

**T-Mobile International's response to
The Communication from the European Commission Concerning a
New Legal Framework for Payments in the Internal Market**

15 February 2004

Comments from T-Mobile International on the Communication concerning a new legal framework for payments

1. General comments

T-Mobile welcomes the review of the new legal framework for payments in order to adapt the legal framework to new technological developments. We agree with the Commission that the main contribution to the new legal framework is to identify legal or regulatory barriers hindering improvements in the efficiency of payment markets, systems, service providers and instruments.

Main tools in achieving the aimed result and improving the legal framework are cost-benefit analyses of regulatory obligations and the application of the principle of proportionality. These tools are crucial to achieve the principle of “same activity, same risks, same rules” while at the same time removing regulatory obstacles in an increasingly complex environment of market players and services.

1.1. The legal framework for payments from the mobile perspective

The grey area between mobile telecommunications services and services falling under financial regulation is not clearly defined due to technological advances in the mobile as well as in the financial sector. The first legislation overlapping both sectors is the E-Money Directive. Recent discussions in the GTIAD Committee¹ meeting show the lack of clarity and need for a discussion on the interpretation of the E-Money Directive with regard to mobile operators amongst regulators and market players.

The inherent challenge is the growing together of two sectors, the mobile and the financial sector. This leads naturally to the tension between two very different regulatory traditions.

The mobile industry was from the start of its existence competitive, dynamic and focussed successfully on providing telecommunications services. Mobile operators are primarily regulated by sector-specific regulation. According to this regulatory framework ‘emerging markets’ are not to be regulated. Mobile micro-payments are clearly an ‘emerging market’ in the view of T-Mobile; and regulation of emerging markets has an adverse effect on the incentive for innovation and investment.

In addition, the prudential requirements in the financial sector come from a different tradition: high-value payments, person-to-person transactions, higher risks for consumers, etc. These requirements are now being applied to the mobile sector exactly at its very early stage of development as an emerging market of mobile payments.

¹ 27 November 2003

Financial regulation is not designed for the risk levels of micro-payments (there is even no experience or even evidence of the risks involved in mobile micro-payments which could be addressed). It has also not been designed with the development of mobile services in mind. For example, the E-Money Directive is simply not designed to take into account 'hybrid' service providers (i.e. operators who charge products via a prepaid account as an extension to existing services). The definition of e-money services applies to mobile services ex-post without any perceived need to regulate those services. An example for this are premium rate services. No additional need to regulate those services has been perceived until after the E-Money Directive was already implemented.

There is therefore a mismatch in two ways: in the intention of the Directive and also in its effect. The intention of the Directive was clearly not to regulate mobile operator's prepaid account with regard to premium rate service because the practical implications for the implementation in the mobile sector are not considered in the Directive nor were they thought through at the time of the adoption of the Directive. The effect of the Directive to promote more choice for consumers is in the current light of discussions certainly not achieved either. The effect of the directive is rather to suffocate current services i.e. premium rate services as well as the emerging market of mobile payments.

The next step for regulators and industry should in T-Mobile's view now be a thoughtful 'convergence period' where two completely different traditions of regulation are let to grow together in a way which allows for proportionate prudential regulation and the incentive to continue to offer more choice of mobile payment mechanisms to its consumers. This is a creative process which should respect regulatory financial principles while at the same time avoiding the imposing of disproportional obligations. T-Mobile would therefore encourage the Commission and national regulators to take decisions which take into account the bigger picture of tasks, aims and current market developments.

1.2. Guiding principles of the new legal framework for payments

T-Mobile fully supports the proposed guiding principles of the new legal framework: efficiency, security, competition on the basis of a level playing field, consumer protection, technological neutrality and value-add of new payment legislation.

In addition, T-Mobile would like to elaborate below further on proportionality, competition and level playing field as well as on cost-benefit analyses.

1.2.1. Proportionality

Previously appropriate regulation becomes an inappropriate regulatory obstacle when it is applied to new technologies and services without taking into account differences and characteristics of those new services.

The main challenge is therefore to avoid extending traditional financial regulation and instruments on new market players and services. Instead the regulatory framework has to allow for flexibility to treat new services in an appropriate manner. The principle of same services, same risks, same regulation has to be applied in addition to ensure that flexibility and proportionality remain consistent throughout the regulated industry.

Proportionality has therefore a vital role and should be added as a guiding principle for the legal framework. It is the most effective tool to remove regulatory obstacles in a technologically-neutral way and hence allowing for the necessary flexibility of the legal framework. Given the dynamic technological developments resulting in increased payment choices for consumers, there is a clear need to make the legal framework more flexible and appropriate for new innovative ways of payments.

