

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

**Consultation paper of
DG Internal Market**

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1. EXECUTIVE SUMMARY

Facing rapid technological and market developments, it is important to consider whether the E-money Directive is still an up to date, efficient and appropriate legal instrument and whether a more appropriate legal framework would be more appropriate for operators that are not traditional e-money issuers. As new services are developed and offered by mobile operators, both proportionate regulation and legal certainty are needed for the investment decisions involved. Industry invited the Commission to consider rules that are proportionate to the risk that they create for the market and for the consumer.

Approximately one year after the transposition date of the E-money Directive (Directive 2000/46/EU), supervisory authorities in the Member States thus compared experiences on the implementation of the Directive and how the rules are applied in practice.. Some authorities concluded that mobile operators *de facto* issue e-money when mobile phone pre-paid cards are used as a means of payment to purchase products and services other than communication services. Therefore they should be submitted to the existing rules concerning e-money institutions.

Diverging interpretations between Member States decisions introduce differences in the treatment of identical cases in the EU which prejudice the good functioning of the internal market in the financial services and electronic communications sectors. Therefore, the issue was examined in March 2003 by the Banking Advisory Committee (hereafter BAC) that mandated its working group on the interpretation and application of the banking directives (GTIAD) to provide its advice on the interpretation of the relevant rules of the e-money Directive.

The analysis focused in particular on the status of mobile operators, who offer – in addition to their voice and data communication services - products and services other than communications via GSM includes voice mail messaging, ring tones, news, weather forecast, videos, games or goods (CDs, books, drinks, ticketing services etc.). The delivery of the product or service is made either on the mobile phone, on a PC or physically to a postal address. These products and services are often offered directly by third parties (“merchants”). Segments of the mobile phone industry provided important information and insights and participated in this work.

On the basis of that analysis and advice, the BAC concluded at its meeting of 10 December 2003 that the conditions for application of the e-money Directive are met if a mobile user purchases third party products or services and pays for them with the electronic value stored on their prepaid card. The BAC invited the Commission to consider the impact of this conclusion on industry, practical criteria for defining the area of mobile phone activity covered by the E-Money Directive and the most appropriate practical solution to apply this regulatory framework in a proportionate manner to “hybrid” companies that exercise E-Money activities as well as other activities. The BAC also advised the Commission to assess whether amendments to the Directive are needed.

The objectives of the present consultation paper are threefold.

- First, to widen the debate and deepen certain aspects of the analysis. The starting point is that when the e-value stored on pre-paid cards issued by mobile operators is used for purchasing products and services offered by third parties this value is e-money and the E-money directive is applicable.

- Second, to gain insights in the regulatory, economic and business consequences that this conclusion would entail for industry, regulators and other interested parties.
- Contributions from all segments of the value chain in industry are encouraged and will serve to complete the assessment of the impact that a supplementary regulatory framework is likely to have on the electronic communication sector.
- Finally, to seek views on possible proportionate and pragmatic ways forward.

Responses are invited to the questions raised in this paper by no later than 20 July 2004 and should be sent to:

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2. INTRODUCTION: THE E-MONEY DIRECTIVE

Directive 2000/46/EC¹ introduces a specific legal framework for specialised undertakings. Its date of transposition in Member States was 27 April 2002.

In the context of the rapidly evolving area of electronic commerce a common regulatory framework allows electronic money to deliver its full potential benefit and contributes to the use of innovative means of payment, increasing the confidence of bearers and facilitating cross border activities. Electronic money can be considered to be *an electronic surrogate for coins and banknotes, stored on an electronic device* and is generally intended for the purpose of effecting *electronic payments of limited amounts*. Harmonised rules are needed because the issuance of electronic money could affect the stability of the financial system and the smooth operation of payments systems.

