THE CARDS AS A PAYMENT METHOD AND AS A FINANCIAL SERVICE IN SPAIN: THE RESPONSIBILITY SYSTEM

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APPROACH

I. PAYMENT CARDS: LEGAL FRAMEWORK AND TYPES

It is not uncommon to hear credit cards referred to as "plastic money". Their use is becoming more common and widespread, even when transactions involve small amounts of money. Furthermore, the continuous, though sometimes slow, growth in electronic commerce seems to have found credit cards to be the easiest method of payment, even though it creates some distrust. This social phenomenon is contrary to the scarce legislation in the area, which consists of few isolated rules within the policy

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framework of other institutions. In fact, we cannot find within the Spanish legal structure a systematic framework regarding credit cards nor its use as a method of payment. There are only some dispersed rules that refer to credit cards, specifically, _art. 46 of the Legislative-Decree_, regarding payments made with credit cards on long distance sales and _art. 2_ which also contains rules for financial services contracted long distance, without the physical presence of either party to the transaction. Nevertheless, the regulations are clearly insufficient as they are limited only to covering very concrete issues and do not solve the legal problems which arise out of this method of payment. This lack of governing law is troublesome because there are existing conflicts in the use of credit cards, especially with respect to the consequences that arise out of the fraudulent use by third parties through the use of lost and stolen cards, blank payment slips, and other methods which are currently being regulated applying the Recommendations on this topic that exist in the scope of the European Union due to the lack of national legislation on the issue. Thus, the purpose of this article is to analyze the cards as a payment method, not to make reference to all the problems regarding the use of cards as a credit instrument. However, before analyzing the issue, we must discuss the different types of cards that are available.

### A. Paying with cards: types of cards

Although our pockets and wallets are all filled with plastic magnetic cards, legally, they are not all considered to be the same. The first type of cards, debit cards, is distinguished by the fact that the debit or credit transaction is completed immediately through an electronic transfer of funds. This is precisely the method used by cards to make payments. This process is one of the features used by EU’s communitarian rules to define this type of payment method and will be analyzed in section two below. It is possible that the card also establishes a limited credit line, which turns it into the second type of cards we will discuss: credit cards. The basic type of credit card has evolved to create the deferred debit card, also known as “T & E”. This type of card does not use credit, but the transactions are liquidated temporarily, usually during monthly periods. This system is similar to a cash advance transaction. Currently, it is one of the most widely used methods along with the granting of credit beyond the liquidation period.

The last type of cards are the ones commonly known as pre-paid cards, which can be distinguished from pre-paid cards with limited or multiple

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1. As to this important matter, see BARUTEL MANAUT, C., Payment Cards and Credit Cards [Las tarjetas de pago y crédito]. Barcelona, 2001, pág. 491 y ss.
use. Limited use cards are those offered by a specific product or company—phone cards, for example—in which the issuer of the card and the provider of the goods or services is the same party. On the other hand, “multiple” use cards allow the cardholder to use the card within an open group of providers which accept them; these have recently reached great popularity—for example, the so-called “cash card”.

B. Credit cards as more than a method of payment

Most of the cards, (except for the pre-paid cards with limited use) aside from sharing the common feature of serving as methods of payment, have an additional feature which identifies them: they are banking cards issued or controlled by a financial entity. However, we can also refer to a different type of card, which is not a banking card. These are known by various names, most commonly, purchase cards, client’s cards, or “private” cards. These are cards from commercial firms which can be used only in purchases from the issuer of the card, and even though they are not banking cards, they may include a line of credit through a financial institution. Thus, while analyzing these different cards as payment methods, a single legal standard is applicable to all of them because they share a common feature in that they are all methods of payment. Consequently, we will not discuss those cards which, while being client cards within business groups, their only function is to keep loyalty within their client base through the granting of commercial benefits (for example, “points” or discounts). In this case, the card is merely an instrument to control purchases by each client, and it is not used for payment, nor is it connected with electronic transfers of funds. This type of card is a promotional tool for sales instruments, whose regulation can be accomplished through the articles contained in Law 7/1996, so long as the cards include, for example, special offers, discounts, special sales, prizes, or raffles.

With that caveat, and as stated by GETE-ALONSO CALERA, one of the main functions of credit cards is to serve as a method of payment and because that is the only predictable feature of all credit cards, they should be called payment cards. This main function is also a common denominator between the different kinds of cards already in existence. With a very clear and purposeful manner, we have used the expression “cards as payment method” in the title of this article.

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2. We follow the terminology of BERNAL JURADO, E., The Spanish Market for Banking Payment Cards [El mercado español de tarjetas de pago bancarias], Madrid, 2001, pág. 56 y ss, which is the same followed by the European Central Bank (1999).

3. As to this distinction see BARUTEL, op. cit., pág. 104 y ss.

4. GETE-ALONSO CALERA, M.C., The Credit Cards [Las tarjetas de crédito], Madrid, 1997, pág. 22.
II. THE CARD AS "DISTANT ACCESS PAYMENT INSTRUMENT": THE FUND ELECTRONIC TRANSFERS.

