



**European Commission Communication concerning a
New Legal Framework for Payments in the Internal Market**

Orange Group

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Introduction

Orange Group welcomes the opportunity to respond to The European Commission's Communication on this important issue. Orange sent its Position Paper on the implications of the E-Money Directive on the European mobile industry to the Commission in November 2003. This response to a New Legal Framework for Payments in the Internal Market builds on that position, which we continue to maintain.

Orange operates in seven EU member states¹ and two of the accession states², serving a customer base of around 40 million. Whilst the provision of voice telephony remains our core business, the mobile industry is extremely dynamic and technical advances now enable us to deliver a range of innovative, new digital content services to our customers' mobile phones. Although this remains a very small part of our overall business, there is increasing customer demand for these types of services as they develop. These services are likely to grow considerably as our European 3G networks start to come on line.

Orange would like to take this opportunity to reiterate its view that any payment legislation should only cover legitimate payment services and not existing mobile services. Mobile operators offer a range of premium rate mobile services to both their pre-pay and post-pay customers. We do not accept that these services can be defined as payment services given the intrinsic relationship mobile operators have with their customers in supplying these services. Orange therefore believes that all existing premium rate mobile services fall outside the scope of this Communication.

In its Communication the Commission recognises the role of newcomers to the EU Payments Market in preparing alternative and specialised payment methods for a more efficient market. The Communication acknowledges that micro-payments are being increasingly used for payment of new media services and that vendors of such services require automated, secure payment processing methods to keep their administrative tasks to a minimum. The Commission also appreciates the importance of critical payment transaction mass for micro-payment systems to become commercially viable. Orange is pleased to note that the Commission has recognised that the legal environment for micro-payment systems needs to be improved in order for them to thrive. Orange welcomes the suggestion that competition in this part of the payment market may be enhanced by reducing the level of regulation, particularly of reporting requirements, thus reducing the burden on simple payment service providers.

In our response, we have concentrated particularly on the legislative environment for payment services and the importance of proportionality to the risks involved, as well as looking at how to protect the customer. Our general belief is that for micro-payments the risk to the customer is very low and therefore any new or revised legislation must take this into account. We also advocate the use of the Internal Market principle of mutual recognition in order to encourage the introduction of pan-European services. We are looking for clarity in the legislative environment to allow the necessary investment in this emerging market to take place.

Orange makes its comments on the Annexes, where the subject matter may affect mobile operators and their payment services, below.

¹ France, UK, Denmark, Netherlands, Belgium, Luxembourg and Portugal

² Slovakia (2004) and Romania (2008)

Annex 1: Right to provide payment service to the public

In the sixth paragraph of this Annex, the Communication appears to infer that payment services such as micro-payments in the internet or in wireless communications services are not covered by the E-Money Directive. Orange is pleased to note this and also that the Commission recognises that new players in the payments market consider the existing prudential rules for both credit and e-money institutions too burdensome and not appropriate for the activity of small value payments. Mobile operators, including Orange, have been maintaining this for some time.

The Communication states that the objective of the E-Money Directive was to cover monetary value circulating as an electronic surrogate for coins and notes between separate individuals. This definition does not cover current mobile services such as premium rate services for digital content. Mobile pre-pay customers pay for these services using the pre-paid value stored electronically in a centralised account on the mobile network, or on a SIM card issued by a mobile operator. This stored value can only be used by the customer with its mobile operator for mobile telecommunication services which include premium rate services. Mobile operators do generally accept that some future pre-paid services which only act as payment services to third parties and where there is no other involvement of the mobile operator, may fall under the current e-money definition. However, it is unlikely that such services will ever be able to flourish under the current, burdensome regulations. In particular the capital and funding requirements, the limitation of investments, the fund redeemability obligation, the need to create a separate entity to manage e-money accounts, as well as the application of money laundering provisions, are extremely onerous conditions.

In this respect, the Communication offers three possible solutions to remedy the existing situation.

Solution 1

The first solution involves applying the Internal Market principle of mutual recognition to all kinds of payment activities in the EU. In order to avoid the risk of disputes, it is suggested that an EU-Passport regime based on minimum licensing or registration requirements should be established.

This first solution would allow the clarity that operators such as Orange are looking for to enable them to offer pan-European mobile micro-payment services and roll out these services around their Group companies. Our main argument against the onerous regulations of the E-Money Directive is that they are disproportionate to the micro-payments involved, and to the low consumer risk associated with such amounts, and mean that any mobile payment services that fall under the E-Money directive are not, currently, commercially viable. Consequently a light licensing regime, proportionate to the risks involved, that is recognised in all member states will allow mobile operators to develop their pan-European micro-payment services freely, thus opening up new possibilities for consumers to access content providers easily and simply. Obviously we would wish to see the minimum licensing regime put out to industry consultation.

