

**APPLICATION OF THE E-MONEY  
DIRECTIVE TO MOBILE OPERATORS**

**GUIDANCE NOTE FROM THE COMMISSION  
SERVICES**

## **GUIDANCE NOTE**

1. The Commission launched a consultation process in May 2004 on the question of the application of the E-Money Directive (Directive 2000/46) to mobile telephone operators. A large number of responses were received by the Commission. Following an analysis of those, and in line with publicly stated commitments, the Commission is publishing a 'feedback document' on the consultation in parallel with this guidance note.
2. This note aims to summarise the Commission services' views on the issue of the applicability of the E-Money Directive to mobile phone operators and other potential 'hybrid' issuers of e-money. Following the extensive consultation process that the Commission has undertaken, it is appropriate that the Commission services draw some conclusions and make these public. However, it is not intended to provide a binding interpretation of the treatment of mobile phone operators.
3. The responses to the consultation process did not give rise to any consensus view on the part of mobile operators, third-party content providers, existing e-money institutions or other interested parties as to how to determine precisely where e-money may be created by mobile phone operators whose customers use pre-paid cards to purchase third-party content. In framing its views, the Commission services have no wish to impose unwarranted constraints on mobile operators. On the other hand, it is important that a level playing field exists between e-money issuers already regulated under the E-Money Directive and other service providers who may be issuing e-money as a non-core part of their business.
4. Although the consultation that took place was narrow in its scope and focus, looking solely at the mobile phone sector, it is clear that the issues raised in that process are broader in scope. Indeed, there are potentially a large number of suppliers or service providers who could choose to issue e-money. If so, the regulations that would apply ought to be not only proportionate to the risks involved, but also consistent between sectors in order to avoid any distortion of competition. In addition, any regulatory treatment of 'hybrid' e-money issuers, or other innovative issuers, will need to be consistent with any approach that may be taken under possible future legislation in the area of payments. A broader review of the E-Money Directive will be carried out in 2005. This review will look at additional aspects of the Directive and will form the basis for wider discussions on the future scope and content of the Directive.

### **Discussion**

5. Directive 2000/46, although a recent piece of legislative work, was arguably conceived at a time when it was difficult to foresee the potential for widespread and innovative uses of electronic purses. Indeed, one of the primary purposes of Directive 2000/46 was to ensure fair competition between the banking sector and "non-hybrid" electronic money issuers.
6. The BAC concluded in December 2003 that e-money is now being issued under some circumstances by mobile phone operators to their pre-paid customers when those customers purchase some third party services and pay for them using their pre-paid store of value. It is generally understood that the value of third party services purchased by pre-paid customers amounts to a little over 1% of their total expenditure. Thus, around 99% of the monetary value

stored by mobile operators on behalf of their pre-paid customers is used to purchase communication services provided by the mobile operators themselves. Those pre-paid communication services do not fall within the ambit of the E-Money Directive. Neither do the communication or third party services purchased by customers on a "post-paid" (i.e. billing) basis fall under the Directive.

7. The universe of e-money potentially issued by mobile operators is therefore small, at present. However, it may grow with the gradual introduction of 3-G services and the more extended offer of payment facilities for non-digital services. In addition, there are a number of other potential issuers of e-money in the EU whose principal activity is not the provision of banking or payment services. These include transport operators and retail outlets.
8. As technology improves and public confidence in the use of electronic purses grows, it is likely that new avenues for the issuance of e-money will emerge. The Commission services therefore believe it is imperative that any action taken by regulators at this early stage in the development of e-money does not constrain or inhibit the market potential of e-money. At the same time, however, banking supervisors and other relevant regulators need to ensure that the risks run by e-money issuers are adequately catered for and that consumers are protected within reasonable limits.

### **Mobile operators**

9. Turning to the specific issues raised in connection with the issuance of e-money by mobile phone operators, the Commission services believe that a flexible approach needs to be adopted. Information received as a result of the recent consultation shows that market practice may change over time and the regulatory environment needs to take due account of this. In addition, while the current level of expenditure by pre-paid customers on third party services is small in both relative and absolute terms, it is possible that the current level and number of 'micro' payments may rapidly change as new services are made available to the public (e.g. payment for car parking, cinema tickets or vending machines using a mobile handset).
10. In considering the applicability of the Directive to mobile phone operators, it should first be noted that there has so far been no evidence presented of harm done to consumers or to the stability and good functioning of payment systems as a result of the issuance of e-money by mobile operators. Rather, the debate has centred on the obligations of mobile operators as issuers of e-money and the need to create a level playing field with existing e-money institutions. It would appear difficult to justify the imposition of all elements of the Directive (including the redeemability requirement and a limitation on investments) from a 'proportionality' point of view. However, a consumer protection or financial stability rationale for imposing the requirements of the Directive may become more apparent in future. Banking supervisors and other regulatory authorities therefore need to remain watchful in order to respond to any change in the profile of risks presented by mobile operators' provision of third-party services.
11. Working on the basis that e-money may be issued by mobile operators when third party services are purchased by pre-paid customers using a pre-paid card (or "account"), there are three issues that could be considered in order to ensure that the Directive is applied in a practical manner.

