

**Application of the E-money Directive to
mobile operators**

**Summary of replies to the
Consultation paper of
DG Internal Market**

Introduction

This document is designed to provide feedback on the responses received by the Commission to its May 2004 consultation paper on the application of the E-Money Directive to mobile phone operators. It is intended to provide a non-exhaustive commentary on the responses received by the Commission. A list of all the contributions received is available on the Commission's website. This feedback document should also be read in conjunction with the relevant provisions of Directive 2000/46 and the original consultation paper of the Commission, which is available online at http://europa.eu.int/comm/internal_market/bank/e-money/index_en.htm#suivi.

In addition to this feedback note, the Commission will also publish non-binding "guidance" on its website, setting out the Commission's views on the issues that have been raised during the consultation process, and outlining a process for taking further steps.

Background

During work on the transposition and application of Directive 2000/46/EC on electronic money institutions, some supervisory authorities considered that it was not always evident which commercial activities could be captured by the Directive.

Besides companies for which the issuance of electronic money was the sole business, some other commercial operators were developing or had already developed means of payment very close to the concept of electronic money as defined in Directive 2000/46/EC. The activities of mobile phone operators were a major concern for national authorities in this regard. The Commission services became involved in the debate with the objective of providing guidance to national supervisors on how to treat specific types of e-money issuers (usually known as "hybrid" operators).

After discussion with experts from national administrations on the concept of e-money, the Commission services concluded that the definition of e-money was originally designed for operators whose core business was the issuance of this particular means of payment and therefore it did not fit easily with the product that mobile operators were offering their customers. However, pre-paid cards (or "accounts", as the pre-paid value available for mobile customers is charged on a remote computer memory) may function as a substitute for the more traditional form of e-money.

As some grey areas remained, in particular on the "perimeter" of e-money activity and the impact of the regulatory framework on the telecom sector, a broad public consultation took place in order to collect information on current practice and seek comment on how to improve and adapt the legal framework, if necessary.

Comments on the general approach

As indicated in the introduction to the consultation paper, the main objective was to complete a legal analysis on the perimeter of mobile operators' activity implying the issuance of e-money and assess the impact of the current legal framework on the electronic communication sector. Therefore, comments from mobile operators, connected industry and other interested stakeholders focused on practical and legal problems stemming from the application of the current rules and on the impact of a supplementary legal framework. The consultation paper also sought advice on whether the Directive should be amended to better reflect industry needs and risks stemming from "hybrid" activities.

The Commission received over 60 replies to the consultation paper: most came from mobile operators, but many other stakeholders contributed: content providers, e-money associations, e-money institutions, credit institutions' associations, credit card companies, consultants, national authorities and other "hybrid" operators.

On the adopted approach

The replies confirm that legal uncertainty is damaging the sector, because it prevents investments in new technologies, undermines the consolidation and competitiveness of innovative services as well as the launch of supplementary digital services. All stakeholders stress how urgent it is that industry and national regulators receive guidance from the Commission and a proportionate solution is elaborated both for the short and longer term. However, as expected, the policy message emerging from the different interested parties concerning criteria relevant for an appropriate solution is not unanimous.

All stakeholders welcome the initiative of the Commission to expand the debate before issuing a final position on the treatment of mobile operators, but opinions expressed on the scope of the consultation diverge significantly.

Generally speaking, mobile operators criticize the starting point (i.e.: pre-paid accounts are likely to be – under certain circumstances – a form of electronic money) and would have preferred to re-open the discussion on the legal analysis carried out within the experts' working group. A similar position is also taken by some consultants that consider it is not correct to capture mobile operators within the definition of electronic money institutions, mainly because of a very restrictive interpretation of the conditions listed in Art.1 of the E-money Directive, including the definition of monetary value.

Mobile operators and content providers, as well as some consultants, request that any final decision to submit mobile operators to financial services regulation is consistent with the sectoral policy promoted by the Commission for the telecom sector. Due to the need to boost innovation and competitiveness of mobile communication services, regulation (especially ex ante) must be avoided due to its potential negative impact on the development new market segments.

Mobile operators add that the benefits of such regulation are still to be demonstrated and that consumers ought not to be confronted with undue change. If many of the contributors affirm that there would not be any benefit from changing the current situation, the telecom industry unanimously points out that the costs of regulation would in any case be disproportionate to the expected benefits, because the risks to consumers and the financial system are insignificant. In this context, the telecom sector asks the Commission services and national supervisors for an in-depth cost-benefit analysis.

Electronic money associations and other payment services providers underline the need to ensure a level playing field for all operators offering consumers similar payment instruments and creating similar financial stability risks.

Comments on GTIAD legal analysis

The replies are divided in two groups: those who support the preliminary analysis as detailed in the consultation paper (mainly e-money associations and payment services providers) and others who for various reasons consider that this analysis should be reviewed. The arguments put forward by the latter go from the opportunity to directly exclude mobile operators and other "hybrid" issuers from the application of the Directive to the need to further discuss the scope and objective of the three conditions required by the E-money Directive to qualify an entity as an e-money institution. According to some stakeholders, this discussion has not been deep enough and the

working group may have based its general conclusions on a misleading interpretation of Article 1 of the E-money Directive.

Comments on the nature of Mobile operators activity

The replies contributed to provide a broader and more detailed description of additional services offered by mobile operators. In this sense, the contribution of the telecom sector has been very useful, because it has been clarified that the nature of these additional services differs from one operator to another and from one Member State to another. For instance, some operators limit their offer to digital services that can be purchased through a PRS mechanism, while other operators opened the offer to services and products where there is not a revenue share with the content provider.

