

COMMENTS

**from Euro-Info-Verbraucher e.V.
and eCommerce-Verbindungsstelle Deutschland**

**on the
Communication from the Commission to the Council and the European Parliament
- New Legal Framework for Payments within the Internal Market -
COM(2003) 718**

As the European consumer information and advisory centre, the Verein Euro-Info-Verbraucher e.V. is glad of this opportunity to comment on the latest Communication from the Commission to the Council and the European Parliament on cross-border payments.

See below for a brief explanatory illustration of the tasks and working method of the three organisations.

Euro-Info-Verbraucher e.V. (Euro-Info Consumers) is the umbrella structure and has since 1993 been involved in European consumer policy and consumer protection for the citizens of Europe. Euro-Info-Verbraucher e.V. currently has three departments:

The **Deutsch-französische Verbraucherberatungsstelle** (Franco-German Consumer Advice Centre) advises consumers on the use of the European Internal Market and gives information on European and national (i.e. German and French) consumer law. In addition, this department supports the consumer in the extra-judicial settlement of disputes with a non-resident merchant (Germany / France). The Franco-German Consumer Advice Centre also has an observer function regarding the cross-border traffic in goods and informs the responsible national and European organisations on malfunctions in the Internal Market. Visit www.euroinfo-kehl.com for further information.

Early in 2002, the **Clearingstelle Deutschland** (German Clearing House) began operations and since then has supported the European consumer by means of the European network for extra-judicial dispute settlement (EEJ Net) in instances of disputes with companies in other EU countries, Iceland and Norway. The Clearing House is a contact point for consumers involved in cross-border disputes in other EU countries and was founded by the German Justice Ministry and the European Commission. This, coupled with the assistance of the European network of conciliation centres and the other European clearing houses, encourages the extra-judicial settlement of disputes between consumers and companies. Visit www.eej-net.de for further information.

The national **Verbindungsstelle für den elektronischen Geschäftsverkehr** (E-Commerce Liaison Centre) commenced operations on 01.01.2003 and since then has supplied information to users and providers on the ins and outs of electronic commerce with the initial

focus on the creation of a virtual information page. This can be inspected at www.ecommerce-verbundungsstelle.de. In addition, the Liaison Centre can help consumers with their information needs and complaints or point them towards other organisations which can offer further assistance on particular issues.

Our Comments here are confined to Annexes 10 and 11 of the Consultative Document since our organisations deal mainly with these issues.

Re Annex 10: REVOCABILITY OF A PAYMENT ORDER

The three departments of Euro-Info-Verbraucher e.V (Euro-Info Consumers) have so far received only occasional complaints linked to problems with the cancellation of payment instructions. In order to clarify our comments on the proposals contained in the Consultative Document, we would first of all like to mention a specific case, which is a particularly good illustration of the consumer's difficulties, especially his powerlessness when payment instructions are not executed correctly.

We find the conduct of the company concerned incomprehensible in this instance, all the more so since the consumer has a legally transparent claim to reimbursement.

On 11 November 2001, a German consumer bought some clothes in a branch of the Naf-Naf France Group in Rennes (France), the total value of which came to FF 726 and she paid for this purchase with her VISA credit card. While in the act of paying she checked the till receipt, which showed the amount of FF 726, but forgot to check the credit card receipt as well. The next day she received a statement of her account and noticed that the Naf-Naf Group had debited her account with €726 instead of the FF 726 purchase price.

The consumer immediately queried this debit entry with her bank, the Postbank, and also contacted the branch of Naf-Naf. The employees in that branch immediately accepted that it was an error and informed Naf-Naf's accounts department, who undertook to adjust the balance accordingly

Despite various bookkeeping operations on the consumer's account and Naf-Naf's account, which is held by the French bank Crédit Lyonnais, the affair has still not been settled. Whereas Naf-Naf has received the purchase price of € 110.68 (the equivalent of FF 726), the consumer is still waiting for reimbursement of €615.32, which has been debited in error from her bank account. This amount is the difference between the amount actually debited from the consumer's account (€726) and the purchase price for the goods she bought (€110.68).

Thanks to the consumer's bank statements and those of Crédit Lyonnais we have been able to follow through the various bookkeeping operations made in the course of this matter. It was evident to us that Crédit Lyonnais did actually attempt, on 15.11.2002, to reimburse the sum of € 615.32 to the consumer. However, this sum never arrived in the consumer's account.