Contrary to Spanish legislation, which does not have a legal framework as payment cards, the European system has a more systematic legal framework although it is not binding because it only provides mere "Recommendations". Indeed, the commonly named European Code of good practices as to electronic payments, within Recommendation 87/589/CEE (DOCE L365, December 24, 1987), is the first written instrument of this type. It was created for tangible cards, but does not resolve the innumerable problems as to on-line payments. For this reason, while it has interesting provisions, it appears somehow outdated, and the Commission is thinking about updating it to establish a precise legal framework for the relations between the commonly named “accepters” and acquirers of electronic payment methods. Without abrogating the aforementioned legislation and while this article was being written, the EU has published a Directive that systematically and formulaically regulates these methods of payments while still maintaining the analysis which has been set forth in this article. The Directive should be implemented no later than November 1st of 2009.5

The Commission’s Recommendation 88/590/CEE dated November 17, 1988 relates to payment systems, and specifically relates to the relationship between cardholders and issuers of cards (Official Diary n° L 317 of 11/24/1988). This brings a very similar approach to that of the 1987 Recommendation with regard to obligations and responsibilities between the involved parties, but is has been superseded by the provisions of the second Recommendation which provides the electronic payment within open communication networks. For that reason, because it clearly addresses the problems arising from online payments, the most interesting text is Recommendation 97/489/CE, of July 30, 1997, which pertains to transactions made pursuant to electronic payment instruments (R 97). This Recommendation is important because it addresses other important issues like “electronic money”, and also because it is the legal framework that is followed by the judiciary. In addition, several of its provisions—like the €150.00 limit regarding cardholder liability in the event of fraudulent use—are customary practice within card issuance contracts.

For this reason, it seems necessary to refer to this legal framework because it is an especially valuable resource since it offers a description as to how it works. Payment with cards is one of the scenarios for electronic

5. We refer to Directive 2007/64/CE of the European Parliament and Counsel, of November 13, 2007, regarding payment services in the interior, which modify the following Directives: 97/7/CE, 2002/65/CE, 2005/60/CE and 2006/48/CE and replaces Directive 87/5/CE, which were drafted while this article was in the process of being published.
transfers of Funds (ETF), namely, transactions which entail transfers of funds from one account to another without the physical exchange of money. From the legal perspective, they are based on a checking account contract and on an agency relationship. This idea is consistent with GIANNANTONINO; this type of transfer works by orders to transfer funds between persons that are communicated and made solely by electronic means. Hence, they are payment orders that the client sends to the bank, and the bank fulfills through its electronic communication network producing an immediate transfer of funds.

Indeed, Recommendation 97/489/CE gives an indirect definition on two accounts:

- **Functionality**: Those instruments which allow ETF not ordered by financial institutions, and withdrawal of cash, in all of its modes (for example, article 2.a). The idea of defining them by their functionality corresponds to the fact that it is possible to fit, within the definition, new technical systems which will be subject to the same legal regime as if they have the same functionality. (That would be the start of technical neutrality that exists within the realm of electronic signatures).

- **Type**: the described functionality is found in two payment instruments: electronic money and distant access payment instrument. The “distant access payment instrument” is an instrument which allows the account owner to have access to funds within an account established at a banking institution, and to authorize a payment for the benefit of a given payee. This transaction usually requires a personal identification number, or any other similar proof of identity. This category particularly includes payment cards, credit cards, debit cards, debit cards with defer debits or T&E cards, and the services of “telebanking” and home banking.

This means that the Recommendation creates a different legal regime for electronic money, because it works differently. In fact, the name “distant access payment instrument” encompasses the majority of types of electronic payment. Something that is excluded from the Recommendation is payment through checks, and the guarantee function of some cards

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6. CARRASCOSA-POZO-RODRIGUEZ, The Informatic contracts, the New Contractual Horizon [La contratación informática, el nuevo horizonte contractual], 2ª edi, Ed. Comares, Granada, 1999, pág. 38 y ss.
7. GIANNANTONIO, Electronic Transfer of Funds ["Transferimenti elettronici di fondi e adempimento"], Foro italiano, 1990, V, 165, pág. pág. 124.
relating to payment by checks that, in any event, is not within the scope of this article.

The way the cards work implies an agency relationship between the issuer bank and the cardholder-payee; the seller being a third party beneficiary as a result of an onerous contract, which is the one being paid for. This relationship normally also incorporates a checking account, being the latter the source of the funds for the payment. These three types of relationships will be referenced in the next section of this article.

III. RELATIONSHIPS BETWEEN THE CARDHOLDER AND THE VENDOR

Pursuant to a highly regarded doctrine, the payment by credit card implies a three-party relationship in which the cardholder, the issuer bank, and the creditor of the payment—namely, the vendor of goods or services are linked by a scheme of so-called “debt delegation”.

