

China – Certain Measures Affecting Electronic Payment Services

(DS413)

**EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES OF AMERICA
AT THE SECOND MEETING OF THE PANEL WITH THE PARTIES**

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I. INTRODUCTION

1. The United States has shown that China's measures prevent foreign suppliers from supplying the service that enables credit, charge, debit and other payment card transactions to occur in China for *all* transactions where the card is issued in China and used in China. These transactions constitute the overwhelming number of transactions in China, whether they be RMB-payment card transactions or transactions using foreign currency denominated payment cards issued in China. Instead, China has granted one Chinese domestic company, China UnionPay, Co. Ltd. ("CUP"), a monopoly to supply the service. China's written and oral submissions show nothing to the contrary. In fact, in its defense thus far, China has largely avoided substantive discussion of the challenged measures.

II. EPS FOR PAYMENT CARD TRANSACTIONS IS A SINGLE, INTEGRATED SERVICE THAT FALLS WITHIN THE ORDINARY MEANING OF "ALL PAYMENT AND MONEY TRANSMISSION SERVICES, INCLUDING CREDIT, CHARGE AND DEBIT CARDS..." (SUBSECTOR (D))

2. The United States has demonstrated that EPS for payment card transactions is a single, integrated service that is properly classified under subsector (d) in China's Schedule. EPS is supplied as coherent whole, and this service enables cardholders' banks to pay merchants' banks the amount they are owed. EPS suppliers provide an efficient, timely and reliable means to facilitate the transmission of funds from the holders of payment cards who purchase goods or services to the individuals or businesses that supply them. The network, rules and procedures, and operating system provided by an EPS supplier enable payment card transactions to occur. EPS suppliers receive, check and transmit information that the parties need to conduct the transactions, and enable the transmission of funds between participating entities. Each component of EPS is critical to effectuate payment card transactions. The customers of EPS suppliers – the entities that are participating in the payment card transactions – demand and rely on EPS as a complete, integrated, and unified service.

3. The clear language of subsector (d) compels the conclusion that EPS falls within the ordinary meaning of "payment and money transmission services" as one type of "*all*" such services. The illustrative list that explicitly provides that the services in subsector (d) "include[s] credit, charge and debit cards" underscores that EPS is integral to the processing of credit, charge, debit and other payment card transactions.

III. THE SERVICE AT ISSUE IS NOT "SETTLEMENT AND CLEARING SERVICES FOR FINANCIAL ASSETS, INCLUDING SECURITIES, DERIVATIVE PRODUCTS, AND OTHER NEGOTIABLE INSTRUMENTS"

4. China's arguments regarding subsector (d) are anchored to a flawed premise, cannot be reconciled with the text of its commitments, and are contrary to how the service at issue operates in practice. Moreover, China's position hinges on an exceedingly narrow reading of subsector (d). China's interpretation fails to give meaning to the word "all" in the sectoral description of "all payment and money transmission services, including credit, charge, and debit cards..." At the same time that it reads out the word "all" and pushes for an extremely narrow reading of

subsector (d), however, China advocates an overly broad interpretation of “settlement and clearing services for financial assets” that is inconsistent with its proper context.

5. China continues to assert that certain elements of EPS for payment card transactions constitute separate services that are classified in a sector, item (xiv) of the GATS Annex on Financial Services, for which China has made no market access or national treatment commitments. China’s overly broad reading is also combined with an incorrect understanding of the services in item (xiv) that fails to account for fundamental, recognized differences in the operation and risk profile of financial services under item (xiv) and services related to retail payment processing, such as EPS for payment card transactions.

6. The ordinary meaning of the services described in item (xiv) is evidenced by the words, the illustrative list in item (xiv), the additional context provided by paragraph 5 of the Annex on Financial Services, and other sources, including the United Nations, the OECD, the World Bank, International Monetary Fund (“IMF”), Bank for International Settlements (“BIS”), and BIS Committee on Payment and Settlement Systems (“CPSS”), which all confirm that the ordinary meaning of item (xiv) does not include EPS for payment card transactions. Moreover, even if one were to erroneously attempt to disaggregate the component parts of EPS, no element of EPS falls within item (xiv). In short, the same rules of treaty interpretation that compel the conclusion that EPS for payment card transactions fall within subsector (d) also compel the conclusion that EPS for payment card transactions do not fall within item (xiv).