Following our intervention, Crédit Lyonnais made a further attempt on 11.04.2003 to transfer the outstanding amount. According to the Postbank, to which we forwarded a copy of the transfer instruction, in making this attempt Crédit Lyonnais used only the consumer's credit card number to identify the recipient.

According to the Postbank, they could not identify the bank code supplied in the instruction. It was in any case certainly not a German bank code. Only the first six digits of the consumer's card number were supplied.

However, a credit transfer to a credit card can only be made if details of the clearing account and the correct bank code are supplied.

It was only possible for the remitting bank to trace a payment through the banking system so that the Postbank could not check the whereabouts of the transfer instruction.

In response, Crédit Lyonnais asserts that the transfer instruction did contain the correct bank code and so therefore Crédit Lyonnais, for its part, did all that was necessary to make the repayment. Crédit Lyonnais refuses to negotiate any further.

The fact of the matter is that the consumer, a student, has lost € 615.32 through buying t-shirts and a pair of trousers from Naf-Naf – as of today she has still not been reimbursed.

In view of this kind of case, where the consumer has received no compensation, despite the unambiguous legal position concerning a mistake in a credit card payment by a large company, we cannot approve the proposal that such payment instructions should be held in law to be fundamentally irrevocable.

In our view, such a payment instruction should be revocable at least until the consumer has had the opportunity to check the entries in his account. Yet with credit card payments this is generally only possible after about a month. If the consumer is denied the opportunity to cancel such payment operations later, he has hardly any effective means of protecting himself swiftly against misuse or mistakes. Therefore, the remaining proposals made here (including revocability until the amount in question has been credited to the recipient's account) cannot give the consumer sufficient protection.

As can be seen from the case quoted above, even well known companies do not always appear willing to co-operate despite the patently obvious legal position in such instances. If the extra-judicial settlement process fails, taking the matter before the courts is not a feasible solution for the consumer concerned in view of the attendant risks, which are generally considerable.

In order to avoid the consumer being powerless in the face of the Payment Service Provider's conduct in such cases, we therefore consider that there is no alternative to giving him the right to cancel payment instructions and that this right should prevail at least as long as the consumer usually needs to check his account and react to an incorrect entry. For these reasons, we consider it necessary that payment instructions should be revocable for about 2 months.

Re Annex 11: ROLE OF THE PAYMENT SERVICE PROVIDER IN THE CASE OF CUSTOMER / MERCHANT DISPUTES IN DISTANCE COMMERCE

Taking the collective experience of the three departments of Euro-Info-Verbraucher e.V. (Euro-Info Consumers), we can confirm that the creation of a New Legal Framework for the protection of the European consumer is indispensable in the field of distance commerce. For several years now, the Franco-German Consumer Advice Centre and the German Clearing House have been recording a steady increase in the number of disputes in e-commerce.

For example, the number of complaints in the e-commerce sector noted in 2002 by the Franco-German Advice Centre was 7.1% of the total number of complaints. In 2003, 15.9% of the legal disputes handled by the Advice Centre were in the e-commerce sector (provisional number of disputes - further details will be in our 2003 Annual Report, which is still being prepared). In 86.1% of the disputes in 2003, the ordered goods were not delivered despite prepayment by the consumer.

The German Clearing House also recorded a significant increase in the number of e-commerce sector legal disputes. Whilst these only accounted for 9.7% of cases in 2002, this figure had risen to 12.6% in 2003 (provisional figure – the current statistics are still being worked out). The same was true in the German Clearing House's dispute cases, i.e. the majority of cases were where the consumer had prepaid but the goods were not delivered (73.7%).

In the first year of operation of the eCommerce-Verbindungsstelle (E-Commerce Liaison Centre), 53.7% of the complaints submitted related to the purchase of goods on the Internet, whereas the remaining enquiries were concerned with subjects such as data protection, e-mail advertising and other general e-commerce-related issues. In over half the complaints about purchasing goods (54.5%) the subject of the enquiry was also non-delivery despite prepayment by the purchaser.

The complaints so far submitted to our three organisations concerned both purchases in an Internet shop and in an Internet auction such as eBay or ricardo. So far, we have evidence of only one case where non-delivery was attributable to an error on the part of the carriers.