For non-banks, the specific nature of an economic activity based on the exclusive issuance of e-money has two consequences. First, e-money institutions are assimilated to credit institutions. Second, business activities of electronic money institutions other than the issuing of electronic money must remain restricted to closely related financial and non-financial services and the storage of data on the electronic device on behalf of other entities. However, *the legal framework must also be technology-neutral and limited to the essential aspects linked to the possible risks related to the nature of business that e-money institutions carry out*. The prudential supervision of electronic money institutions has thus been harmonised only to the extent necessary for ensuring their sound and prudent operation and their financial integrity. In order to respond to the specific risks associated with the issuance of electronic money this prudential supervisory regime is more targeted and, accordingly, less cumbersome than that for credit institutions, notably as regards reduced initial capital requirements and the non-application of rules concerning capital adequacy, solvency ratios and large exposures of credit institutions. As is the case for credit institutions, rules on money laundering will however also need to apply to e-money institutions.

Redeemability (i.e. the possibility for the user to re-convert the e-value in banknotes or scriptural money) is a necessary condition for ensuring bearer confidence in electronic money, as an effective and trustworthy substitute of coin and banknotes². Prudent limits on investments by e-money institutions ensure that their financial liabilities related to outstanding electronic money are backed at all times by sufficiently liquid low risk assets.

Importantly, the E-money Directive already incorporates some flexibility and allows Member States to identify those institutions that do not need to fulfil all the conditions of

¹ Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions *Official Journal L 275 , 27/10/2000 P. 0039 - 0043*

² In the current monetary order, commercial bank money is always tied to central bank money with the redeemability requirement. In most countries, the legislation stipulates that these credit entries should be paid out in central bank money at par on the request of the account holder. Indeed, the obligation to redeem the claims recorded on a specific account at a financial institution (giro accounts) into central bank money (such as notes and coins), makes these claims trustworthy and widely accepted.

the Directive 2000/46. *Competent authorities have the discretion to waive some or all of the requirements* imposed by the Directive for electronic money institutions which usually operate only within the territories of the respective Member States. As a consequence, these institutions will not have the passport for establishing or offering services in the other member states.

3. MOBILE OPERATORS LAUNCH A NEW BUSINESS

Already during the negotiation of the future e-money Directive, mobile phone prepaid cards had been identified as a possible means of payments that would be covered by the e-money scheme.

Technology has rapidly evolved and mobile phone operators are now able to promote a wide range of services adding value to traditional communication services. In the past, pre-paid cards were used only for paying "airtime". Now the value purchased in advance by customers can be used to pay for additional services or goods (voice or other digital products delivered on the handset, pay tickets and parking facilities or even small value goods). They are provided in real time (services available via mobile phone or internet) or in "second time" (goods that must be physically delivered, for instance, at home). At this stage the agreements between phone companies and other content providers (so-called "merchants") are limited to small value transactions giving origin to "micro-payments". Looking at current practice, "premium rate services" (PRS), where the overall price paid by the user includes communication costs and the price for the content, represent the large majority of the additional services offered and purchased. However, the business is in permanent and rapid evolution.

Mobile operators may conclude agreements with several suppliers of goods and services that customers may purchase via their mobile-phone. Payments can be made by credit card or debited in the phone bill. A more frequent option for consumers is to use the value stored on their pre-paid card. The motivation offered by mobile operators is that the majority of mobile users prefer this mode of payment prepaid cards to the bill system, because:

- it is easier to control and limits the phone expenses;
- users may remain anonymous and;
- pre-paid cards and services purchased via pre-paid mobile-phone cards are affordable by the larger part of the population, including those without a credit card or a bank account.

According to mobile operators, this business segment is a "niche" market, comprising basic third party services and small value goods, (taking into account that the value of a pre-paid card usually ranges between 10 and 50 euros).

4. ARE MOBILE OPERATORS E-MONEY ISSUERS?

As the Directive applies to all issuers of electronic money, the identification of the covered undertakings depends on the definition of e-money³.

³ According to Article 1 of the Directive, an "**electronic money institution**" shall mean an undertaking or any other legal person, other than a credit institution as defined in Article 1, point 1, first subparagraph (a) of

It has been clear from the outset to the Commission services and Member States' national experts discussing the application of the E-money Directive in the telecom sector that only the *pre-paid* mobile phone card could correspond to the definition of e-money.