In order to achieve this, it is important to understand new market players, their services and the respective inherent regulatory risks. Today's regulation has to accommodate on the one hand a wide range of players and services while on the other hand allowing for technologically neutral regulation. This is a challenging task and T-Mobile is willing to provide further input to the Commission if required.

Proportionality criteria to be considered could be:

- Assessment of characteristics of new developments in the market:
 - Are the respective e-money services offered by 'hybrid' players?
 - Is the respective e-money service a core service or an ancillary service?
 - If it is an ancillary service, how can the spill-over of financial regulation on core services be avoided?
 - Is a new market emerging? What treatment is appropriate in order not to suffocate the market?
- Assessment of risks:
 - Identification of the actual inherent risks of the service? What is the average amount of payments, is person-to-person transfer of monetary value possible or is it a premium rate service which is already regulated by consumer protection law, etc?
 - Conclusion as to which risk needs to be addressed by the regulatory requirements (consumer protection, financial stability, money laundering, etc.)
- Assessment of the regulatory tool
 - What is the most suitable and least intrusive measure to mitigate the risk identified?

1.2.2. Competition and level playing field

T-Mobile's request to the Commission is to ensure proportionality of legal requirements to the actual risks involved irrespective of the technology concerned.

1.2.3. Cost-benefit analysis

A cost-benefit analysis should be undertaken in order to determine the appropriateness of regulation. A balance should be struck between legal obligations and their benefit for consumers, financial stability, efficiency of payment markets, systems, service providers and instruments.

The review, interpretation and application of regulation should be justified on the basis of a clear benefit and value add for the market.

1.3. Mobile industry

In order to choose the right regulatory instruments for mobile payments it is important to understand the dynamic and successful development of the industry and its services. Mobile operators have traditionally offered voice telephony to their customers.

If the legal framework for payments is to be appropriate it has to allow for those criteria which have been responsible for the success of mobile services in the past also for the future: mobile services are simple, secure, easy-to-use, providing a good customer experience and a huge variety of innovative services. These characteristics have to be maintained for the benefit of consumers and also for the successful development of the mobile industry.

In 2001 the majority of mobile operators have acquired 3G licences. Mobile operators at this stage were bidding for the licences in a competitive process. The actual payment processes are within T-Mobile only being developed since 2002. This shows that the development of the commercial systems has not yet started at the time when the E-Money Directive has been drafted. Mobile operators have not envisaged themselves as payment providers in the past because the prevalent view was that mobile operators are investing in 3G licences to offer mobile services. Given the investments in 3G it was clear that the range of mobile services will expand considerable in the area of data. However, in 2001 this has been not assumed to fall under payment regulation neither by financial regulators nor by mobile operators.

1.3.1. Financial services

T-Mobile acknowledges that when we offer truly financial services or distribute prepaid money which is actually considered as means of payment by the public and which is accepted as such by third parties, those services will fall under the scope of e-money directive.

In case regulatory authorities do consider prepaid premium rate services to be e-money², then those obligations under financial regulation have to be applied proportionately to the actual risks involved. T-Mobile is not aware of risks with premium rate services which would justify financial regulation.

With regard to financial regulation of mobile services following variation of services should be considered. Some mobile operators may want to enable their customers to pay with their existing credit cards via the mobile phone. In this case the mobile operator only has an enabling function and the payment is undertaken by traditional means. As a consequence, the mobile operator is not involved in the payment transaction as such and falls outside the financial regulation. Macro-payments will continue to be paid via credit and debit cards.

Mobile operators may offer the possibility of payments via a stored value account. Typical products offered via a stored value account are cinema and parking tickets. These services are clearly no classic mobile services and some form of financial regulation may be justified. However, current regulatory requirements are in the same way disproportionate for mobile operators as for other e-money issuers. Hence there is a clear need to review the directive in a technologically neutral manner with regard to its appropriateness and proportionality.

Thirdly, there are micro-payment services offered via the mobile prepaid card. These services are strongly connected to the telecommunications service itself (i.e. voice, data, some premium rate services, emergency calls, directory inquiries etc. A consultation on the interpretation is currently awaited from the Commission with the view to decide which services fall under the scope of e-money regulations.

However, be it micro-payment services offered via the mobile prepaid card or stored value accounts, these services are only emerging. The adverse affect of regulation at a very early stage of development has to be avoided.

² In our opinion, the current prepaid premium rate services do not qualify as e-money. More importantly, there is no benefit for consumers to regulate these services under financial regulation.