These differences are mainly due to the level of development of the market in some Member States or to a pure commercial choice; generally speaking the biggest operators tend to give the maximum choice to their customers and are developing more sophisticated payment schemes.

The arrival on the market of 3G handsets will also increase the offer in terms of quantity of available digital services (bigger products and more sophisticated than current ones and also more expensive) and will lead to an increase in the number of content providers. The development of 3G technology is therefore considered a key issue for the expansion of the sector. Very few operators make available non digital services, such as ticketing, parking, download of products on PC, purchase of physical goods.

According to mobile operators and many content providers, the special nature of the activity carried out by the telecom sector, the way the sector is developing and becoming globally competitive deserve special treatment. This specificity has also been recognised at Commission level in the policies promoted by the Information Society Services Directorate-General. However, according to other stakeholders, the nature of the third-party product or service provided is irrelevant.

As for Member States, some confirm the preliminary analysis made by the GTIAD in 2003 and therefore support the need to come to a legal and pragmatic conclusion on how to apply current rules to mobile operators; others consider that mobile payments are not sufficiently developed and stable yet to allow a definitive evaluation in terms of nature of the activity and risk involved.

Are mobile operators e-money issuers?

The analysis carried out with Member States confirmed that means of payment offered by mobile operators can fall under the definition of e-money provided in Article 1 of the Directive.

Are the three conditions stipulated in Article 1 fulfilled?

The opinions emerging from the replies to the consultation differ significantly. Some for instance excludes that mobile operators are captured by the e-money Directive because the pre-paid card (or account) does not represent a monetary value, as it is not a perfect substitute of coins and banknotes. Others draw attention to the fact that some offers of pre-paid accounts are not in monetary terms (i.e. purchase of 'X' minutes of conversation or 'X' SMS). However, most opinions adverse to the idea that pre-paid cards and accounts can be a form of e-money are based on:

- The absence of value flow from the customer to the merchant (i.e. no P2P transactions) and / or

- The fact that merchants are not aware of which specific means of payment is used by customers and therefore they could never “accept” it; or
- The idea that the pre-paid value constitutes only the advanced payment for mobile operators’ services (this opinion considers that all additional services, including services physically provided by third parties, are part of the mobile operators’ core business); or
- The fact that it is the mobile operator who pays (monthly) the merchant on the basis of a monthly bill and customers have not obligations vis-à-vis the content providers;
- Absence (with very few exceptions to be examined case by case) of operators offering the possibility to pay physical goods or non-digital services.
- Opportunity reasons (risks generated, balance costs-benefits, loss of services and payment opportunities for consumers)

Mobile operators generally plead for the exclusion of pre-paid cards (or accounts) from the concept of e-money, invoking all the arguments previously listed; many of them insist on the nature of services that they offer to their customers: only PRS or only services that they re-sell to their customers. Some mobile operators consider that any digital service (especially PRS, where the revenue share would demonstrate that the mobile operator contributes with an added value and therefore becomes a service provider) must be considered as a communication service. If these services are part of the mobile operators’ core-business, the pre-paid card is a single purpose card. Accordingly, it cannot fall under the concept of electronic money as defined by Directive 2000/46/EC.

Content providers generally support the position of mobile operators, even if their arguments are more focused on the negative economic impact of supplementary regulatory obligations. They admit that, according to current practice, there is no direct link between customers and merchants and that any legal or contractual relationship merchants have is exclusively with mobile operators.

Other stakeholders have very diverse positions. E-money associations, as well as payment services providers and some banking associations, consider that when the payment instrument is in practice equivalent to the “usual” e-money, any issuer – even if only a hybrid issuer – should be covered by the E-money Directive.

Some more information on the commercial practice:

(1) To complete the analysis, the Commission services need clear examples of the commercial practice concerning price policy and business models for the issuance and reloading of pre-paid mobile phone cards. Industry in particular could describe if and how special conditions concerning delayed payment, promotions, bonus (amount and nature) are offered to pre-paid customers.

The replies to the consultation have been very useful to collect more information on the practice and on the functioning of the distribution network. It is now clear that the majority (if not the totality) of the pre-paid schemes are based on the concept of “re-loadable account”, where “account” must be considered as amount of value not incorporated in a physical device, but centrally registered by the mobile operator and available for airtime and other additional services.

The majority of mobile operators confirm that in a post-paid mode many forms of promotions are available: in general they correspond to extra communication time, free SMS or MMS. It does not appear that the offers concern the purchase of digital content or other third party services and (where available) products.

The distribution network is complex: most operators sell through supermarkets, kiosks and other intermediaries. The nature of the distribution network is, according to mobile operators, a supplementary difficulty should they be required to comply with some of the e-money provisions (in particular money laundering).

Prudential Risk assessment

The consultation paper indicated that provisions included in the e-money Directive aimed to address different risks: the stability of the institutions offering financial services, the stability and trustworthiness of the global system of payments, reinforcing consumers' and merchants' confidence in innovative means of payments offered by non-traditional credit institutions.

All the replies and all stakeholders agree that the Commission services and the national regulators and supervisors should adopt a risk based approach to determine:

- whether mobile operators should be covered;
- to what extent e-money provisions should be applied.