These pre-paid cards have been compared to the conditions of Article 1 of Directive 2000/46/EC.

1. There should be a monetary value

The user of a pre-paid phone card has an e-value to spend, which is expressed in monetary terms (according to the currency used). In practice, a mobile phone user has money to disburse. This e-value is not only the pre-payment of pre-determined services they expect to receive in the near future (i.e. all the *communication* services supplied by the mobile operator). This e-value is also conventionally accepted as a means to pay additional and non pre-determined *goods and services*.

2. Stored on an electronic device

It is generally recognised that the e-money value can be stored either on a microchip or in a computer memory. It may be physically in the hands of the bearer or not; it suffices that it is fully available and accessible to the bearer who may pay without the authorisation of a third person (bank, credit card company or another intermediary for payments). In this sense, also a remote access scheme fulfils the requirement of the Directive⁴. Mobile phone pre-paid cards function on the basis of a remote access to the stored e-value.

3. ...Issued on receipt of funds of an amount not less in value than the monetary value issued

In order to acquire a pre-paid mobile phone card a customer must pay for it immediately. However, it cannot be excluded that in practice different commercial modes are available.

4. ...Accepted as means of payment by undertakings other than the issuer

Pre-paid cards are used to pay for goods and services other than airtime. These products and services are supplied by an undefined number of merchants, which are not necessarily controlled or linked to the mobile operator. Specific agreements between mobile operators and content providers are needed to make this wide range of additional products and services available via the mobile phone.

Some services are supplied on the handset (ring tones, logos, games, screen savers, music, videos, news, etc). It has to be clarified, on a case by case basis, who the content provider is in relation to the user who purchases (mobile operator or merchant) and how additional services are presented to the user (who is the supplier

Directive 2000/12/EC which issues means of payment in the form of electronic money; "**electronic money**" shall mean monetary value as represented by a claim on the issuer which is:

- (i) stored on an electronic device;
- (ii) issued on receipt of funds of an amount not less in value than the monetary value issued;
- (iii) *accepted as means of payment by undertakings other than the issuer*

⁴ This analysis has been accepted during the negotiations of the Directive in the Council.

and who is the creditor?). For instance, is the mobile operator merely a “carrier” of the additional service offering the technological platform for the delivery?

In case of additional services and goods supplied without any intermediation of the mobile operator (physical goods, tickets, parking fares, food-outlet consumptions, etc) the identity of the provider cannot be confused and it is clear that the mobile operator receives a payment only for the communication aspect of the transaction (if any).

In the light of the above, the e-value stored on mobile phone pre-paid cards that is used to pay third party products and services is indeed likely to be e-money. However, there is room for further analysis on how the e-value is transferred to the merchant, on how the additional product / service is offered and presented to the mobile phone users and how the reciprocal responsibilities (legal and financial) of merchants, mobile operators and users are established.

Only an in-depth analysis of the practice and the commercial models adopted by mobile operators would allow any conclusions about the specific area of the business exercised by mobile operators would be covered by the E-money Directive. The possible criteria to define the perimeters of this business are discussed in the paragraphs below.

Question:

(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.

5. PRUDENTIAL RISK ASSESSMENT

The prudential risk generated by an additional activity (e-money issuance) carried out by mobile operators is also an important factor. Although it is clear that it is not possible to proceed with a detailed assessment because of the absence of sufficient figures. The Commission services consider that if mobile operators give rise to risks equivalent to those identified at the time of the adoption of the Directive, it is appropriate to submit mobile operators to the Directive, *for that specific segment of activity linked to the issuance of e-money.*

The elements to be taken into account for purposes of prudential risk assessment are:

- risks stemming from insolvency of the e-money institution (in the specific case, the mobile operator) for customers and merchants;
- risks stemming from the lack of liquidity to satisfy redemption requests of the e-value by customers and merchants;
- financial stability risks⁵;

⁵ E-money issuance can create systemic risks due to possible lack of safety and reliability of the electronic money as means of payment. Inefficiency and loss of confidence in this means of payment

- money laundering.