Indeed, the payment by card implies a change of the debtor. The original debtor is the cardholder who acquires goods or services, but the issuer’s bank turns into a debtor for the benefit of the creditor or seller, who additionally is a merchant. Technically, it is a modification of the payment obligation which implicates three different types of relationships:

- Between the initial debtor and the creditor a “valuta” relationship gets established, namely, a purchase contract for the acquisition of goods and services which triggers the payment by card. This is the underlining contract which causes the payment, and it does not possess special problems.

- First and second debtor: their relationship is one of agency, and the second debtor takes the debt and releases the first debtor of it. The delegation needs a so-called coverage relationship that justifies why the second debtor takes the debt. In the event of cards, the coverage relationship is embedded in a contract for the deposit of funds that the cardholder has with the bank, often under the scheme of a checking account. The agency relationship and the terms and conditions of the payment to be done by the bank are set forth within the commonly named card issuance or card use contract. On that basis, it is a financial service, as it will be shown at section five of this article.

- Between the second debtor and the creditor, the creditor should authorize the change of debtor, namely, the creditor

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must assent to modify its credit. This authorization is done beforehand when the merchant agrees to enter into the payment system through an affiliation contract. The latter sets forth a provision for the benefit of a third party (article 1257 CC*) when the merchant agrees to take cards as a payment method. Because of this, it can be confirmed the payment with cards is a mode of payment, as it will seem within section four of this article. The structure usually gets complicated in practice, because of the participation of a company that provides the technical platform for the payment method, for example, VISA, MASTERCARD, as to which the bank is merely a "handler", but this four-party regulation is not an obstacle for the offered approach. The approach merely adds a franchise contract between the bank and the owner of the platform which allows the bank to offer this payment method for its clients, even sometimes under an exclusive regime.

The analysis sought by this article, and which justifies its title, begins with the cardholder which uses it when acquiring goods and services, and the problems which may arise with the other two actors; namely, the issuer bank which provides the service of payment by card, and the provider of goods and services which accepts the payment through the card. We shall devote our interest to the aforementioned from this point forward.

IV. THE PAYMENT WITH CARD AS "PAYMENT MODE"

As will be discussed later on, the "payment mode" must be explained to the consumer prior to entering into a purchase transaction. Certainly the cardholder of a payment card may or may not be a consumer, a legal category defined by law within article 1.2 TRLCU as final recipient of the service, namely, the one consuming its utility. It gives an idea of what can be considered as settled law within the Spanish jurisprudence in the sense that the qualification as consumer is justified as long there is poor bargaining power from one of the parties, despite its unavoidable limits.

Information to the consumer, with respect to the so-called named "payment modes," prior to entering into a purchase agreement is already a

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*Translator note: [Código Civil] Civil Code.


11. As to the need of a flexible and wide concept able to solve any situation of contractual balance, we have pronounced in Del consumidor- destinatari final al consumidor- no expert en la contractació en massa", en Revista Catalana de Dret Privat, Revista de la Societat Catalana d'Estudis Jurídic- Institut d'Estudis Catalans, volum 7-2007, passim.
legal principle within the Spanish legal regime for distant contracts. For contracts regarding goods, article 97 of TRLCU requires that the merchant informs the consumer as to the "admissible payment modes" in the so-called distant contracts. In turn, the new Act 22/07, regarding distant marketing of financial services, LCDSF, also demands this requirement within its article 7.2,f, for these types of services. This is true despite retrieving the old "method of payment," which was the form of art. 40 LGDCU before the revised 2007 text.

But this obligation responds to the fact that our legal regime regards the payment with cash as the general mode to get release out of monetary obligations. Indeed, the Civil Code [CC] demands payment with money of legal tender (article 1170), and despite the fact that the article provides for silver or gold money, it is clear that coins and bills have replaced those methods as legal tender. In that sense, taken as a reference to a purchase transaction, payment must be done as to a "certain price" which is the one that releases the obligation (article 1156 CC). However, it is fair to say that other payment instruments, i.e. wires, transfers, etc., or even those which fall within an ample definition of negotiable instruments, i.e., the check and payment card, have nowadays a preeminent place within the payment system. Further, we must point out more recent payment methods, characterized because they are completely virtual, among them, the so-called "electronic money", i.e., those based upon accounting entries and upon online registries.

In order for these payment methods to be valid, and to have the regular effects of any type of payment, it is required that the creditor admits them to preserve the payment identity principle (article 1166 CC). As mentioned before, this is the idea that is reflected by the above-mentioned articles with respect to goods and services regarding distant contracts. Despite the fact that these laws often present themselves as a way of disclosing information prior to entering into a distant contract, their goal is to avoid a merchant from refusing to accept a payment mode that had been admitted prior to the agreement. In this sense, payment cards are one example among the payment modes which the merchant may accept. This is especially important for distant contracts, because the consumer does not have the access to the information as to what payment modes are acceptable by the merchant. Therefore, the latter must inform the former prior to entering into an agreement.