## **1. The scope of the definition ('perimeter') of e-money**

12. Although there is a school of thought that suggests that no e-money is created when pre-paid customers use their store of value with mobile operators to purchase third party services, other commentators agree that e-money is created when the monetary value stored on a pre-paid card is accepted as payment by a third party merchant in line with Article 1.3(b)(iii) of the Directive. The Commission services support this view, with some caveats.
13. First, given the fact that in many cases (though not all), it appears that mobile operators themselves arrange for the payment of third party content providers, either as a result of a contractual relationship under which the mobile operator assumes the liabilities of its pre-paid customers towards a merchant or through a revenue-sharing arrangement with a merchant, it is arguable that many purchases of third-party content do not give rise to e-money.
14. The Commission services believe that the conditions stipulated in Article 1 of the Directive have to be read in the light of the notion of e-money as an "electronic surrogate" for notes and coins (Recital 3). Although it is clear that e-money may not have all the functionality of notes and coins, its primary purpose is still to be used as legal tender in a payment transaction with a third party. The Commission services therefore suggest that when Member State authorities conduct an analysis of whether a mobile operator or other 'hybrid' institution is engaged in the issuance of e-money, they consider the form of direct payment relationship between a mobile customer and a third party vendor. This payment relationship may be established when either:
  - a) there is a direct transfer of e-value (as far as the Commission services understand, this may be technically feasible for mobile handsets); or
  - b) the mobile operator acts as a facilitator (or intermediary) in the payment mechanism in such a way that customer and merchant would also have a direct debtor-creditor relationship.
15. Judging from the responses to the Commission's consultation, it seems that there are at present few instances where mobile operators act simply as payment agents for customers vis-à-vis third party merchants. The Directive would therefore only apply in a correspondingly limited number of cases.

## **2. Broader use of waivers**

16. A limit on the definition (or "perimeter") of e-money does not of itself, however, reduce the burden of requirements incumbent upon mobile telephone operators under the Directive. On the contrary, the more limited the definition of e-money under the Directive, the more costly the redeemability clause under Article 3 of the Directive and the prudential rules on the investment of assets under Article 5 become on a per transaction basis. Indeed, without a detailed risk analysis, it is difficult to see that the requirements imposed by the Directive are proportionate to the risks undertaken by either the operators themselves, or pre-paid consumers of third-party services.
17. Article 8 of the Directive, however, provides the possibility for "competent authorities" to waive the application of the Directive under certain circumstances. The waiver article is drafted in a restrictive manner. However, the Commission services believe there may be merit in applying the waiver provision in a more consistent manner across Member States.

18. Although the monetary amounts quoted in Article 8 are possibly low for mobile operators (total e-money liabilities of less than € 6 million and less than €150 of stored value per customer), it should be possible for Member States' authorities to exempt a large part of the pre-paid business of mobile operators from the scope of the Directive, at least over the short to medium term. However, in order for mobile operators – or indeed other “hybrid” issuers of electronic money – to continue to conduct their business under conditions of fair competition with like service providers, it would be important that competent authorities take steps to ensure that waivers are applied with a similar scope. Exchange of information between supervisors will be critical here.
19. Equally important will be an ongoing flow of information from mobile operators and other “hybrid” e-money issuers to banking supervisors in order for supervisors to be kept abreast of market developments and able to take early action if they consider that the risks to consumers or the payments system increase over time.

### **3. Thresholds**

20. The use of waivers may, however, need to be supplemented by a longer term solution that looks at amending the thresholds mentioned in Article 8. This could of course only be done by amending the Directive itself, and is therefore a longer term project.

#### **The longer term**

21. The Commission has an obligation to report on the application of the E-Money Directive in 2005. Work on that report will begin shortly. Following publication of its report, the Commission will need to consider what amendments to the Directive may be necessary. An impact assessment and analysis of the costs and benefits of any changes to the E-Money Directive will need to be carried out. In addition, the Commission will need to consider the impact on “hybrid” operators arising from their obligations under the E-Money Directive as well as their obligations under any future legislation on payments. In particular, the Commission and Member States should take care to ensure that the consumer protection obligations of mobile operators (or other “hybrids”) arising from different pieces of legislation would be appropriate regardless of whether a consumer is a pre-paid or a post-paid customer.
22. Amending the thresholds, in tandem with a judicious use of waivers, may be one way of ensuring that the business models of mobile operators (and other “hybrids”) are not subject to excessive regulation that could dampen innovation. In future, however, it may be that not all stores of value held by mobile operators or other “hybrids” (e.g. transport companies) will be used for the purposes of making micro payments only. In such circumstances, an appropriate threshold, combined with adequate money laundering safeguards, would need to be maintained.
23. This longer term work will need to include a range of stakeholders and consumer representatives in order to ensure that any modifications in the design of the E-Money Directive take account as far as possible of the changing landscape for the innovative provision of third-party services.