



The Incredible Sad Tale of a Doomed Code:

**The trial and tribulations of implementing the
Code of Practice for Consumer Debit Cards¹**

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¹ Gabriel Garcia Márquez would no doubt forgive us this allusion to *The Incredible Sad Tale of Innocent Eréndira and her Heartless Grandmother*.

Executive summary

A- A few observations

We got way less information than the Code requires from almost all the twelve agencies we visited as part of our survey. Five of the six agreements we analyzed scored pretty poorly in terms of compliance with the Code. While they are difficult to classify, it is tempting to hand the grand prize to the Bank of Montreal for the number and scale of their irregularities. On the other hand, the TD Agreement shows that it is still possible to put together a document that corresponds to the requirements the industry agreed on almost fifteen years ago.

In short, we have more or less the same to report as Ekos, albeit on a different scale. One might almost begin to think that the situation hasn't really changed very much since 2002 as far as conformity with the Code is concerned. The market, however, has changed.

What's the reason behind these persistent divergences between actual practice and the rules that the industry claims to support? Are they due to the nature of the instrument, the fact that it's not legislative? ² Are they due to chronic staff training problems? Are the risks so great that financial institutions prefer to limit them contractually? Since it seems impossible for them to modify the Code politically, have they simply chosen to work around it, knowing that the short-term legal consequences will be minimal? One thing is certain: nothing appears to be changing very much at all.

B - A criticism of the Code

In the view of a consumers' association that has been pondering this question ever since it was adopted (almost fifteen years ago!) the Code has serious problems in at least five (5) major areas. This criticism has led us inexorably to the conclusion that the instrument is doomed.

² It is tempting here to draw a parallel with accessibility to basic banking services. The situation improved appreciably in Canada as soon as we moved from a voluntary basis to the application of a regulation adopted under the *Banking Act*.

First of all, the Code is based on the premise that a payment mechanism dependent on a debit card (magnetic stripe³ or chip⁴) and a PIN is reasonably safe and that its use rests on responsibilities and risks that are shared between issuers and users. This, however is a highly contestable thesis: the mechanism appears to be intrinsically not very safe and, applying the principle that the party that creates the risks should assume their consequences, the issuers should be held responsible for the problems experienced by card users. It's the very philosophy behind the Code that needs to be reconsidered.

Second, and by its very nature, the Code is not equipped with truly effective, workable sanctions. We can see the consequence of this: it is only very imperfectly respected. The results obtained from this supposedly normative instrument are very small, especially considering how much energy everyone involved has expended on it since the early nineties.

On top of that, the Code is incomplete and out of date. It doesn't cover issues such as the legibility of contracts or the imposition of presumption of fact. There are gaps in the area of security requirements. The issue of stolen cards raises a host of problems, and that of counterfeit cards even more so. The inconsistencies between the Code and the Guide obviously do not serve to enhance the image of the Code.

The result of all this is that contracts concluded with consumers do not protect their rights adequately and, in many cases, are not in compliance with the Code. These contracts have both a normative function in relations between the parties and an informational function with respect to their rights and responsibilities. At the normative level, they do not reflect the balance of services the authors of the Code considered to be acceptable in principle, and at the informational level, they fail to inform consumers about the rules that are supposed to apply to the use of debit cards.

The market is so distorted that even if one issuer makes an effort to comply with the Code, he has to deal with competitors who (to differing degrees) are attempting to dodge their responsibilities.

³ Anderson, Ross. *Why Cryptosystems Fail*. Cambridge, 1993, available at www.ftp.cl.cam.ac.uk/ftp/users/rja14/wcf.pdf; Redbird. *Magnetic Stripe Reading* in 2600, vol. 22, No 1, spring 2005, p. 28.

⁴ Schneir, Bruce; Shostack, Adam. *Breaking Up is Hard to Do: Modeling Security Threats for Smart Cards*. USENIX Workshop on Smartcard Technology, May 1999, available at www.counterpane.com/smart-card-threats.html.

The behavior of the financial institutions themselves seems to condemn the Canadian Code of Practice for Consumer Debit Card Services. The gaps in its contents condemn it. Its impotence condemns it by its very nature. History condemns it, because the efforts that would need to be authorized to revamp the system and ensure its implementation seem doomed to failure. It's time we moved on to something different.

It's also a question of contemplating the situation as a whole. Consumers are not only having a hard time with debit cards, but also with other types of electronic payment instruments, because the normative frameworks that apply to them vary, and most often have no clear legislative basis. The entire situation needs to be addressed.

C – And now...

This said, we venture to propose the following recommendations:

Recommendations sent to the federal government:

- 1. Government authorities, especially the Department of Finance and the Bank of Canada, in association with all the parties involved, should hold consultations on the development of electronic fund transfer methods, the factors influencing their development and the consequences of their implementation on the rights and obligations of citizens.**
- 2. In the light of this consultation, Parliament should institute legislative measures to harmonize as far as possible the legal status of electronic fund transfer mechanisms, whoever the suppliers may be, paying particular attention to the following questions concerning:**
 - a) risks allocation and, *inter alia*, the installation of electronic payment user protection mechanisms, and**
 - b) the disclosure of the rules related to these mechanisms.**

- 3. The Government of Canada should before that time cease devoting any significant effort to developing instruments for standardizing codes of practice in the domain of electronic payments.**

Recommendations sent to the provinces:

- 4. The provincial authorities should act in concert with the federal authorities to ensure that work in this field progresses quickly.**

Recommendations sent to suppliers, including financial institutions:

- 5. Suppliers should cease inserting leonine clauses in their consumer contracts, ensure compliance of the contents of these contracts with the relevant legislation and ensure the transparency and equity of the rules that they set in place.**
- 6. In the immediate future, suppliers should at the very least ensure that their agreements are in total compliance with the Code.**

Recommendations sent to merchants:

- 7. Merchants should endeavour to offer their customers effective, inexpensive or free payment mechanisms.**

Recommendations sent to the consumers:

- 8. Consumers should attempt to obtain as much information as possible about the characteristics and methods of the electronic payment mechanisms they have to use.**
- 9. Consumers should attempt to use only the electronic payment mechanisms that best correspond to their needs, that offer them the best quality-price ratio and provide them with adequate guarantees in the event of non-compliance.**
- 10. Consumers should protest vigorously to suppliers who offer payment mechanisms that do not correspond to these criteria, and should take advantage of the rights that the Code intended they should have.**