Because of the aforementioned, in presence commerce, the payment modes must be made explicit also, and often they are tacit. This is accomplished by means of exhibiting the admissible types of cards, or when

collecting the purchase price out of the card once is presented by the consumer. These practices, in which the payment modes have not been explicitly informed prior to the purchase or receiving the service, are contemplated by Act 7/1998, April 13, as to General Conditions as to Contracts (LCGC) which requires the posting at conspicuous places of signs indicating certain practices as sufficient for the party adhering to them to know when the agreement is not documented (article 5.2). Thus, by way of example, the display of the logo of a credit card or a sign advising that the card is accepted upon a minimum purchase is an indication that the card is accepted. As a general condition to enter into agreements with a given merchant,, the widespread use of these practices, along with the good faith principle (article 1158 CC), makes it currently necessary to warn about the opposite proposition; namely, that payment with card is not accepted.

V. PAYMENT CARDS AS FINANCIAL SERVICES

Payment cards imply a contractual agreement as to services rendered by a financial institution. Based upon this, they are within the definition of “financial service.” Specifically, they are financial service for payments according to article 2, b of D. 65/2002, similar to Act 22/07, of July 11, as to distant marketing of financial services (LCDSF) that brings the Directive to the Spanish legal regime, having gone into effect on October 12, 2007 (DF 2a). Nevertheless, this categorization offers little to establish a legal framework for these type of services within Spain, because these statutes refer to contracts entered at a distance, while the general legal framework as to disclosure of information or content prior to contracts is done through general legislation.

A. As to the legal framework: the bank client

As mentioned, to have the payment card perform this function requires a prior agreement with the banking institution. The scope of this work is the payment by cards, thus, matters about the issuance contract will have only a tangential approach. But it is worthwhile to make some comments as to how this contract is regulated within Spanish Law. Spain lacks a legal framework as to this type of banking contracts, which allows some legal scholars to consider the credit card issuance contract an atypical contract even though is socially typical. Nevertheless, there is a widely specialized

13. See GUIMARAES, M.R., Payment by Credit Card in Electronic Commerce. Some Problems Related to its Legal Nature, Contractual Framework and Applicable Regime, from a Comparative Perspective as to the Law of Portugal, Spain and Communitarian Law”, [“El pago mediante tarjetas de crédito en el comercio electrónico. Algunos problemas relativos a su naturaleza jurídica, marco contractual y régimen aplicable, desde una perspectiva comparada en los derechos portugués, español y
A legal framework which establishes transparency obligations for these types of contracts. Transparency may be understood as the disclosure requirements of information prior to the contract, which is often found within several realms of consumers’ contracts, as seen in the previous paragraph. However, in the case of banking contracts, the duty of disclosure extends to any client, and not only for those individuals falling within the definition of consumer in its narrowest sense. In this sense, Order 12 of December 1989 and the Circular of the Spain Bank of September 20, 1990, and its subsequent modifications are of interest. They are the legal rules which contain the basic information which must be disclosed to the client at the moment of contracting financial services, and, in particular, the conditions for the information for each transaction. In addition, this prior contract with the issuer bank may have a different content, like allowing banking transactions in connection with a bank account. Often, the cards include the possibility of obtaining cash from automatic teller machines, which have their own transparency requirements (Order Pre/1019/2003 as to charges for the use of automatic teller machines).

Lastly, it is worthwhile to mention that the issuance contract usually has general conditions with respect to contracting, hence, the rules contained within LCGC are applicable. If the cardholder is considered a consumer, the rules regarding abusive clauses of article 10-bis LGDCU also apply.

These solutions are applicable to what we refer to as the bank client. For example, D 2002/65, considered distant marketing of financial services, DF 4a, refers to this type of client, namely, any person who enters into a contract with a bank. Even so, the Spanish legislation has a second type of protection for those clients for whom the protection is even broader, which falls within the definition of consumers. It is especially difficult to establish a clear boundary line within the realm of contracts for financial services, because the national legislation goes along with the European Union [EU] “communitarian” legislation, which usually has this broader level of rules. This will be discussed in the following section.

B. The distant issuance contract and the distant payment transaction

The D. 65/2002 is similar to Act 22/07, dated July 11, regarding distant contracts of financial services (LCDSF) which brings the Directive


15. See also, ANDREU MARTÍ, M., op. cit., pág. 41 y ss.
into the Spanish legal system. It establishes the distinction that has interesting nuances in connection with financial payment services, specifically, in connection with the card. Indeed, the idea of financial services is relevant in both legal texts because 1) it implies the application of special rules of duties to disclose information prior to entering into the contract; and 2) it allows a right to repudiate the contract in certain cases, as long as the financial service involves a consumer. Thus, among bank clients, who are all potential holders of credit cards, this law only applies to those who fall within the definition of consumers—although evidently it will include the most numerous category of clients.

Referred legal texts are applicable to contracts for financial services entered "distantly". As explained in the "EdM" of the LCDSF, the statute has as a goal to bring into the Spanish legal system the Directive which is based on protection to consumers. The Directive regulates all distant contracts for financial services, comprising, beyond online contracts of financial services, contracts entered into by phone, fax, and mail, and other similar methods which involve parties that are not simultaneously present at the moment of the mutual assent (article 4.3 LCDSF).