7. The ordinary meaning of the term “financial assets” that China has put forward is incorrect and contradicted by several sources. The United States has cited to the IMF’s explanation that “a financial asset is negotiable if it is actively or inactively traded in a secondary market.” In addition, the United States identified the Uniform Commercial Code (“UCC”) definition of “financial asset,” which is in accord with the IMF’s explanation. Similarly, the BIS CPSS “glossary of terms used in payments and settlement systems” clearly illustrates that the terms “clearing” and “settlement” each have different meanings in the respective payment and securities contexts, confirming that context is crucial and all the terms in item (xiv) must be taken into account in determining the ordinary meaning of “settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments.”

8. The BIS CPSS glossary definitions relating to payments systems, including EPS for payment card transactions, are drawn from different source documents than those for securities settlement systems. China’s interpretation of “financial asset” fails to account for the fact that “settlement and clearing services for financial assets” is a substantially different financial service than EPS for payment card transactions, which is a type of retail payment service. The CPSS has explained that “[r]etail payments are generally classified as cash payments or non-cash payments,” which are subclassified into “cheque payments, direct funds transfers and card payments.” The United States provided a detailed explanation of the many practical differences between the systems used to settle and clear investment instruments of the kind referenced in item (xiv) and the systems used to settle and clear retail payment instruments, like payment cards.

9. Because credit card receivables can be used to create asset-backed securities, China also argues that there is “no distinction whatsoever between the issuing bank’s claim against the cardholder and the acquiring bank’s claim against the issuing bank.” China is wrong here too. The assets that are used to create credit card asset-backed securities are *not* the obligations between issuing and acquiring banks that are processed by EPS suppliers on a daily basis. The relevant assets are the *loans* that are extended from the issuing bank to the cardholder. EPS suppliers are not involved in the processing of such loans.

10. China cites the Basel Committee on Banking Supervision, Report on Special Purpose Entities (Exhibit CHI-76) (“Basel Report”), for the proposition that credit card receivables are financial assets. However, the Basel Report makes it clear that the “assets” are not the obligations between the issuing and acquiring banks, but instead are receivables that generate income or cash flow (that is, the loan). Thus, this source actually supports the proposition that the “financial assets” are *the loans between the issuing bank and the cardholders*.

11. China’s argument that clearing and settlement services for certain types of retail payment instruments such as checks are covered by item (xiv) is also flawed. Item (xiv) covers only those types of “negotiable instruments” that qualify as “financial assets,” and instruments such as personal checks do not fall within that category. The System of National Accounts (SNA), an international standard system of national accounts, prepared jointly by the United Nations, the OECD, the World Bank, the IMF, and the European Commission, distinguishes between financial claims that are negotiable and those that are not, and according to the SNA the term “negotiable instrument” does not include retail payment instruments such as checks.

12. Finally, paragraph 5(a) of the Annex provides additional context that supports the U.S. interpretation. The terms “financial assets” and “negotiable instruments” also appear item (x) of the Annex, which covers, “Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise.” As used in item (x), these terms refer to tradeable investment assets, rather than “interbank claims for payment.” Thus, the context for item (xiv) indicates that “negotiable instruments” and “financial assets” are not retail payment vehicles like payment cards. Additional context is item (viii) of the Annex, which contains the most specific and accurate description of the service for purposes of classifying EPS for payment card transactions.

IV. CHINA’S MODE 1 AND MODE 3 COMMITMENTS FOR “ALL PAYMENT AND MONEY TRANSMISSION SERVICES, INCLUDING CREDIT, CHARGE AND DEBIT CARDS...”

13. It is plain from the text that China has taken mode 1 market access commitments for “all payment and money transmission services, including credit, charge and debit cards...” The word “Unbound” in the market access column of its Schedule is qualified. The phrase “except for the following” is further elaborated by two sentences that describe elements of the service within subsector (d) for which China has taken mode 1 commitments. The qualifying phrase and specific elaboration following the word “Unbound” must be given meaning.

14. Meanwhile, China’s reaction to the U.S. response underscores its attempt to conflate the classification of a service in a particular subsector, on the one hand, with the interpretation of

market access limitations, on the other. China states that “the United States needs the service at issue to be in two places at once: in subsector (d) and in subsectors (k) or (l).” Sequence is critical to a proper analysis. Step one is to classify the service: the service at issue is a single, integrated service that falls within subsector (d). Step two is to discern China’s commitments for subsector (d), such as China’s mode 1 commitments. This is a separate and distinct exercise from step one. Yet China continues to muddle the discussion of these separate steps.