Mobile operators are of the view that even if their activity linked to the offer of means of payment should be considered e-money issuance, risks stemming from this activity are extremely low, both in terms of financial stability and consumer protection. The reasons alleged to justify this position are: low amount of transactions devoted to purchase of third party services (currently max 5 €, but 1 € as average); generally low amount available on the individual pre-paid account (from 10 to 50 €); financial solidity of any telecom operator, due to accurate check by the relevant national authorities before granting the licence; acceptance of the minimum risk of losing pre-paid value shown by customers as part of the contractual risk when they pay in advance for a service; extremely low impact of m-payment on the payment system if compared to other means of payment (e.g. cash or credit cards¹).

Other payment services providers (e-money institutions, credit card companies and banks) provide their opinion without the necessary data to compare their activity with the mobile operators' payment activity. However, they generally consider that even in a context of micro-payment, the amount of e-value floating and used for payments is equivalent to the e-value managed by other issuers covered by the e-money directive. Moreover, the expansion of the 3G mobile phone, the possibility to pay for services downloaded on PC and the significant changes in consumers' expenditure for additional services will certainly increase the e-value devoted to non-communication services and therefore potentially to e-money. The need to ensure a level playing field for all operators offering similar or equivalent financial services leads to the conclusion that mobile operators must be also covered.

Questions:

- (2) Are there any other relevant criteria or elements that need to be taken into account for the risk assessment of e-money issued by mobile phone operators?**
- (3) Industry is invited to provide aggregated figures or any other data that would allow the Commission services to assess the risk involved.**

(As mentioned above, most mobile operators have not provided aggregated figures.)

¹ Mobile operators generally refer to public available data, as the ARPU (average revenue per user). Taking ARPU as reference, it appears that between 1 and 2.5% of the monthly average expenditure is used for third party services.

(4) To what extent is the perceived money laundering risk relevant to the e-money related activity of mobile phone operators?

Money laundering is not considered by mobile operators a real risk, due to the alleged difficulty to launder through pre-paid cards or accounts of little amount. In any case, mobile operators affirm that they have already the possibility to monitor on one side the activity of each merchant with whom they have a contract; on the other hand they monitor (or could easily monitor) significant transactions or excessive use by a single pre-paid customer.

On the contrary, other stakeholders affirm that the laundering risk is real and comparable to the risk that e-money institutions dealing with micro-payments and small value devices have to face.

The e-money perimeter

All stakeholders agree that only the pre-paid value used to pay third party products and services has to be examined in the light of the e-money Directive. Mobile operators add that all products and services offered in a re-selling mode must also be excluded.

Criteria for determining the area of business where the e-value must be considered as e-money

A) Business models (intended to clarify where there is a well known and identifiable trilateral relationship)

As a general comment, most contributors underlined that it would be counterproductive to pre-define business models adopted by mobile operators as the practice evolves permanently. It would also not be advisable to come to conclusions on the basis of the current practice, because it could have two adverse effects: either push mobile operators to freeze their operational practice (and it would negatively impact innovation) or exclude future developments in the business practice from an appropriate legal assessment.

Therefore, business models should only be taken into account as a flexible starting point to better understand the functioning and the possible use of the pre-paid account.

Although some mobile operators and other stakeholders criticize the way the consultation paper describes the various business models (some consider that they represent an oversimplification of the complex reality), most replies agree that they fairly represent, although in imperfect categories, the different alternatives available on the market.

Questions:

(9) Which of the business models described above correspond in your view to the e-money scheme as defined by the E-money Directive and why?

Mobile operators agree with the Commission services that the re-selling mode does not imply the issuance of e-money because all the services purchased by the customer are sold by the mobile operators. Industry asks that this is clearly confirmed.

They generally admit that the last business model described may involve the issuance of e-money.

However, for the grey area identified with models b) c) and d) they all reject the opinion that the scheme corresponds to the trilateral relationship required by the e-money Directive. One of the most invoked arguments is the nature of the service purchased: a pure digital service consumed on the handset. As digital services are normally intended for reception

and fruition on the GSM, they are supposed to be communication services. Another explanation provided is related to the consumer's perception. According to mobile operators, the typical customer in the case of digital content, SMS based services and other low cost services does not consider any other counterparty than the mobile operator, because it gives him the possibility to accede to those services.

As for other contributors, they tend to include in the typical e-money scheme the models described under c) and d), because they lead to an identical practical result. These contributors consider that contractual arrangement should not be used to hide services that de facto reproduce the same scheme used by all account based e-money networks.

The payment scheme argument and the PRS model will be developed in the next paragraphs.

(10) Are there other models used in practice? Can you describe them?

As explained, the models described roughly correspond to the practice. Some contributors underline that further nuances exist, but these other models are not described in detail or do not substantially modify the approach.

B) Legal relationships between mobile operators, users and merchants and payment structure

Questions:

- (5) What are appropriate elements to determine the legal points of attachment raised above?**
- (6) It is to note that the content is delivered in real time (or at least in an extremely short delay). Why? Is the content delivered on the basis of an immediate e-payment to the merchant (i.e. the mobile operator debits the e-value possessed by the purchaser and credits for equivalent e-value the storage of the merchant)? Or is it delivered after real payment via the bank account? Or is it immediately available on the basis of a "guarantee" offered by the mobile operator for the purchaser?**
- (7) How is the e-value withdrawn from the prepaid card to pay for certain product/service provided by a third party dealt with in financial administrative processes before it is re-converted into scriptural money on the merchant's bank account?**
- (8) Further details and explanations would be helpful to clarify if and why the various business models, contractual arrangements and technical organisation adopted differ in practice from the payment models described above**

Due to the knowledge requested – information could only be provided by mobile operators

Explanations provided by mobile operators

1) The consultation paper presented legal relationships between the three parties involved (mobile operators, customers and merchants) as one of the possible criteria to be used to determine whether the third requirement listed in Art. 1 of the e-money Directive is fulfilled.