However, we are concerned that this solution will not give us legal certainty, and therefore from a practical point of view it may not work. An authorisation scheme such as the one proposed is not legally binding and member states would still be able to impose their own national rules. This solution would therefore not give the surety we are looking for in order to develop our new services.

It is also likely that there will be many in the payments sector who will feel this solution may not adequately protect the consumer and that it will allow too many new, inexperienced players to enter the market, thus creating instability in the sector. Therefore, if the Commission were to choose this solution, it would be necessary for them to issue guidelines to financial regulators on a light licensing regime for micro-payments which are prudent enough to allay the fears of the banking community, but light enough to allow these services to develop unhindered.

Solution 2

The Communication's second solution involves creating a third category for licensing payment activities, in addition to the existing licences for credit institutions and e-money institutions, which has a lower level of prudential rules than the existing two.

Although this solution would be more onerous than the first, it would give more legal certainty to the micro-payments community as well as allow more protection of the consumer and so allay the instability fears of the banking community. However, it is unclear from the text what these lighter regulations would entail. Orange has already stated that it is important for the development of the micro-payment industry that it should be allowed to grow without disproportionate regulation. It is crucial that the Commission balances adequate protection of the consumer with a light administrative load for the payment providers, in order not to stifle this fledgling market. The Commission would also have to ensure that member states correctly transpose the rules governing this new licence, as well as any waivers, so that pan-European players would be able to take advantage of its mutual recognition regime.

For this solution to be acceptable it would also be essential that no type of mobile payment service could be caught by the E-Money directive as well. It would be impossible for the sector to develop smoothly if some of our services were subject to the new licence, while others required an e-money institution licence. Consequently we would require the E-Money directive to be amended or repealed to take account of the new licensing system so that mobile payment services would not be included in both categories.

If the above opinion is taken into consideration then this is the preferred solution of Orange. However we would want clarity on the timescales envisaged for this solution and an understanding of what the Commission would propose in the interim, as a new directive is likely to take at least eighteen months from first draft to adoption.

Solution 3

The third solution envisages amending the E-Money Directive to take account of new payment services that have been introduced since the original directive was adopted, and includes waivers for many of the new services.

As the Commission is fully aware, there has been great difficulty in interpreting the E-Money Directive with regard to new services developed since its adoption. In fact, discussions at the recent GTIAD meetings, and the BAC paper ref. MARKT/1085/03, appear to indicate that the banking community would like to see all pre-paid funds used for payments for digital content made via mobile operators classified as e-money. This shows a patent misconception of the mobile operators' premium rate service business. In order to change the existing situation, the Commission would have to be very clear about what services are to be classified as e-money, and how waivers would apply. The approach taken would have to be technology neutral in

order to avoid creating problems for future new services that have not yet been developed.

There are numerous problems with the existing E-Money directive. As already stated these include the capital and funding requirements, the limitation of investments, the fund redeemability obligation, the need to create a separate entity to manage e-money accounts, as well as the application of money laundering provisions. It also does not take account of so-called "hybrid" accounts, such as mobile operators pre-paid accounts that are used for both mobile telephony services and mobile payment services. The effect of this is that the whole account could be regulated under the E-Money directive when only a tiny proportion of the account (typically 2% or 3%) is actually being used for genuine payment services. It is vital that only those pre-paid funds that are actually e-money are regulated as e-money when the source of the fund is a multi-purpose account. Another problem with the current directive is that it has not been fully implemented in all member states, in particular some member states have not correctly transposed article 8 on the waiver system.

Given the complexity of these issues, any amendment of or guidance in relation to the directive would therefore require the full consultation of the mobile industry and the Commission would have to ensure that the revised directive was fully implemented by all member states.

If amending the existing E-Money directive meant a speedier resolution to the current problems in this area then Orange would also be in favour of this solution. Nevertheless, we would have to be convinced that an amended directive would be future proof, would provide the necessary light, proportionate regulation, and that all waivers would benefit from a mutual recognition regime.

Annex 2 : Information Requirements

As the Communication states that "some specific provisions applicable only to payment services, such as credit transfers or micro payments, may need to be considered", it is Orange's understanding that the Commission agrees that the draft provisions in this annex are not appropriate to mobile payment services. If our understanding is not correct, then Orange stresses that the draft provisions are completely disproportionate to the types of services we currently offer and plan to offer in the future, and would be totally unacceptable.

Micro-payments, by their very nature, have a limited consumer risk, and the real-time delivery and payment features of mobile payments, as well as the limited length availability of SMS, would make compliance with these requirements impossible. Whilst terms and conditions can be made available on a web page for internet and WAP services, it is not possible to do this for services via SMS.

In any case, Orange believes that mobile customers are already adequately protected by the conditions set out in the E-Commerce and Distance Selling directives, and fails to see the need for further regulation in this area. In particular, articles 5, 10 and 11 of the E-Commerce Directive already cover this area with regard to electronic and mobile payments.

