern the way in which personal data is processed and shared world-wide. In particular, the European Commission encourages TACD to carry out the preparatory work for a meeting next year on the lines proposed and thereby to solicit public views from all stakeholders on the need for such a convention and the issues it should address. The European Commission's services are presently looking into the extent to they could sponsor such an initiative.

TACD RESOLUTION ON OPEN BROADBAND NETWORKS

- 1. The US and EU member states should enact the appropriate policies to ensure open and non-discriminatory access for broadband Internet services on all major platforms. This includes access to EPGs and other functionalities necessary to ensure the widest access to websites and other Internet traffic.**
- 2. Digital or interactive TV systems must also be required to operate in a similarly open and nondiscriminatory manner.**
- 3. Policies must be enacted to ensure that noncommercial content providers receive favorable treatment on broadband platforms, including access to bandwidth, EPG's, and other essential delivery services.**

EUROPEAN COMMISSION SERVICES' RESPONSE

The TACD resolution essentially considers two related issues: broadband Internet and digital television. Points 1 and 3 of the Resolution propose regulatory solutions in the broadband Internet environment, while point 2 is aimed at addressing perceived problems in digital television. This response considers both issues in turn.

Broadband Internet

We consider that TACD makes too much of a black and white distinction between two broadband business models. These are likely to coexist. The main benefit of broadband for users currently is (1) speedier access to the public Internet than is possible by dial-up connections. A second strategy for operators is (2) to develop a private broadband network that bypasses the public Internet and offers privileged access to content that operators choose themselves. This type of network would offer enhanced quality-of-service compared with the public Internet. It is too pessimistic to assume that (1) and (2) cannot coexist, as they do already in the comparable narrowband example of AOL and Compuserve. Consumer demand has forced both these providers to add Internet capability to their initial "walled garden" environments. Similar pressure could have similar results in a broadband environment.

The Commission therefore cannot support point 1 of the Resolution. It is too early to argue for open access to be imposed on nascent broadband networks. While we can support TACD's aspiration to ensure the widest range of content is available to consumers, mandating open access to broadband networks at this stage is likely to deter investment in the infrastructure needed to deliver such content, with a consequent negative impact on consumer welfare.

If, at a later stage, market failure does manifest itself in the ways TACD suggests, competition law and the new regulatory framework have the tools to address any problems that arise. But it is vital that in taking regulatory action, regulators and competition authorities achieve the right balance between consumer welfare and investment incentives for infrastructure providers. The philosophy of the new Communications Framework is only to apply access remedies following market analysis and an assessment of market power. This protects the interests of other market players and consumer welfare while preserving investment incentives.

Neither can the Commission support point 3 of the Resolution. We consider that this is not relevant or necessary as long as public interest content is available via the public Internet. Broadband is still at an early stage in its development. To require that all non-commercial content has privileged access to any such bypass network could eliminate the incentive for providing it in the first place. Ill-judged regulatory intervention could therefore detract from consumer welfare. We must ensure that we only regulate these networks where there is proven market failure.

Digital television

We agree that interactive television could become an important medium, but TACD makes unwarranted assumptions both about the speed of its development and the direction it is likely to take. Interactive television will not necessarily mean full Internet access. For instance the Multimedia Home Platform – an open API platform developed by the DVB Group and sharing many common elements with OCAP middleware in the USA - has three profiles for interactive TV, including an Internet profile. However, Internet access is not foreseen in the first profile “enhanced broadcast” and it is only optional in the second profile “Interactive broadcast”. These profiles are intended to meet different cost and user requirements.

Many market players consider that reversioning web content will be essential for ergonomic reasons (computer text is hard to read on an interlaced TV display), rather than direct Internet access. A “walled garden” approach to interactive content will often be necessary because of limited spectrum and capacity. Most EU Member States impose ceilings for non-programme related data in digital broadcast multiplexes, usually 10-20%. Equal access for all content providers will not always be possible in interactive TV therefore, although judicious use of both the broadcast channel and the outward path of the set top box modem in “push mode” could ensure that a wide range of content is available. We do not consider that point 2 of the TACD resolution is therefore practicable.