As for the respective liabilities, replies confirm that the liability for a defective product or service remains with the content provider, although customers tend to address their complaints first to the mobile operators. Mobile operators are responsible for the communication services necessary to the delivery, for correct deduction of the amount to pay and for any other necessary intervention in the process.

In order to establish who is creditor and debtor of what, mobile operators stick on the structure of the payment scheme adopted with some little differences all over the EU. According to the information made available, the merchant can never ask mobile customers for payments, because of its contractual arrangement with the mobile operators. On the other hand, the customer is only obliged vis-à-vis the mobile operator. More difficult is to clarify the legal position of the mobile operator: it could be “delegated” to collect payments in the name and on behalf of the merchant, it could be the “factor” for all credits cumulated by merchants, it could be a collector *de facto*, but without any specific legal position.

Therefore the practice – based on available information from mobile operations and merchants - can be summarised as follows:

- The customer is debtor only vis-à-vis the mobile operator;
- The mobile operator is the creditor vis-à-vis the customer and the only debtor vis-à-vis the merchant;
- The merchant is creditor only vis-à-vis the mobile operator.

To this, it can be added that the delivery of the service / product purchased is made either after check of the customer’s capability and “green light” to the merchant or immediately without any previous check and in this case merchants assume the risk of delivery to a non covered customer (it is still unclear whether mobile operators provide a sort of informal guarantee of payment for any service supplied by the merchant). Everything depends on the specific contractual arrangements between mobile operators and merchants.

2) As for the payment scheme, mobile operators insist on the absence of P2P transfer of money or e-value. Given the absence of a P2P or contact transfer of value, the merchant cannot “accept” the means of payment used by the customer (pre-paid account or post paid bill).

They add that the presence of the mobile operator as intermediary for the final payment and the need of its authorisation to complete the transaction are against the spirit of the e-money directive where the idea of pure substitute for coins and banknotes requires that no intermediary must be able to interfere in the payment.

Concerning the way the “float” is treated (where “float” is the e-value already spent by customers for third party services or products), mobile operators clarify that there is no e-purse for merchant, or separate scriptural account. They specify that when the e-value is “erased” from the availability of the customer, it remains “property” of the mobile operator until the emission of the bill and the subsequent payment via the credit institution. In the meantime, merchants have no specific right to claim that money (or “redeem” what they are supposed to accumulate).

Comments made by e-money institutions on payment schemes

E-money institutions stress that their usual practice is for merchants to receive payments once a month; it is also common practice that the issuer keeps a balance recording bearers’ expenditures and merchants’ credits. The only difference is that in the typical e-money scheme the issuer immediately credits e-value on a merchant’s “e-account”.

E-money institutions also recall that current technology does not allow an indefinite number of P2P transfers and that the circuit is always closed via a banking payment made by the issuer to the merchant.

Finally they consider that the way mobile operator chooses to keep their accounts should not influence the nature of the payment scheme and therefore the payment scheme adopted by

mobile operators for their own convenience should not be sufficient to exclude the possibility of the creation of electronic money.

Comments from merchants

One sectoral association underlined the weakness of the merchants' position in the current system; changes due to regulatory obligations could lead to a more transparent system, better and clearer conditions for content providers and avoid merchants bearing all the risk of lack of payment as it happens in many cases.

C) Should PRS be treated differently?

The consultation indicated that the PRS model should not be treated in a special way because of the revenue share between content provider and mobile operator. Payments made for the third party service must be submitted to the relevant criteria to assess whether the pre-paid value has been used as e-money.

All mobile operators and some other content providers or consultants criticise this approach, considering that PRS are not a new service, that there is no question of separating the merchant's role from the mobile operator's role and that in any case they are part of the core business of mobile operators due to the added value systematically brought by the mobile operator in the supply or content production chain.

Mobile operators consider it crucial that PRS should be excluded from the e-money test, because they constitute the quasi-totality of the additional services provided and provide a source of income to mobile operators. This income serves to pay technology and licence investments.

Question:

(11) How are PRS advertised? What information does the customer receive on the sharing of the tariff? How much of the cost is intended to pay the content (approximate percentage)? What is the nature of the content of a PRS (information, music, logos, other non digital services, etc ...)? Are there specific contractual clauses for purchase of PRS?

According to the information provided, the same services are sometimes available as the PRS, sometimes following another supply mode without revenue share. Generally speaking, only digital services and voting services are available as PRS.

Contract with customers only specify the possibility or not accede to PRS (the mobile operator must always check that the service is not "barred").

In some countries consumer regulations or specific telecom rules provide some more details on how PRS can be marketed. ICSITIS in UK is an example of soft regulation. In other countries, it is the sectoral competent authority that surveys PRS, in particular to preserve consumers' rights.

All over the EU, the only obligation vis-à-vis the customer is to make clear the overall price of the service. The percentage of revenue share varies according to the agreements with each merchant and is not known by the customer.