Annexes 3 – 6

Not applicable to mobile payments services.

Annex 7 : The Evaluation of the Security of Payment Instruments and Components

The mobile telecommunications industry uses information in the SIM card and handset for security and authentication purposes. Standardisation in this area is driven through industry bodies such as 3GPP which to date has proved wholly satisfactory. This would therefore continue to be our preferred approach and we see no requirement for additional regulation in this area.

Annex 8 : Information on the Originator of a Payment

Orange supports the idea of a “de minimis threshold” for payment services falling under SRVII. The obligations under SRVII are completely disproportionate to the amounts involved for mobile payment services, and were they to apply to micro-payments would render such services uncommercial. We would therefore wish to see the euro amount in paragraph (3) set well above the amounts used for mobile payment services, possible around 500 euros for cross border payments and 3000 euros for national payments. However where the risks are deemed to be lower we would potentially support a higher limit.

Annex 9 : Alternative Dispute Resolution

Orange supports alternative dispute resolution mechanisms in general and has no particular comment to make on this annex.

Annex 10 : Revocability of a Payment Order

Orange believes that conditions in the E-Commerce and Distance Selling directives give sufficient safeguards for consumer protection, and that more regulation would be unnecessary and provide uncertainty for m-merchants. Article 6 of the Distance Selling Directive gives consumers a right of withdrawal following the conclusion of a contract and the right to full reimbursement if they do exercise the right to withdraw.

In order for micro-payment services to be commercially viable it is necessary to keep administrative costs to a minimum. Due to this fact and to the real-time consumption of digital products/services, which make revocability of payment once the order has been placed and delivered technically unfeasible, none of the wording suggested could apply to mobile payment services for digital products.

Annex 11 : The Role of the Payment Service Provider in the Case of a Customer/Merchant Dispute in Distance Commerce

Orange is unclear as to why additional measures of redress are required and believes the Distance Selling Directive already adequately protects the customer from a **product** liability point of view. It would be interesting to understand what commonly occurring examples the Commission could give to explain why it believes customers have less redress in this respect, as in the vast majority of cases it is not hard for consumers to get in contact with the supplier in the case of distance sales. To the extent that the Commission considers it necessary to strengthen remedies and redress available to consumers in distance selling contracts, then such measures should only be introduced in the context of amendments to the legislative measure specifically intended to address these issues, namely the Distance Selling Directive.

From a **payment** liability point of view, it is the nature of the mobile payment services settlement process with merchants for the customer to receive the product prior to the merchant receiving payment. Due to this fact, and because of the inherently different risks involved in micro-payments, joint liability is totally inappropriate and disproportionate, thereby failing to satisfy one of the three conditions that the Commission has indicated any solution must satisfy.

Annex 12 : Non-Execution or Defective Execution

It is unclear how this issue could affect m-payments, because when the customer chooses to buy a service by charging it to their mobile account, the merchant will not deliver the service until they have received the authorisation from the mobile operator. This authorisation represents the mobile operator's commitment to pay the merchant once the transaction has been captured.

However, if it were to apply to mobile payment services, Orange would wish to see liability under this provision only extend to the amount of the non-executed payment. Issues of indirect and consequential damage would then be dealt with in accordance with the contract between the Payment Service Provider and the customer and in accordance with the law governing that contract, as envisaged by paragraph 4 of the draft legal provisions. As the Commission itself accepts in the Communication, changes to the issue of consequential damages are not meant to be within the scope of any rules to be introduced.

Bearing in mind the above, Orange considers the wording of paragraph 3 of the draft legal provision and the relationship between paragraphs 3 and 4 to be unclear. Orange recommends that paragraph 3 should be amended so that it is clear that liability under paragraph 1 only extends to the amount of the non-executed payment order, as well as charges and interest thereon. This clarifies that issues of indirect and consequential loss should then be dealt with in accordance with the contract between the Payment Service Provider and the Payment Service User and the applicable law governing the contract, as is envisaged by paragraph 4. Orange suggests, therefore, amending paragraph 3 as follows:

Without prejudice to paragraph 4, liability under paragraph 1 shall ~~be limited to~~ the non-executed payment order, as well as charges and interest thereon.

Deleted: include the amount of

In addition, Orange suggests the following amendments to paragraph 4:

Further financial compensation shall be determined in accordance with ~~the~~ contract concluded between the Payment Service Provider and the Payment Service User ~~and in accordance with the law applicable to that contract.~~

Deleted: the law applicable to

Furthermore, in order to clarify that the rules only relate to liability of the Payment Service Provider to the Payment Service User, we also propose the following amendment to paragraph 1:

The Payment Service Provider shall be liable ~~to the Payment Service User~~ for the non-execution or defective execution of a payment order, which the Payment Service User has initiated in accordance with his obligations [mandatory/contractual].