There is an alarmingly high number of suppliers who fail to deliver orders and simply no longer react as soon as they have received the purchase price. This behaviour seems to be especially prevalent if the purchaser is not based in the same European country as the supplier. The frequency of such cases is creating the suspicion that this is a deliberate policy.

Our experience to date would suggest that there is little chance of success if these differences between purchaser and vendor are left to self-regulation. Large companies, which would like to build up and maintain a customer base, frequently display a serious attitude to contract execution and, if necessary, for reasons of good will are even prepared to meet the customer halfway. However, the cases reported to us, where the suppliers did not fulfil their obligations to deliver, frequently involved small and little known companies. It sometimes turned out while investigating the case that the suppliers were insolvent and had ceased trading. In such cases, extra-judicial settlement of the case is unfortunately ruled out and there is little prospect of success in taking the vendor to court.

A crucial problem, which we encounter when handling such cases, is the lack of any authority with the power to pursue claims on behalf of the purchaser. The purchase prices involved are usually small whereas the costs of litigation are relatively high and so it is often not worthwhile for a purchaser to engage a lawyer to assert the claim in court. In Germany, organisations representing consumers are prevented by the Rechtsberatungsgesetz, the law regulating who may give legal advice, from pursuing the claims of consumers before the courts. That is why the purchaser has no means whatsoever of exerting pressure on the vendor to back up his claims. This means that the vendor runs relatively little risk of prosecution if he fails to deliver. Even if such cases are reported to the Public Prosecutor or the police for prosecution under criminal law, our experience shows that little if any action is taken against patently fraudulent suppliers.

It becomes considerably more difficult to assert a consumer's claims as soon as the case has cross-border implications. More and more goods are offered for sale and sold over the Internet worldwide. However, if problems arise in executing the order, the consumer is generally left empty-handed because he has scarcely any means of redress to safeguard himself against non-performance by the vendor. By way of contrast, the vendor is cushioned from losses by using cash-on-delivery or supplying on prepayment only. But once a loss has been suffered because of unsatisfactory performance, the person concerned would generally be ill advised to go to law because of the high costs and because the case would often have to be pursued abroad.

The upshot is often that the purchaser is saddled with the whole risk that the on-line purchase could be incorrectly executed. On the one hand this is due to the Payment Service Providers who are experiencing enormous increases in business (e.g. credit card companies) because of the surge in on-line business and yet are doing hardly anything about consumer protection systems, such as a trustee service.

On the other hand, there are also the many on-line auction and trading platforms such as eBay, mobile.de, ricardo etc. Although these levy a certain charge for every purchase concluded via their platforms, they disclaim any responsibility for the individual purchase agreements. Officially at least, the consumer protection systems offered here do exist (individual assessments of purchasers and vendors, compensation if one party defaults). In practice however, the assessments are easy to manipulate ('pretend' sales to friends and acquaintances, denigration of competitors) and are deleted after a certain period. And purchaser protection programmes do not always lead to customer compensation: compensation is tied in with strict conditions and there is also a lengthy handling process. Such programmes often give flimsy reasons for turning down a purchaser's claims.

In view of the only inadequate safeguards for purchasers afforded by the existing means of customer protection, we consider it to be indispensable that binding regulations, to be arrived at by joint action, should place all e-commerce companies under an obligation to make a contribution to enhanced consumer protection.

We make the following comments on the two ideas put forward in the consultation process:

Proposal (1) definition of a type of joint liability shared by the Payment Service Provider and the merchant in instances of product non-delivery (or even of a product delivered but not as per contract);

We consider a joint liability of the Payment Service Provider and the merchant to be an appropriate way forward. This could be implemented, for example, by setting up a special fund into which every Internet merchant, every commercial platform operator and every Payment Service Provider must pay a certain amount for every transaction concluded over the Internet (e.g. a percentage of the purchase price).

It would be relatively easy to monitor that Payment Service Providers were paying such a charge. By contrast, it would be considerably more difficult to check payments by the individual Internet merchants. One reason for this is the volatility of the Internet. In a matter of a few hours, homepages can switch between being off-line and on-line, but while they are in operation, a whole range of purchasers can be injured.

This is why we feel that there is no alternative to setting up a central authority at national and European levels with the twofold task of monitoring payment of contributions to the fund and, at the same time, monitoring compliance with the European or national provisions on e-commerce and distance commerce. This monitoring authority should have the power to issue quality seals with pan-European validity for consumer-friendly homepages or to set up a so-called watch list which would warn consumers of dubious suppliers. It would be even more effective, to the extent that national law permits this, to give this body powers of enforcement, which for example would allow access to a supplier's assets and control of them at the supplier's location with an obligation on the part of the web host to place an official warning on the respective homepage.