From the practical point of view, it would be extremely difficult to determine where the content of the additional service provided by the merchant ends and where the communication / added value brought by the mobile operators starts. As a matter of fact,

this depends on the nature of the PRS, on the specific agreement applicable case by case to the service and on the practice adopted by each mobile operator.

Other provisions regulating the telecommunication sector

Telecom existing rules

The consultation paper stresses that the application of a supplementary regulatory framework such as the e-money directive must remain proportionate and can be limited to aspects that are not already covered by sectoral existing legislation at Community or national level. In the absence of specific EC harmonisation in the telecom sector covering the risks identified for e-money issuers, the Commission services wished to find out more about the regulatory landscape in Member States.

Questions:

(12) *How is consumer protection in the telecommunications sector already covered by sectoral national legislation? Is there any provision intended to preserve or influencing the solvency of mobile operators?*

All the contributions made clear that to some extent consumers are already protected in their relationship with mobile operators. How far this protection goes, it depends on the national legislation: some countries adopted rules for the specific sector (ex. DK); in the majority of the Member States, however, one must refer to the general rules concerning consumer protection, general contractual clauses, misleading advertising etc.

It is quite clear that none of these provisions can protect consumers from specific risks stemming from financial services activities. The only exception seems to be DK, where under national law also mobile operators have the obligation to redeem the pre-paid value upon request of the customer in case of termination of the contract.

As for the solvency aspect, it is to note that in all member States mobile operators are subject to licence and that the competent authority often requires clear evidence of the solidity of the applicant company.

Mobile operators add that the specific activity they carry out requires availability of considerable liquidity, in order to observe all their contractual obligations.

(13) *Would the application of the E-money Directive duplicate other sectoral rules or forms of control? Are there specific national rules on payment schemes and /or business models that mobile operators must / may use?*

Comments received from mobile operators, content providers, and some other stakeholders list the various national regulations applicable to mobile operators. The information provided show that the sector is already highly regulated from the point of view of the attribution of licences, frequencies, consumer protection and technical standards.

According to the same replies, there are not specific national provisions concerning payment schemes and business models. The only applicable rules come from civil law (contract law) and consumer protection regulations (transparency, standard clauses etc).

However, although sectoral industry considers that the e-money Directive would duplicate these rules without being justified by a specific supplementary need, it appears that existing

sectoral regulation are not intended or appropriate to deal with issues and risks that the e-money Directive addresses.

A supplementary regulatory framework for mobile operators: impact of specific provisions:

- Redeemability

The consultation paper tried to identify the impact of specific provisions of the e-money Directive that would oblige mobile operators to change their operational models. Pre-paid accounts (or cards) are not in principle redeemable (with the exception of Denmark) and this obligation would clearly impose a radical change implying costs and a different relationship with customers.

For obvious reasons, this document summarises informations reported by mobile operators, the only contributors able to explain the impact of this obligation.

Questions:

(14) *What would the operational and business consequences be, if full redeemability of pre-paid mobile phone cards was required?*

The replies insist more on the business consequences of the redeemability obligation than on specific costs that related changes would imply.

One of the most important modifications would concern the distribution network: in fact the large majority of the pre-paid cards (accounts) are sold and reloaded via distributors in supermarkets, kiosks other shops. Mobile operators ask how in this case the redemption should be dealt with and by whom.

The second consequence would be in terms of liquidity that operators would be obliged to keep available to answer possible and unforeseeable requests of redemption. The usual pre-paid mode was intended to allow customers to pay in advance and therefore better control their communication expenditure. The advantage for mobile operator was a permanent cash flow used to finance all their other activities and costs. Blocking this money to make it promptly available upon customer requests would oblige mobile operators to change their entire financial operational mode.

Mobile operators also stress that should their activity be covered by the e-money Directive, the redemption must be limited to the average amount considered on an ex-post basis as corresponding to the possible e-money use.

(15) *Are the possible solutions presented above viable; are there alternative solutions to redeemability that would satisfy user's confidence?*

In this framework, mobile operators ask to take into account their hybrid nature – should their activity be considered as e-money issuance – and make an exception to the redeemability obligation. In this sense, most of them consider acceptable the possibility envisaged in the consultation paper to “transform” the cash redemption into airtime expenditure until exhaustion of the pre-paid value, also in the event of shortcomings.

Some general comments on the redeemability issue also came from the banking sector, credit card companies and e-money institutions. They generally consider that redeemability should remain a key obligation for “hybrid” issuers in order to preserve a level playing field between different types of issuers that the e-money Directive aims at ensuring.

- Money laundering

Money laundering was one of the key issues mentioned by mobile operators as source of considerable problems in case they would be obliged to fulfil the obligations imposed by the E-money Directive. Anonymity of pre-paid customers and administrative costs linked to their systematic identifications and recording transactions were the main difficulties invoked.

Question:

(16) Which particular provisions of the European Directives on-money laundering and your national legislation are less meaningful and would have negative consequences on the current and future “new business”? Which changes would be needed to be introduced by industry to fulfil those requirements, and what costs would be incurred? Are there alternative solutions that would meet the objectives of the present rules? As regards bulk purchase of pre-paid low value cards, which measures have you taken or envisage taking in order prevent the risk of money laundering at any level of transaction, included the level of the final consumer?

All mobile operators recall the above mentioned problems and underline the need to balance benefits obtained from the application of money laundering rules in the specific sector with costs and actual risks. Comments do not refer to specific provisions of the money laundering Directive. However, it is extremely clear that they are particularly concerned by the obligation to identify customers and keep detailed record of transactions for a certain lapse of years.