The reason for this special regulation is because contracts for financial services entered "distantly" had fallen outside the scope of Directive 7/97, and thus, outside the general rules for distant contracts of LOCM. However, the logic of the system is preserved, because electronic contracting with consumers is deemed as distant contracting, and, therefore, subject to the requisites of previous disclosure of information (articles 4 y 5), and to the ability to repudiate the contract (article 7). Therefore, financial services become a special type of distant contracts with consumers.

LCDSF, though indirectly, considers the payment card as a financial service. Indeed, the new statute refers to article 52 of Act 26/1988—as to discipline and intervention of credit institutions—to determine those financial services subject to its application. Article 52, f includes the issuance and handling of payment means, such as credit cards. This dual reference to the issuance and handling of cards allows a determination of two scenarios where distant financial services can be applied; 1) the commonly named card issuance or use contract; and 2) the different distant payments made with the card. Indeed, article 4.2 of LCDSF distinguishes between the “initial agreement for the service” and the so-called named

16. GRAMUNT FOMBUENA, M. D., ibidem.

17. The idea of indirect mention is reaffirmed when we see article 52 of Act 26/88 as titled "Activities that can be developed in Spain by Credit Institutions authorized in other Member State of the European Union [Actividades que se pueden desarrollar en España por entidades de crédito autorizadas en otro Estado Miembro de la Unión Europea]." Absent of a legal catalog of financial services, we must abide to the one deserving consensus within the framework of the EU.
The use of the credit card as a payment method may create important legal conflicts, especially when the cardholder has the ability to challenge any of the charges made with the card. Indeed, payments made with cards will be uneventful as long as they may be imputed to the cardholder. However, problems may arise in determining whom to charge for certain transactions made with a card. Disputes with the cardholder as to undue charges are solved in R 97 using a system based on three concepts:

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18. The terminology of the Directive for Financial Services is somehow different: it regulates what it calls "contracts that imply successive transactions" (Cdo. 16), in which the "initial agreement" and the "transactions" are distinguished (Cdo. 17).


• Translator note: Latin for reverse construction.
1. The duty of custody by the part of the cardholder, that relieves the cardholder of responsibility in the event of undue use;

2. The liability of the issuer for risks arising from diffusion and malfunctioning of the system;

3. The special circumstances of risks arising from contracts entered at a distance. (Because this is the only scenario regulated by Spanish legislation, it will be the subject of a special section of this article.)

A. The Duty of Custody by the part of the Cardholder

The so-called "custody risk"—referring to the risks of undue use arising out of the lack of care on the part of the cardholder—is assumed by the cardholder. As stated by PAZ ARES, SAEZ LACAVE, Y BERMEJO, according to the theory for negotiable instruments, the general rule of the appearance is applicable to this scenario. The nexus that links the objective situation of appearance with the person who is going to bear the risk is the ability to dominate the risk. It is imputable to the cardholder when the risk is able to be dominated beforehand. In the event of a lost or stolen card the cardholder must inform the issuer to avoid liability.20

On that basis the R 97 imposes upon the cardholder a duty to maintain custody of the card, either when preserving it or when using it. Diligently maintaining custody, along with notification as to the loss or theft relieves the cardholder of liability for fraudulent charges21. Article 5.a R-97 establishes this general duty to secure the electronic payment instrument, and the means, i.e., personal identification numbers or other codes, necessary for its use. Then, article 5. c) establishes a specific aspect of the duty of custody, which forbids writing down PINs or other codes in a manner easily identifiable, especially on the electronic payment instrument, or on any other object kept or carried along with it. This would be a clearly negligent practice which would limit the liability by the part of the issuer, even after being notified as to the loss or theft. In this sense, this limitation within the liability system establishes that the conduct standard must be, at a minimum, the standard expected from a reasonable person.

As to the diligent conduct of a reasonable person, on December 19, 1986, the SAP of Bilbao held that such conduct must be adapted to the circumstances to the case ex 1104 CC. This decision stated that it was not negligent to leave a card within a vehicle from which it was stolen. That

20. PAZ ARES, SAEZ LACAVE, Y BERMEJO, The expression of Assent through the Internet ["La emisión de la declaración de voluntad en Internet"], en PERALES SANZ, Legal Certainty in Electronic Transactions [La seguridad jurídica en las transacciones electrónicas], Madrid, 2002, pág. 117.

action could be considered negligent, and hence, breach the duty of custody. In any event, also relevant to this decision was the fact that the signature on the receipt was clearly different to the one on the card.\footnote{22} The SAP Valencia Feb/20/95 did not follow this approach, and opposed this practice, but continues to consider as essential, for purposes of liability, the immediate notification to the issuer of the card. In turn, in the SAP Málaga 9-9-94, the duty to communicate the loss is also applicable to expired cards when the cardholder has not received the replacement. In this case, however, it is also significant that the misuse of the card came from a bank employee’s actions.