Thus, customers would benefit from a dual safeguard by having preventive warnings on sites and a compensation fund for losses already suffered.

Proposal (2) definition of specific cancellation rules for e-commerce payments, for example a provision that distance payments for e-commerce contracts can be cancelled up to the point where the merchant has proved to the Payment Service Provider that he has performed the delivery.

We do not consider that this proposal goes far enough to solve frequently occurring problems in e-commerce. As it is, this proposal does not provide the consumer with any safeguard where he exercises his right of cancellation for e-commerce transactions after concluding a contract, returns the goods to the merchant but never receives any refund of the purchase price he has paid. However, a form of liability as described in the first proposal would protect the consumer in such cases as well.

A further problem which might become significantly more apparent with proposal 2 than proposal 1 is the costs which such cancellation rules could create. These represent a risk which the Payment Service Provider would find it hard to calculate. By contrast, a general levy due with every Internet transaction payment can always be calculated.

To summarise, we therefore argue in favour of setting a joint charge to be paid by merchants and Payment Service Providers into a compensation fund for future cases of loss (as has already been set up to safeguard against insolvent package holiday operators) linked to the creation of a monitoring authority which can monitor compliance with these provisions at national and European levels.

We are convinced that the costs of such action could be kept low because they would be spread over all the transactions occurring over the Internet. Overall, this would cause only minor increases in prices for goods on the Internet and for the associated payment services.

In order to reinforce our view that there is an urgent need for action in this area, we would like to describe some particularly blatant cases which have been handled by the Euro-Info-Verbraucher e.V., the Clearingstelle Deutschland and the eCommerce-Verbindungsstelle Deutschland (Euro-Info Consumers, the German Clearing House and the E-Commerce Liaison Centre).

Examples of cases handled by the Euro-Info-Verbraucher e.V., the Clearingstelle Deutschland and the eCommerce-Verbindungsstelle Deutschland:

♦ Die Box Hifi GmbH

Between late November 2001 and late July 2002, a French consumer and two Finnish consumers ordered entertainment electronics equipment valued at between €300 and 1,661 from the German supplier Die Box GmbH (www.dieboxhifi.de). All three consumers paid the purchase price in advance, but did not receive the goods. Their many enquiries kept being answered with new excuses for the delay. The consumers contacted a variety of consumer organisations (such as Euro-Info-Verbraucher, [Euro-Info Consumers] and Clearingstelle Deutschland, [German Clearing House]) who were informed by the company that they had already sent the goods. However, the company failed to supply any supporting evidence that the goods had in fact been sent. All the consumers have withdrawn from the contract but so far the purchase prices they paid have still not been reimbursed.

The eCommerce-Verbindungsstelle (E-Commerce Liaison Centre) in conjunction with the Clearingstelle (Clearing House) and the Euro-Info-Verbraucher (Euro-Info Consumers) have succeeded in getting a caution issued to this company by the Competition Centre. Nevertheless, since the company is still not willing to pay, the only recourse open to the consumers is to seek repayment through the courts.

♦ Tycoon Multimedia GmbH (www.medialo.de bzw. www.snoox.com)

In February and June 2003, three German consumers ordered a digital camera each on two different Internet sites of the Austrian supplier Tycoon Multimedia GmbH and paid the purchase price upfront. Even so, the ordered goods never reached the consumers.

In this regard, the German Clearing House contacted the Austrian Clearing House and the Austrian Internet Ombudsman. However, there was no possibility of reaching agreement because Tycoon Multimedia GmbH had filed for bankruptcy. There was also no further means of compensating the consumers because the bankruptcy proceedings were not initiated for lack of sufficient assets. According to the Austrian Internet Ombudsman, the head of the company had been arrested and detained while withdrawing customers' money from a bank in Passau.

♦ PC Mac 2000

The cases involving the supplier PC Mac 2000 need mentioning here as illustrations of the difficulties which arise when such cases are handled. These cases were handled by the Euro-Info-Verbraucher e.V (Euro-Info Consumers), the Clearingstelle Deutschland (German Clearing House) and the eCommerce-Verbindungsstelle Deutschland (German E-Commerce Liaison Centre). A total of 13 French consumers had submitted a complaint to us about this supplier.