As for changes that these provisions would imply, mobile operators mention:

- systematic identification of all pre-paid customers and, what would be nearly impossible, identification of existing anonymous pre-paid customers. They explain that current national regulation obliges in some cases to identify the person who register for the phone number, but not the person who actually uses the phone; in many countries there is not even the obligation to identify the customer and “Mickey mouse” customers are not an exception. Distributors must also be involved and some changes in their operational mode are necessary.

Identification of all customers has a twofold negative impact on mobile operators activity: the first an immediate is the administrative costs, that the majority of the contributors does not quantify but affirm being very relevant; the second is in relationships with customers that like the current system just because is not only simple but also preserve their privacy. The most important cost would be probably the loss of a significant number of customers.

- recording data on transactions. Current systems foresee to record transactions, but these records are not kept according to money laundering rules. Mobile operators would be obliged to invest money to change their administrative organisation, technical support and increase staff devoted to administrative tasks.

In this context, mobile operators consider the obligation to follow all the money laundering provisions disproportionate. According to their opinion, money laundering risks are very limited, also in the case of purchase in bulk of pre-paid cards. The main reasons are the quite low average amount of pre-paid cards (accounts), the practical difficulties in laundering relevant amount of money via pre-paid cards and the fact that anti-fraud internal systems are already in place to monitor suspicious transactions or expenditures.

Mobile operators also recall the fact that low money laundering risk is due to the fact that pre-paid customers cannot redeem the amount paid. Redemption (above all in cash) is in fact a perfect vehicle for launderers.

However, as industry understands some concerns of the financial authorities for the risk of money laundering, it is available to a compromise solution.

One possibility would be to reinforce the monitoring of merchants activity: if a specific surveillance by mobile operators must be ensured for possible e-money transactions, the easiest and more efficient way is to monitor and record merchants' activity and to carry out accurate investigations before concluding agreements.

A second possibility would be to monitor and register only transactions over a certain threshold.

Finally, mobile operators generally welcome the draft proposal for a third money laundering Directive, where obligations are lightened for all e-money issuers.

Of a totally different view are other stakeholders (e-money institution in particular), which consider that the level of risk stemming from the issuance of means of payment by mobile operators is comparable to the risk that ordinary e-money institutions have to face. In fact, also the majority of the e-money institutions currently licensed deal with micro-payments (around 10€) and despite the low level of transactions their experience shows that the system can be used by launderers.

- Float

Mobile operators now have the opportunity to devote money paid by pre-paid customers to the use they consider more appropriate, because they have no redemption obligation.

Under the E-money Directive, they would be obliged to keep a certain reserve to face customers' requests and ensure that a sufficient amount is also promptly available to re-convert merchants' e-value into scriptural money.

The box below summarises relevant information provided by the telecom industry.

Questions:

(17) Which business activities would be impacted by specific investments rules made the float likely to be used as e-money? Are there viable alternative solutions that would still meet the objectives of the Directive?

Mobile operators dislike the obligation to keep the amount corresponding to the float liquid, as the e-money Directive requires. According to the information provided, this will prevent the use of relevant funds for financing (or covering) future and past investments. In practice, mobile operators would be obliged to change all their investment strategy.

No alternative viable solution is identified. However, mobile operators stress that the breadth of the mobile activity, the contractual obligations they already have and controls made by competent authorities vis-à-vis licensed telecom operators should prove that they are able to ensure a sufficient financial coverage for paying merchants at the foreseen date and avoid that customers suddenly lose their money. In practice, customers will always have the possibility to exhaust their pre-paid account before activity are closed in case of bankruptcy (a very remote possibility in Europe) or other shortcoming of the company.

Another point stressed by mobile operators is the fact that comparing the total amount of payments for third party services by mobile customers, it is largely lower than the amount spent with other means of payment and – always according to mobile operators – probably also lower than “traditional” floating e-money.

In this context, also the possible systemic risk linked to the trustworthiness and stability of the payment mechanism would appear very limited and much lower than for an 'ordinary' e-money institution.

(18) Are there any sensitive differences, also taking account of potential future business developments, between the average float of an ordinary e-money institution and that (calculated on ex-post basis) of a mobile operator's new business relating to pre-paid cards that are used for paying for goods and services?

Mobile operators were not able to answer this question. However, they affirm that the hypothetical amount of e-money transactions would be lower than for ordinary e-money institutions, as well as the global float involved.

No specific forecast is made considering future business developments (in particular the wide use of 3G phones). Also merchants confirm that they are unable to predict how the market will react or adapt habits in the near future.

E-money institutions warn the Commission services on possible anomalies stemming from the fact that the pre-paid value is not considered e-money until it is actually used as e-money. Should this method be used, mobile operators would be responsible only for half of the float: the portion linked to pending credits vis-à-vis merchants, without any regard for customers' claims.

Therefore, they invite the Commission services and national supervisors to adopt a corrective rule.

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Some mobile operators consider that also the nature of "hybrid" operators might raise per se difficulties, should their activity be considered as e-money issuance. Art. 1.5 of Directive 2000/46/EC prohibits the exercise of any other activity than the issuance of e-money and closely related business, as well as the participation of e-money institutions in other companies. How would the application of the E-money Directive to mobile operators be compatible with this rule? Does it mean that the creation of a subsidiary is unavoidable? Is there a way of interpreting this provision in a more sensitive way, taking into account that a hybrid issuer cannot (or should not) be obliged to waive or separate payment services from its core business?