15. China’s arguments fail to give any meaning to the extensive language qualifying the term “Unbound” in its mode 1 commitments. They essentially reduce to the single point that all of the extensive language qualifying the term “Unbound” in its mode 1 market access commitments was provided simply to confirm language already existing elsewhere in China’s Schedule. According to China the additional wording should be given no meaning whatsoever. If China wished to be fully “Unbound,” that is, not to have *any* mode 1 commitments, it should not have qualified its commitments; rather it should have left the word “Unbound” unqualified. However, as its Schedule reflects, China did not do so. It is not credible to argue that the additional language is merely for greater certainty to repeat China’s commitments in subsectors (k) and (l). Such an argument fails to give meaning to this treaty language. Perhaps knowing this, China implores the Panel to “imagine” instead different treaty language rather than the actual words in its Schedule.

16. Elements of CUP’s own activities are described in terms similar to the “excepted” elements that are set out in China’s mode 1 market access commitments, and China’s regulatory system similarly describes a primary activity of CUP as exchanging information among financial institutions. Moreover, the concept that a service may include elements of “provision and transfer of financial information, and financial data processing” was recognized, for example, in paragraph 8 of the Uruguay Round Understanding on Commitments in Financial Services. The provision and transfer of financial information and data processing is central to the supply of many different financial services, and, according to the Understanding, signatory WTO Members cannot frustrate their commitments by, for example, blocking the ability to communicate and process information.

17. With respect to China’s mode 3 market access commitments for subsector (d), the presence of the term “financial institution” in China’s schedule does not create a separate and independent limitation. The Schedule states that “[c]riteria for authorization to deal in China’s financial services sector are solely prudential.” There is nothing in China’s Schedule that indicates it may condition the supply of a service on the criteria listed in the market access commitment column and also require that another Member’s supplier meet additional (and unspecified) criteria to be recognized as a “foreign financial institution.” Such a limitation would have needed to be imposed explicitly in its Schedule, and China did not do so. Finally, even if it were the case that the term “financial institution” somehow served as a limitation in China’s Schedule, the definition of “financial institution” offered by China is too narrow. Many definitions are much broader, and some explicitly include “an operator of a credit card system.”

V. CHINA’S MEASURES ESTABLISHING AND SUPPORTING CHINA UNIONPAY’S MONOPOLY ON THE SUPPLY OF EPS ARE INCONSISTENT WITH ARTICLE XVI OF THE GATS

18. China’s measures limit the number of suppliers of EPS. The United States identified 19 instruments in the U.S. panel request and is challenging each of them independently. The United States has also identified six separate categories of requirements that constitute six separate measures that are implemented through several instruments operating in conjunction:

- Requirements that mandate the use of CUP and/or establish CUP as the sole supplier of EPS;
- Requirements that RMB denominated payment cards issued in China bear the CUP logo;
- Requirements that all automated teller machines (“ATM”), merchant card processing equipment, and POS terminals in China accept CUP cards;
- Requirements on acquiring institutions to post the CUP logo and be capable of accepting all payment cards bearing the CUP logo;
- Broad prohibitions on the use of non-CUP cards; and
- Requirements pertaining to card-based transactions in China, Macao and Hong Kong.

19. These measures establish and maintain CUP’s monopoly and limit the number of suppliers of EPS for payment card transactions and are inconsistent with China’s obligations under Article XVI of the GATS.

VI. CHINA’S MEASURES ARE INCONSISTENT WITH ARTICLE XVII OF THE GATS

20. The measures at issue affect the supply of services and accord less favorable treatment to foreign suppliers of EPS, and are inconsistent with China’s obligations under Article XVII of the GATS. Some measures impose a limitation such that CUP is the sole entity that can process certain transactions, such as domestic RMB transactions. This of course means that foreign suppliers of EPS are prevented from supplying the service at all. Other measures promote CUP’s position in the marketplace such as by imposing certain requirements on every key player in a card-based electronic payment transaction. The United States has explained how China’s measures affect every aspect of a card-based electronic payment transaction and the key players, including issuers (all cards issued in China for domestic RMB transactions must bear the CUP logo), merchants (all merchant card processing equipment and POS terminals must accept CUP cards), and acquiring institutions (which must post CUP logo and accept CUP cards).

VII. CONCLUSION

21. The United States respectfully requests that the Panel find that China’s measures are inconsistent with China’s obligations under Article XVI:1 and XVI:2(a) and Article XVII of the GATS. The United States again thanks the Panel for its continued service in this dispute and looks forward to responding to any questions the Panel may have.