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Government
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TO THE MINISTRY OF JUSTICE

TREATMENT OF CHARGE CARDS UNDER THE CONSUMER CREDIT DIRECTIVE

This letter is submitted by Hannes Snellman Attorneys Ltd on behalf of American Express Services Europe Limited (“**American Express**”) in respect of certain matters of the Consumer Credit Directive (“**CCD**”) and the Finnish Ministry of Justice’s (“**MoJ**”) report of 19 November 2009 relating to the reform of consumer credit legislation to implement the CCD.

Key issues for American Express are the application of the CCD to charge cards (credit is not provided under these products) and the nature and extent of the exemption that will be available under the CCD once implemented. The Article 2(2) (f) exemption applies to the agreement where it is free of charge and interest, or where only insignificant charges are payable and the credit has to be repaid within 3 months. American Express sought clarity on the application of the CCD to its charge card products and the answer given by Commissioner Kuneva on behalf of the Commission to the European Parliament was as follows:

“Article 2(2)(f) and Recital 13 of the text of the future revised Directive on Consumer Credit, as voted by the Parliament, does not cover normal deferred debit cards, where the consumer is required, usually at the end of each month, to repay the credit in full, and where only very limited charges are applied (usually an annual fee). Such agreements are closer to means payments than to genuine credit agreements. Article 2(2)(f) of the Directive, therefore, excludes all credit agreements with only insignificant charges, where the credit has to be repaid in full within 3 months. If the charges are not insignificant, the credit function becomes more important than the payment function, consequently the exemption does not apply any more and the relevant product

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would fall into the scope of the Directive. The exact definition of what “insignificant” means is left to the Member States, so that national practices can be taken into account.”

As further outlined below, the charge card product offered by American Express does not provide a credit function. At the most, a charge card allows for a deferred payment functionality, for the benefit of the cardmember, which will not exceed 30 days from the date the charge is applied on the card account.

If, however, the view is taken that credit is provided, American Express outlines below, its position of what constitutes an insignificant charge, as referred to above. Critically, any assessment of this question has to be based on an understanding of the nature of the payment products in question.

Nature of American Express charge cards – No credit extended

Offering and issuing charge card products is a substantial part of the overall business of American Express. The products are available to consumers as well as corporate clients; charge cards are not merely available to corporate clients.

Charge cards (also known as deferred payment cards) are not a “credit” instrument, but rather deferred payments from the cardmember to the issuer. A cardmember uses his/her card for purchases, American Express pays the merchant on behalf of the cardmember and then the cardmember must repay American Express *in full*, on a monthly basis, on receipt of the statement. No balance is allowed to run; no credit is extended.

There is no pre-set spending limit per se, as the charges debited to the account are approved based on a variety of factors, including but not limited to the cardmember’s credit record, account history and personal income. Charge cards are therefore dynamic and the charges approved vary at every transaction level during the entire duration of the card relationship.

There is no interest charged on purchases charged to the account as credit is not provided. There is, however, a fixed annual fee, which becomes payable upon the annual anniversary date of the card account. These annual fees do not vary in relation to the amounts spent on these cards.

In the event the cardmember wishes to use a charge card for cash advances, the cardmember will need to apply and be granted, on a separate application, the ability to withdraw cash. American Express is currently charging for cash advances on all charge cards products in Finland a minimum of EUR 4,25 or 4% for consumers and a minimum EUR 4,25 or 3% for corporate cardmembers (there may be variations, for i.e. 2% or 0% among different corporate client companies), of the amount of any cash withdrawal, whichever is greater.

Each charge card has its own set of non-payment service benefits, such as services, products and special offers. The non-payment benefits are offered as



a package and the cardmember will generally receive a competitive rate in comparison if the cardmember were to obtain the same benefits on the open market. The non-payment benefits are specially tailored to the different segment of customer needs with, for example, low fee charge products which have a basic level of benefits and higher fee products which have richer benefits. The extent and scope of the non-payment benefits are extremely wide depending on the product.

If credit is deemed to be extended, what is intended to be covered by the “significance” test and what principles should apply to its application?

While American Express expressly disagree that credit is extended in a charge card product, set out below is American Express’ position of the significance test if the view is taken that credit is extended in a charge card product.

Having regard to the purpose of the CCD and the nature of the “charges” that is intended to be addressed, the following principles flow naturally from a reading of it:

- The annual fee would need to be apportioned as to the aspect that relates to the benefits attached to the card and to the aspect that relates to the so called “credit” facility. The charges that must be “insignificant” in order to qualify for the exemption are the charges for the use of the credit facility. Charges levied which relate to the provision of the quite extensive additional services are not intended to form part of the “charges” that would then have to be assessed when determining the application of the CCD. The nature of these charges for services not covered under the significance test can be extensive.
- It is in the interests of both the charge card providers and consumers, as well as enforcement authorities, that there is certainty as to what level of charges will be treated as “significant” and therefore would not justify an exemption. Without this certainty, the inter-relationship between the CCD and the legislation implementing the PSD will be further confused and complicated, rendering compliance with both very difficult.
- Due to the range and extent of the benefits provided in the array of products available in the American Express portfolio, the definition of “insignificant” needs to be flexible so that it can operate for different levels and types of charge cards made available.
- In addition, a formula needs to be provided which will operate on an objective basis, *i.e.* should not be variable for each and every customer depending on their actual use of the “credit facility” of the charge card in any particular period.
- Finally, a workable mechanism has to deal with new product launches where specific historic data relevant to that product is not available. The provider may have forecasts as to behaviour and credit propensity but these will be forecasts rather than actual numbers. This would also cover off card launches where the same product already exists in the



marketplace but the customer profile may be different, hence potentially leading to different payment levels.

Proposal applying the above principles

As stated above, American Express strongly disagrees that credit is extended in a charge card product. To apply the CCD to a charge card product would be to fundamentally misunderstand the characteristics of this product.

Having regard to the above, if charge cards were nevertheless deemed to provide a credit facility:

- a) The annual fees levied on charge card products would need to be segmented into the portion attributed to the so-called “cost of credit” as a proportion of the annual fee and the portion attributed to the non-credit services benefits. Benefits can be quite extensive depending on the product, but some common examples are the concierge service and travel insurance.
- b) The “significance” of the cost of credit segment of the annual fee would then need to be determined. “Significance” could be calculated as a percentage, resulting from a formula where the numerator is the cost of credit segment of the annual fee and the denominator is the “credit limit” for a particular card portfolio. American Express submits that anything below 10% should be deemed insignificant.

This would appear to meet the principles in that:

- it focuses on what matters (i.e. the charge for the “credit” services),
- it covers new products as well as existing/repeat versions of existing product models, and
- by applying it to a category of product, it allows for a consistent objective approach which card providers can monitor and apply.

This approach would be consistent with the CCD’s primary purpose in promoting a single market in consumer credit. It is important that the Finnish Government ensure that in meeting the harmonised consumer protection objectives that it does not “gold plate” the CCD which would generate a differentiation in approach which would deter cross-border lending even further when charge cards are one of the few products that are available and operate in a genuine cross-border basis currently.

Conclusion

If required, the supervisory authorities of American Express, the UK Financial Services Authority and the Office of Fair Trading could verify compliance – and in particular, that credit is not being provided on a charge card product – by seeking confirmation of the supporting statistics. Clearly, this type of



information is highly confidential commercially and therefore the nature of the disclosure required should be such as to retain its confidentiality such that it would not form part of any published announcement or report prepared by the relevant regulatory body.

American Express would welcome the opportunity to enter into dialogue with the MoJ to help them establish a viable and effective approach.

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Respectfully,

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