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Impact of the financial services regulatory framework

In the consultation paper, the Commission services agreed that any regulatory initiative must be proportionate to market needs (consumers and merchants) and financial risks (trustworthiness and stability of payment systems). In order to better assess how far the application of the e-money Directive should reasonably go (not only in the short term, but also with a view to amending inappropriate rules), it was necessary to obtain a clear picture of the consequences for industry.

Question

(19) To what extent could the application the new regulatory framework described in this document impact competitiveness and the future development of new services and new technologies? Is it possible to quantify the effects it may have in terms of changes in legal arrangements, internal organisation, business models or otherwise?

All mobile operators and merchants underlined how negative would be the impact of a supplementary regulatory framework on telecom industry. Many are the reasons listed:

This moment is crucial for the development of the telecom sector, which needs to expand after huge investments in terms of technology and license. Any change in the current landscape could break the delicate balance built in order to consolidate and boost telecom companies in Europe and outside Europe (Asia in particular). Any change would therefore have a negative impact not only on future competitiveness, but also on the survival of many mobile operators and their partners.

Mobile operators also recall the Lisbon process and the Commission commitments made in the Information Society policy context to stress that this sector needs a different treatment and needs more than other a certain regulatory flexibility.

Although mobile operators insist on the need to limit as much as possible the perimeter of the supposed e-money activity (which influences the float and redeemability obligations), negative consequences will intervene irrespective of the breadth of the e-money activity actually carried out.

In practical terms, the application of the e-money Directive would:

- imply administrative costs (new staff and new training, technology needed to manage with new obligations, internal organisation, compliance with different legal schemes and contracts, relations with financial authorities)
- force a change in the distribution network;
- oblige companies to rethink their commercial strategy (vis-à-vis consumers and merchants);
- reduce business opportunities;
- reduce income from pre-paid customers. Mobile operators insist on the customer aspect, because the current system developed in the way it works now to meet the need and preferences of the typical customers. It is not sure than the same customer will appreciate a more complicated purchase mechanism, identification obligations, more complicated contractual clauses, the possible need to pre-define the amount that may be spent for third party services etc²;

² From contributions of mobile operators and content providers it is clear that a large part of the pre-paid customers is formed by young people and in general by people without large expenditure capacity. They chose pre-paid mobile cards to better monitor their consumption. They use the pre-paid value to pay additional services because either they have no viable alternative or because they do not like too sophisticated means of payment and "one in all" is the most user friendly solution.

- prevent coverage of previous investments (present income serves to cover high licence costs);
- prevent planning of future investments (the increase of income in the short-middle term would have been devoted to new investments and expansion);
- determine a loss of competitiveness in the global market.

As for merchants, the main concern is that a different legal environment with heavy economic impact will push mobile operators to reduce activity with third party providers. Merchants are often small medium enterprises, whose core business is developing and providing digital content and totally depending on the development and success of the mobile sector, in particular the 3G technology. One scenario prospected by merchants is that mobile operators will fence their offer, limiting to some services or transforming all the additional services according to the re-selling mode (so called "walled garden"). Should it be the case, merchants are afraid to be wiped out from the market. No contributions came from other partners offering non-digital services.

Unfortunately only some of the mobile operators and mobile partners provided quantification of the effects that the application of the e-money Directive would produce on their business activity. These contributors asked to keep these informations as strictly confidential.

According to these numbers, supplementary administrative costs would be far higher than the income expected for the short medium term from the offer of third party services and would clearly make impossible the coverage of previous investments. In practice, mobile operators would lose any economic interest in developing the offer and / or availability via GSM of third party products and services (digital or not).

In addition, mobile operators stress that all these adverse effects are not counterbalanced by real benefits for customers, merchants and the system itself. Therefore, they ask the Commission services and national regulators to strike a right balance between costs and benefits, in the light of well assessed risks, before deciding to apply the e-money Directive.

Another issue raised by some replies is the fiscal treatment of third-party products and services. Apparently, in the current system PRS services and digital services in general are treated under the VAT regime of the mobile operator.

Appropriate solutions

The Commission services highlighted some guiding principles for the assessment and the development of appropriate legal and practical solutions.

- clarity and legal certainty;
- level playing fields for all operators offering the same services;
- proportionality between the financial stability risks and burdens for issuers;
- consumer protection;
- innovation;
- technological neutrality

All interested parties (mobile industry and their competitors) agree on these principles, in particular on the need to come to a clear and definitive opinion the mobile operators' issue, because uncertainty is per se an obstacle to the development of the industry.

However, mobile operators and merchants insist more on a risk based approach and on the need to ensure the maximum innovation possible in the telecom sector.

E-money institutions stress the need to preserve the level playing field for all issuers (hybrid or not) offering comparable services and creating similar risks, without the need to proceed to a completely new risk assessment when the issuers deal mainly or exclusively with micro-payments.

As for consumer protection, all mobile operators and merchants consider that it is not an issue, not because consumers are not relevant, but because in the specific case consumers are already fully protected and happy with the current schemes and rules.

Technological neutrality is differently interpreted; for mobile operators it means that any regulatory framework hampering the development of new technology must be avoided, while e-money institutions consider that the proportionality test, the risk assessment and the comparison between issuers must be made irrespective of the technological solution adopted by operators.