Finally, Orange would also support the introduction of a provision relating to "force majeure".

Annex 13 : Obligations and Liabilities of the Contractual Parties Related to Unauthorised Transactions

Orange believes that this annex should make a distinction between stored value solutions and credit based solutions, as with stored value the risk is limited to the amount left in the prepaid account.

Orange would want to limit its exposure on this issue to liability only where the customer has used the payment instrument, in our case the mobile handset, in accordance with the terms and conditions governing the use of the phone. We would therefore wish to see the wording of paragraph 2 of the “Article on liabilities between the contractual parties” changed as follows:

The Payment Service Provider shall not be liable if the Payment Service User acted with gross negligence or fraudulently or if the Payment Service User failed to use the Payment Instrument in accordance with the terms governing the issuing and use of the instrument...

We also do not agree with limiting customer liability to 150 euros as this greatly increases the risk of fraud to the Payment Service Provider. We would therefore wish to see reference to any amount removed from paragraph 5.

Annexes 14 – 17

Not applicable to mobile payments services.

Annex 18 : Data Protection Issues

Orange believes that new measures are required in order to tackle fraud and is therefore supportive of an appropriate derogation from/relaxation of the EC Data Protection rules in this respect.

Orange considers that the present situation, whereby different member states have different rules (due to the differing implementation of Article 13(d) of the Data Protection Directive), does not contribute to the EU's goal of combating fraud. Having the same or similar rules across the EU would provide a more seamless co-ordination of anti-fraud initiatives.

With regard to the solutions suggested in the Communication, as the Commission itself accepts, a number of these would not appear to achieve the objective of relaxing the Data Protection rules to combat fraud.

Solution 1 : Orange agrees with the Commission that interpretative guidelines would not result in an amendment of the directive and would not require member states to amend legislation in order to grant a derogation to combat crime and fraud.

Solution 2 : Similarly, inviting member states to change national laws may not in itself result in the desired legislative amendments.

Solution 3 : It appears that the Commission believes that amendment of the Data Protection Directive 95/46 is not practically feasible.

Solution 4 : This suggests the inclusion of an appropriate provision in the New Legal Framework and appears to be the only solution that meets the objective whilst being practically feasible. Orange supports this proposal and requests the Commission to

ensure that the provision in the Framework legislation is as precise as possible so that member states are in no uncertainty as to how to implement the provision.

The Commission should also note that in order to prevent widespread fraud, centralised or local fraud prevention databases which provide information on high-risk and fraudulent merchants are of immense benefit. Therefore, any amendment to the Data Protection Directive should ensure the legality of running such databases.

Annex 19 : Digital Signatures

Orange has no specific comment to make on this annex except to support further investigation into measures required to increase the use of digital signatures.

Annex 20 : Security of Networks

Orange believes it is likely to exceed any minimum requirements specified as a result of measures contained in this annex. In general our opinion on this type of regulation is that it should not be undertaken unless absolutely necessary and that would entail obvious and frequent security lapses. It is extremely difficult to specify in regulatory terms what technical measures organisations should take to protect data. The threat and landscape changes so rapidly that it seems unlikely that any of the measures described could remain current for long. It is in an organisation's own commercial interest to protect its networks in the most secure method possible.

Annex 21 : Breakdown of a Payment Network

Orange and other providers are highly motivated from a commercial point of view to provide the highest quality service possible. To provide poor availability would discourage customers and merchant use, and each outage would represent lost opportunity for us to gain revenue and could result in us losing both customers and merchants to our competitors. We therefore have a strong incentive to ensure that we keep our service running with the highest possible availability levels. Consequently we do not see the need for regulation in an area where competitive forces are functioning correctly.

Conclusions

Overall, Orange believes that regulation should be proportionate to the risks involved and should encourage investment in infrastructure and services. The onerous rules and regulations under the E-Money directive are both disproportionate and disincentivising to the mobile payment services industry. If the Commission seriously wishes to see this payment services sector develop, it is vital that it recognises the need for a light, credible licensing system that will encourage innovation in an area where, until now, the majority of the payment/banking sector has had little interest in entering.

A number of directives, in particular the E-commerce and Distance Selling directives already adequately protect the customer and Orange sees little need for additional regulation in this area. What is needed is recognition of the low risk to both consumers and to the stability of the financial services sector that these new payment services pose. Operators urgently require legal certainty in order to make the investment in services that their customers and content providers are already demanding.

Whilst accepting that the Communication concerning a New Legal Framework for Payments is looking ahead to a future regime, Orange urges the Commission to look at the interim period when these payment services will be developing, and take speedy measures to facilitate their development. In this context Orange looks forward to the consultation exercise on amending the E-Money directive to accommodate these new low value, electronic payment services.

For further information concerning the views expressed in this paper please contact:

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