Up to December 2003, PC Mac 2000 was offering computer accessories for sale on the Internet. The company had concentrated its activities mainly on the French-speaking region (France, Belgium, Luxemburg) although PC Mac 2000 also had a German-language Internet address. However, so far, the complaints we have handled came solely from French consumers. The French-language Internet page was a detailed homepage with a range of products, full information on the individual products and the current General Terms and Conditions of Business.

The French consumers mentioned above all ordered computer items via PC Mac 2000's Internet page using the address

www.pc-mac2000.com.

The value of the products ranged between €178 and €320. All the consumers paid upfront and were assured that the goods would be delivered in the next few days. In none of the cases did this in fact happen. After enquiring using the following e-mail addresses

maxime_relation_client@pc-mac2000.com

vente@pc-mac2000.com

commercialx@pc-mac2000.com

the consumers were assured that the goods would be delivered later and that the delay in delivery was due only to the manufacturer's delivery problems. Although the consumers made demands for the goods, now ordered and paid for months earlier, to be delivered according to the agreement, nothing happened.

The orders were all made between 26.11.2002 and 03.04.2003.

In some cases, with our help, the consumers have instituted debt collection proceedings with the responsible Amtsgericht, the local first-instance court, in Berlin/Wedding with a view to reclaiming the amounts paid. One of these consumers recently received reimbursement of the purchase price.

We have also written to the following institutions informing them of the complaints in question so that they can issue warnings against buying from PC Mac 2000 on the Internet:

B.E.U.C. (The European Consumers' Organisation),

The Koblenz Chamber of Trade and Industry and

UFC Que Choisir (a French consumer protection organisation).

Whilst handling the complaints, the eCommerce-Verbindungsstelle (E-Commerce Liaison Centre) had checked the legality of the content of the PC Mac 2000's Internet page . As the company was based in Lahnstein, Germany, the company was required to comply with German law as specified by § 4 Teleservices Law (TDG), Art. 3 paragraph 1 of the E-Commerce Directive 2000/31/EU (country of origin principle) when offering goods for sale.

Whilst checking the legality of the content on both versions of PC Mac 2000's Internet page, the Liaison Centre had determined that the company had not complied with the special information obligations (§ 312e German Civil Code (BGB), § 3 of the Civil Code's Information Obligation Regulation, implementation of Art. 10, 11 of the E-Commerce Directive) with relation to the finalisation of agreements created electronically. Information was missing on the technical stages needed to enable finalisation of an agreement. In addition, there was no information on how to save the text of the agreement, or how to correct any input errors when placing the order nor was there any information about the language choices for the agreement. Instead, the Internet page only offered the option of concluding the agreement by e-mail. Because of the preceding advertising material on the Internet page, the company was not in a position to rely on the exemption detailed in § 312e II German Civil Code (BGB).

Also, the web page owner's details failed to display the VAT registration number. In addition to that, the company's homepage displayed a registered business number as if registered with the Lahnstein Register of Business Names, but the Lahnstein local court does not keep a Register of Business Names and the Koblenz Register of Business Names neither contains the number quoted nor is there any entry for a company called PC Mac 2000.

These two defects in the web page owner's details represent a breach of § 6 of Teleservices Law (TDG) (implementation of Art. 5 of the E-Commerce Directive 2000/31/EU).

We have also referred the cases illustrated above to the Federal Association of Consumer Centres and reported them to the Centre for Combating Unfair Competition.

We are convinced that the cases referred to us are not isolated instances and that countless other consumers have been affected. The fact that the company's headquarters was in Germany greatly complicated the recourse to law for the French consumers.

The particular obstacles in the way of taking legal proceedings were ignorance of the German legal system, the language barrier and the relatively small financial loss, which made any legal proceedings abroad seem too costly a venture. This explains why the consumers have so far refrained from taking legal action against PC Mac 2000.

In December 2003, we learnt via the company's Internet page that it had finally closed down and received a message that the managing director of the company had moved to the USA.

To our astonishment, she got in touch with us early in 2004 to request our help in repaying the injured consumers. In this way, some consumers have already received their money.

In summary, it must however be emphasised that, in view of the current e-commerce situation, the consumers would have stood no chance whatsoever of getting their payments reimbursed after closure of the company if this had not been done voluntarily.