Precisely, the duty to report any anomaly (Article 5.b R 97),\footnote{23} is the pivotal element for the liability to the cardholder (Article 6.1 and 2 R 97). According to these articles, until a notification is communicated, the cardholder is subject to strict liability—namely, liability regardless of negligence or intention on the part of the cardholder—for all charges that may be fraudulently made with the card. There is a limit on the amount, which is not higher than 150 €, unless there is negligence or intention. Actually, it can be said that the communitarian recommendations establish, as a general rule, that the responsibility arising from fraudulent use of the card corresponds to the cardholder as long as the cardholder does not notify the loss or theft. The cardholder’s responsibility is absolutely linked to the duty of custody. Thus, the notification to the issuer as to the loss or theft of the card is a burden for the cardholder,\footnote{24} because the cardholder will suffer the negative consequences arising from the absence of notification, i.e., the cardholder’s liability. In any event, as pointed out by MARÍNÓ LÓPEZ,\footnote{25} when concurrent negligent acts arise with the issuer bank, the Spanish jurisprudence seems to override the strict criteria regarding the shift of burden once the cardholder has made a notification.

\footnote{22} Cfr. VALLADARES RASCÓN, E., The Responsibility of the Credit Card holder in the event of its theft ["La responsabilidad del titular de una tarjeta de crédito en caso de sustracción de la misma"], \textit{Poder Judicial}, 6 de junio 1987, pág. 95.

\footnote{23} \textit{Article 5: Duties of the cardholder}

\textit{The cardholder b) shall notify without delay to the issuer (or the institution chosen by the issuer), once the cardholder acquires knowledge of:}

\begin{enumerate}
    \item loss or theft of the payment electronic instrument or of the
    \item means that allow its use,
    \item the registry in the account of any unauthorized transaction
\end{enumerate}

\footnote{24} In similar sense, GETE-ALONSO CALERA, \textit{op. cit.}, pág. 65 y ss.; y FARRANDO MIGUEL, I., and CASTAÑER CODINA, J., “Allocation of Civil Responsibility by unauthorized use of cards”, ["Atribución de responsabilidad civil por el uso no autorizado de tarjetas"], \textit{Revista de Derecho Bancario y Bursátil}, enero-marzo, n. 81, pág. 91.

\footnote{25} MARÍNÓ LÓPEZ, A., Fraudulent Use of Credit Cards by Unauthorized Third Parties [Uso fraudulento de tarjetas de crédito por terceros no autorizados], Madrid, 2006, pág. 41 y ss.
The cardholder is released of liability if he or she notifies any mistake or other anomaly in the handling of the account by the part of the issuer (article 5-b and 9). The notification marks the exclusion of liability except for those cases of gross negligence or ill intention, such as fraud. The notification of loss or theft may be made by any means. Written notification is not required because the Bank of Spain Claims Department (SRBE) considers it poor banking practice that the card issuance contract requires written notification during business hours, releasing of liability in the event of oral notifications or by phone call (Res. Num. 459/93, Memoria 1993, pag. 103); and also considers it poor practice that the issuer does not have a phone customer service center to receive those notifications (Res. Núm. 1196/98, Memoria 1998, pág. 921). Thus, because of the use across borders, and because the structure of the companies devoted to card services, it appears necessary to offer cardholders a fast and effective means of communication, which currently should be complemented with other means such as e-mail.

This system is completely different from the one in the U.S., where the matter is handled by means of the close monitoring by the part of the issuer bank to detect fraudulent uses. The cardholder is only liable up to $50.00, unless there is proof of the cardholder negligence. The onus to produce evidence is on the part of the person with the best chance of providing evidence, i.e., the issuer that offers the card and dominates the system.

The rules as to responsibility in connection with the duty of custody, duties upon the cardholder are complemented with duties on the part of the issuer of the card. The issuer shall make it easier for the cardholder to perform her duties of custody. These duties include not revealing the PIN or other code, except to the cardholder, keeping an internal registry as to transactions more easily correct any mistake, and securing appropriate means to allow the cardholder to notify any loss or theft (article 6 R 97). Article 9 R 97 establishes that the issuer will provide the means so the cardholder, at any time during the day or during the night, may notify the loss or theft of the card. On the other hand, it is necessary that the electronic transactions are recorded so there is evidence of them. On that basis, article 6.4 R 97 essentially shifts the burden of proof regarding transactions which have not been affected by a technical malfunction.