Short-term approach

Opinions on what is viable in the short term differ a lot from one operator to another. It seems that the size of the operator is a key issue allowing a certain flexibility and, in the short term, the possibility to comply at least with some of the obligations.

Of the three identified solutions only one is considered as viable: the application of a waiver. But also in this case, some operators are reluctant to accept it as appropriate remedy for different reasons. In some countries waivers have not been transposed (it was an option); in some other they have been transposed, but detailed provisions make their application very unlikely or de facto unsatisfactory (for instance it has been decided to waive only few of the provisions); some other operators are already (or would be soon) above the ceiling of 5M € float. Another inconvenience of the waiver solution is the impossibility to benefit from a passport. This is acceptable in the short term perspective, but very negative in the future, given the cross border vocation of the telecom sector, especially following customers' expectations.

Questions:

(20) Are the possible approaches and solutions described above operationally and legally viable and what are the costs involved (administrative costs, changes in commercial and contractual strategy, business opportunity, impact on investments)?

Solutions A) and C) have been generally rejected.

In the first case (creation of a specific sub-entity dealing with the issuance of e-money) is considered to expensive and these costs would be unjustified compared to the expected income. Direct costs would concern internal administration, staff, contracts, relations with financial authorities, technology. In many cases the structure would be simply doubled. Contracts with customers and merchants would need radical changes, with all the risk that customers in particular will prefer to give up the use of their GSM as a vehicle for consumption of additional services. These costs will affect business opportunities and investment possibilities.

Solution C) (outsourcing the issuance to another entity, as in the "buy-on-the-fly" model) is not interesting because it would oblige operators to share revenue and would impose complicated legal arrangements to split respective responsibilities.

(21) Is the use of "waivers" from the application of the Directive a satisfactory solution allowing mobile operators to continue their business in conformity

with the e-money regulatory framework without any further need of intervention by the national authorities? Are the nature and the limits for waivers sufficient for mobile operators to cope with e-money obligations at least in the medium term? Is the consequence, the absence of an EU passport, an issue?

When waivers have been accepted, it has been clarified that as they are designed now they would be viable only in the short term.

First they should be transposed by all member states in order to avoid unjustified differences and opportunities depending on the country where the company operates.

Second, the ceiling should be higher, in order to meet business ambitions of the telecom sector.

Third another waiver should be introduced and should be based on a limit per transaction. Some operators suggest 100 € as a reasonable level.

Moreover, the passport should be granted to all telecom operators under a waiver.

Long-term approach

It was also requested to make some suggestions on how to improve the regulatory framework for mobile operators.

Question:

(22) *As stipulated in the current Directive, EC rules must be technologically neutral. In order to better shape any possible future amendments, which broad types of amendments to legislation would best reflect technological changes?*

Most replies from mobile operators answer questions on long term approach insisting that for them the application of the E-money Directive (and of any supplementary regulatory framework) is not desirable and would at least damage and slower the development of the sector. Their first request is therefore to include a very clear provision excluding the telecom sector from the application of the E-money Directive.

Comments received and encouraging changing the e-money Directive do not answer directly to this question. Mobile operators (and other consultants) proposing solutions for the long term stress that a sensible long term solution would be addressed to all hybrid operators and would be based on a risk-weighted approach, which is the most appropriate guiding criterion for all hybrid issuers.

One sectoral association underlines that the current situation is not entirely satisfactory for merchants, which are in very weak contractual position vis-à-vis mobile operators. Clearer rules on respective obligations and on the legal status of the floating e-value once the customer has been debited would certainly bring benefits to merchants.

One consultant considers that all account based payment systems should be isolated in a separate chapter of the future e-money Directive. These schemes should also be considered as an intermediary activity between banking, e-money based on physically available devices and payment services. Only in this way risks could be better addressed.

All stakeholders agree on the need to preserve consistency between different financial services legal instruments and in particular co-ordinate any amendment with the new payment legal framework, in order to avoid duplication or legal uncertainty.

(23) *The assessment is in this consultation paper largely influenced by the possible future development (and increase) of the level of risk originated by mobile operators. Can industry explain whether and when their activity will shift from micro payments to bigger payments in a pre-paid mode?*

Mobile operators and merchants expect an increase of the consumption of third party digital services when the 3G phones will be largely used. However, they consider this increase as a short term effect.

More in general they all agree that it is not possible to predict in terms of expenditure the choice of their customers, depending also on the fact that they will not probably reduce their airtime expenses. It is also possible that part of the pre-paid customers (teen-agers and all the people without significant payment capacity) will not afford to overcome a certain amount of additional services.

Mobile operators also indicates that when the amount to be paid for a single service will be higher than 10€, then it is probable that customers will switch to traditional payment schemes (credit card in particular).

Finally, if it is very unlikely that customers will use the pre-paid account for macro-payments, it is also not in the interest of mobile operators to allow macro-payments through pre-paid accounts. They would be obliged to compete with more efficient and well experienced payment services providers; they would increase their operational risks and would be obliged to issues higher pre-paid cards, while the practice is to self-limit the ceiling in the pre-paid mode.

On the other hand, mobile operators' competitors consider that the business will significantly increase. Not because customers can opt for the pre-paid card as a universal means of payment, but because customers tend to use more and more their GSM to pay additional services and not only digital service, but also ticketing, parking, products offered in non-attended POS, taxi, restaurants and cafeterias, museums etc, as some examples all over Europe show.