2. Comments on Annex 1

The consultation document proposes to introduce a new specific category of licensing for payment activities, which would cover in addition to the credit institution and the e-money licenses services such as: money transmission services, prepaid and stored value accounts used for third party payments and services not covered by the e-money regime. However, the benefits of such a transmission licence need yet to be explained in the communication. It remains unclear which benefit such an additional layer of regulation would bring to the removal of regulatory obstacles in the current regulatory regime.

T-Mobile would therefore suggest as a way forward to deal with issues appropriately where they occur. This means that the review of the E-Money Directive which makes it more suitable for the requirements of the industry should have priority. Only if there can be shown that the introduction of a new layer of regulation is beneficial towards the aims of this consultation as stated by the Commission this possibility should be pursued.

T-Mobile fully supports the basic principle of attributing different levels of regulation to different levels of risk. However, the proposal to introduce a transmission licence as proposed by the Commission seems to extend regulation (depending on the awaited interpretation of the E-Money Directive). In addition, the 'transmission licence' does not introduce the prudential requirements (i.e. requirements to prevent money laundering) in a proportionate manner. Again, it looks as if the actual result of this proposal is harmful extension of regulation instead of removal of regulatory barriers or increased efficiency.

T-Mobile assumes that the E-Money Directive will be dealt with in another upcoming consultation. However, since the Directive is addressed by this consultation as well, T-Mobile would like to state that the E-Money Directive currently has a very negative effect on the mobile industry and its ability to offer its customers new services. Reasons for this are:

- 1) The intention of the Directive with regard to the mobile sector is being discussed now as opposed to during the drafting period. The result is a discussion of legal definitions, which does not fit the reality of the market or the initial purposes of the Directive of promoting more choice for consumers.
- 2) The legal uncertainty with regard to the interpretation of the E-Money Directive is having a stifling effect on the development of the market. The inappropriateness of the Directive is likely to continue to have a negative effect on the development of mobile payment services, if the interpretation of the Directive does not remedy the existing problems.
- 3) The regulatory conditions to comply with the Directive are not proportional. A very striking and important example for this are money laundering regulations which were initially designed for dealers of high value goods. However, in the E-Money Directive money laundering obligations are applied in an undifferentiated way on providers of micro-payments (i.e. less than €10) as on providers who deal with macro-payments.

- 4) The Directive does not take into account providers of hybrid accounts like mobile operators who offer own services and potentially e-money services in addition. This has a huge effect of over-regulation on mobile operators potentially regulating the whole prepaid account also for non-e-money services.

Should the final outcome of the interpretation of the E-Money Directive be that premium rate services are considered as an e-money service without modifying the obligations coming from such an interpretation, this would force mobile operators to stop offering them for prepaid consumers and going through the costly and lengthy procedure to separate these services and offer them via a different account and subsidiary. Having to do this in each case will discourage the consumers to such an extent that the market is likely to be suffocated before it can come to life. This will sacrifice the very reason (simple and easy-to-use) for which these services are used by our consumers.

3. Comments on Annex 2

T-Mobile is in favour of the approach taken by the Commission to keep information requirements for consumers consistent with e-commerce and distance selling regulations. However, this approach will only be beneficial where the information requirements are reasonable. The proposed draft provisions seem to be excessive. For example, an obligation to inform the consumer of the execution time of a transaction, the value date, the reference exchange rate etc would seem disproportional for low value transactions of may be as low as 2 euros. In case of mobile micro-payments, the suggestion that payment services providers will provide consumers with a raft of information after each transaction (in this case on the mobile device) will reduce market efficiency, will cause consumer dissatisfaction and place unnecessary burden on payment service providers.

T-Mobile would therefore like to suggest that the subject of this consultation should be the principles of information requirements which allow for the choice of reasonable and proportionate requirements based on the kind of service and its risks for consumers.

4. Comments on Annex 8

Provisions in this annex propose a directly applicable legal instrument (regulation) on the requirement to provide full originator information.

The proposed obligations are completely disproportionate to the amounts involved for mobile payment services. The result would be that compliance with the money laundering regulations would render services uncommercial. These requirements should therefore be balanced against the actual risks of money laundering and against the actual services provided.

T-Mobile would therefore like to have the possibility of cost-benefit analyses by financial regulators on the national level instead of a directly applicable instrument of a regulation.

5. Comments on Annex 11

The proposal to introduce joint liability for the payment provider with the merchant does not reflect the underlying commercial relationship between consumer and merchant. Such regulation would lead to inefficiencies in and extra costs for the execution of payments.

It may be that some payment providers wish to offer a guarantee to their consumers as a means of differentiating themselves in the market place. However, this should be left to competitive market forces.