B. Liability of the issuer of the card upon the risk of diffusion and malfunction of the system.

The issuer bank has the duty to control the security risks associated with the payment system. The required standard of diligence is one proper of an expert professional. The diligence of a good professional standard is
a high standard, higher than the average diligence of a reasonable person.\textsuperscript{26} Obviously, the reason is because the issuer controls the system, so the risks for undue use by the part of third parties, or for malfunctions of the system, should be assumed by the one in a better position to control it; namely, the service providers. This risk is assumed by the bank as a qualified intermediary which may redistribute liability expenses within the costs of the company.\textsuperscript{27}

The commonly named "diffusion risk" is the risk of use by unauthorized third parties. This risk is most evident in Internet use where no user may control the risk of diffusion of personal data. Thus, article 8.1,b makes the issuer responsible for the use of the payment instrument by unauthorized third parties. This is the purpose behind article 9.2 de la R 97 which establishes that the issuer, even when the cardholder has acted with gross negligence or fraudulently, shall, by any reasonable means at its reach, prevent the subsequent use of the electronic payment means.\textsuperscript{28}

This is in response to article 6.3 R-97 which releases the cardholder of liability, even before the notification as to its loss or theft, when they have not been identified—physically or electronically—namely, when there is risk of diffusion. This would be more difficult to accomplish if security software, like Protocol SET\textsuperscript{29} or SSL, were used for the safe transmission of data.

A second aspect is that the issuer of the card dominates the risk, and thus it must be liable in the event of the malfunction of the system. Indeed, just like in the event of risks arising from diffusion, the financial intermediary must be liable because it is the one who may redistribute the costs. This is the idea of R.97, within article 8.1.a as to the no execution or the defective execution of the cardholder transactions included within the application realm of the Recommendation. And, in this case even when the transaction is initiated with an equipment or terminal or with an equipment not under the direct or exclusive control of the issuer, as long as the transactions is not originated within an equipment or terminal or with an equipment which use has not been authorized by the issuer, and also the transactions no authorized by the cardholder, and also any other error or

\textsuperscript{26} \textit{See generally} MARINO LÓPEZ, \textit{op. cit.}, pág. 73 y ss.
\textsuperscript{27} SERRA, A., "Consideration in tema de pagamenti elettronici e moneta elettronica", in \textit{Il contratto telematico e pagamenti elettronici.}, Milano, 2004, pág. 74.
\textsuperscript{28} A deep analysis is available at PLAZA PENADES, J, ibidem. Translator’s note: text from original Spanish version: "el emisor, incluso en el supuesto de que el titular haya actuado con negligencia grave o de forma fraudulenta, deberá procurar, por todos los medios razonables a su alcance, impedir la ulterior utilización del instrumento electrónico de pago ".
\textsuperscript{29} PAZ ARES, SAEZ LACAVE, Y BERMEJO, The Expression of Assent through the Internet ["La emisión de la declaración de voluntad en Internet"], in PERALES SANZ, Legal Certainty in Electronic Transactions [\textit{La seguridad jurídica en las transacciones electrónicas}], Madrid, 2002, pág. 117.
anomaly imputable to the issuer in connection with the handling of the account of the cardholder. In the marginal case of erroneous transactions, the liability inquiry is resolved after considering the categories of non excusable mistakes.30

VII. A SPECIAL CASE: PAYMENT WITH CARD FOR DISTANT SALES

Contracts entered into distantly deserve special attention, because they have a legal framework within Spain, but R97 is not applicable to them. Indeed, article 106.1 TRLCU and article 12 LCDSF regulate distant contracts virtually in an identical way. It is difficult to do a systematic analysis because they regulate a specific case of liability because the general system is not yet developed. As to article 106.2 TRLCU, it adds a new rule that will be analyzed at the end of this section.

Both articles mentioned above regulate the responsibility for payments for distant sales and contracts for financial services entered distantly, and both use the term “cardholder”. Article 106 TRLCU, changing the aforementioned legislation, states that this right is only applicable to “consumers or cardholders,” resolving doubts as to its applicability. On the other hand, LCDSF (article 1 and article 4.1), is also limited to contracts for financial services involving a consumer. Nevertheless, the rationale of this provision, namely, to provide the cardholder a repudiation right of any undue or fraudulent charge, should be extended to any cardholder.31

Indeed, in contracts entered distantly, due to the lack of direct contact among the contracting parties, the card is not directly presented, but the purchaser is forbidden from communicating the personal identification number without further proof of identity. This problem is more difficult when the purchase is made through an electronic procedure (online sale). In this case, article 106 TRLCU and article 12 LCDSF allow the cardholder to cancel the payment on the basis of fraudulent use of the card, that, according to REVERTE, is based on the action of payment of a thing not due of article 1895 CC, in which a mistake is presumed when a payment is done pursuant to a non existing obligation of payment (article 1901).32 Those articles imply exceptions to the regular regime of responsibility of R97 because the cardholder is not liable for fraudulent uses even before

30. SERRA, ibidem.
31. In this sense, BERCOVITZ, RODRIGUEZ-CANO, R., (comment to article 46 in Comments to the laws regulating the retail commerce [Comentarios a las leyes de ordenación del comercio minorista] BERCOVITZ, R.- LEGUINA, J., coords., Madrid, 1997, pág. 729) for whom article 46 LOCM seeks to protects the cardholder, whether or not is the one making the distant contract, and whether or not a consumer in the strict sense. See also GUIMARAES, op. cit., pág. 193.
32. REVERTE NAVARRO, A., comment to article 46, in ALONSO-LÓPEZ-MASSAGUER-REVERTE, coords., General Legal Regime of the Retail Commerce [Régimen jurídico general del comercio minorista], Madrid, 1999, pág. 586.
notification of the loss of the card. The exception is based on the fact that the lack of physical presence of both contracting parties makes it more difficult to know if a third party has gained access without knowledge of the cardholder since the cardholder does not know if fraud is involved, and has not been able to notify the incident. On that basis, it is not fair to hold the cardholder liable according to the general rules indicated in section 6.1 of this work. The mentioned articles shift the responsibility to the creditor of the payment, namely, the provider of the goods and services, because the law orders to the issuer bank to reverse the payment, by means of a credit.  

This idea agrees with article 6.3 R 97 as long as the cardholder has not been identified, nor assigns her responsibility, understanding that the use of a numeric code, i.e. PIN, does not preclude the change as to rules regarding liability. The undue use by the party or third parties may not be imputable to the cardholder. Also, this provision has the advantage to be applicable, without further arguments, to any cardholder. Nevertheless, article 6.3 R 97 is limited to shift the risks to the issuer because the cardholder could have been absolutely diligent when maintaining custody of the card, and nevertheless, an undue use resulted. On that basis, R 97 releases the cardholder of liability, understanding that it is a special risk for diffusion. The Spanish legislation goes further, and, as indicated by MARTÍNEZ NADAL, 34 perfects the R 97 system in this case, and demands the bank reverse the charge, thus, shifting the final liability for the fraudulent or undue use of the card to the provider of the services that has acted negligently when confirming the identity of the user of a payment card. In this sense, these articles allow a reversal of the charge, and allow adjudication of the liability inquiry between the issuer and the merchant. This is done in order to figure out who failed in their duties to identify the user, or to control the risks of diffusion of the card, but the cardholder will be unharmed either way. The cardholder is exempt from any liability, even in the case that the fraudulent use is due to the negligent custody of the card on the part of the cardholder or before the notification of the loss or theft of the card.

Due to this fact, it seems excessive to limit the reach of articles 106 TRLCU and 12 LCDSF to the cardholder-consumer, because the offered remedy is more favorable to the cardholder than the rules of R 97. On that basis, it seems necessary to understand that, in these cases, because there is a lack of hierarchy of law in Spain, it may be applicable to any cardholder since, by being in two different laws, it can be perceived as a principle for

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33. As to this subject, MARÍN O LÓPEZ, op. cit., pág. 67 y ss, citing plenty of bibliography.

34. MARTÍNEZ NADAL, A., Payment with card in the electronic contracts. Especially Article 46 LOCIM” [”El pago con tarjeta en la contratación electrónica. En especial, el artículo 46 LOCIM”], en Revista de Derecho Bancario y Bursátil, octubre-diciembre, 2001, pág. 67 y ss.

35. As to this obligation and its reach see MARÍN O LÓPEZ, op. cit., pág. 133 y ss.
its regulation. The main problem, that can be only adverted in this work, is the tension within the Spanish legislation between the deregulation of bank contracts, and the fragmented regulation for the benefit of the consumer – bank client- that permeates through the necessary application of the communitarian legislation, in this case Directive 7/1997, as to contracts entered distantly with consumers.

Article 106 TRLCU includes a second paragraph that was not included within the Directive, but it was within its drafts. It stated if the cancellation of the payment made by the cardholder is proved to be fraudulent, the cardholder is liable to indemnify the merchant, because it a scenario of a ill intended breach of a contract on the part of the purchaser, who is also is the cardholder. The purchaser is liable for damages, in addition to the price of the cancelled purchase, if the merchant opts to request the specific performance of the contract, pursuant to article 1124 CC.36

VIII. CONCLUSIONS:

The payment card is a distant access payment instrument that causes an electronic wire transfer of funds through a financial intermediary for the benefit of a third party creditor. The legal scheme is based on the delegation of the debt including three-parties relationships between the cardholder, the bank and the creditor or merchant adhered to the system. As to this last relationship, it comes to a role the legal framework as to payment means, because the payment with cards is valid only if the creditor admits it. The relationship between the cardholder and the bank is based on the issuance contract which falls as a financial service. Spain does not have a systematic legal framework as to this type of services, particularly as to contracts for issuance of credit cards, that is regulated by disperse provisions, even by Recommendations of the UE, that bring important problems within the realm of its application, specially as to the separation between the concepts of bank client and consumer. As to the liability system, the communitarian provisions are applicable, and they make the cardholder responsible for risk arising from the custody of the card until the cardholder notifies a loss or theft of the card; while the risk for diffusion and for malfunctioning of the system are for the issuer. A special system rules distant contracts, that upon fairness reasons, seems applicable to any cardholder. In this case, the merchant gets penalized on the basis of lack of care with the identity of the user of the card, and the charge is reversed, while the determination of the true negligence between the issuer and the merchant is secondary for the cardholder who request the reversal of the payment.

36. We follow, in this matter, BERCOVITZ, op. cit., pág. 729.