These risks are also directly linked to the potential importance of the business, i.e. to the amount of money likely to be used as e-money for each company per country and the medium/long term growth perspective.

The issuance of multi-purpose means of payment is ancillary to mobile operators' main business activity and the use of pre-paid cards as multi-purpose means of payment is limited to micro-payments for goods and services directly offered by third parties.

Figures indicate that the individual expenditure for third party products and services is relatively low at present (maximum 2-5% of the pre-paid value). This value however will likely increase and the risk assessment must also take into account macro-data.

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

6. NEXT STEPS

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

There are two important issues in order to determine the precise area of activity that is covered by the directive. First, there must be a clear trilateral relationship between the user, mobile operator and merchant: only *multi-purpose cards* are in fact likely to be e-money. The transaction scheme must also fulfil the specific characteristics described in the E-money Directive.

The Commission services consider that *business models, legal relationships between the different actors and payment structure* are the key elements to be analysed.

undermine the good functioning of the internal market in the sector of payments, with heavy consequences on all the companies issuing e-money, on cross border transactions and generally speaking on intra-community trade.

Monetary implications must be added to the concerns on the stability of the financial services sector, as e-money can have an impact on the demand and supply of liquidity. Therefore, the European Central Bank advised the Commission at the time of the discussion of the E-money Directive to take in due consideration the opportunity to regulate activities influencing the monetary policy.

6.1.1. Business models

In practice, there are different *business models* depending on the nature of the content and the presentation of the offered product/service. Five examples are provided below in simplified terms.

a) A mobile operator offers content to its customers via a “portal” without specifying the origin of the content. Therefore, the product/service belongs to the mobile operator itself, or it is re-sold and supplied by the mobile operator, or it is sold and/or supplied by a third party but without any information to the customer. In practice, the purchase is made using the portal as a catalogue.

In this example the customer has only one counterparty: the mobile operator. The e-value is spent to buy something presented as an ancillary product / service of the mobile operator.

b) A mobile operator offers its customers content through a “portal” and it is clearly apparent that some products or services are produced and/or supplied by third parties. However, the mobile operator appears as “the seller” to the customer.

In this context, the payment is likely to be made to the mobile operator in exchange of what appears one of its ancillary services. Again, there is no question of e-money, because the card is not used as a real multi-purpose card (intended also to pay third parties). It will also be interesting to assess who is responsible for the product / service in case of default, error in delivery etc. More details on these arrangements could clarify if, despite the technical arrangement adopted to sell the product/service, the content must be considered as sold by the third party and this third undertaking is the real counterparty.

c) A mobile operator offers content through a “portal”, and where certain products or services are clearly produced, supplied and sold by third parties.

In this context there are three visible actors and the card is likely to be used as a real multi-purpose card. The mobile operator appears as mere “carrier” of communications or of the digital content, if any.

d) Access to services through a channel other than the mobile operator’s portal. The customer may call a specific phone number or connect himself to a web page, and make his purchase via voice-call, SMS, or web message. In this case, the mobile operator appears as a mere technical *intermediary* for the communication allowing the order and the delivery of the content on the handset (examples: logos, screen savers, games, news, horoscope, music, ring tones, videos, etc).

In this case, as in the case described sub c), as well as for the exception described sub b), there are three visible actors: a customer (purchaser), a merchant (seller and supplier of the content) and the mobile operator (technological intermediary for this new form of e-commerce). The pre-paid card becomes a multi-purpose card and its-value is used to pay a provider other than the issuer. The requirements of the E-money Directive will be met.

e) Finally cases exist where mobile operators are themselves in no doubt that the e-value used as mean of payment is *de facto* e-money. For example, a customer may dial a phone number and pay for a parking space; buy a soft drink from a vending machine or orders a CD or a pizza to be delivered at home. In these cases

there is no confusion or overlap between the communication service and the product / service paid, or the origin of the product or service, neither by the customer nor by the phone company.

There is no conceptual difference between this last example and that described sub c) and d), apart from the fact that the content is completely separated from the communication device and related services (where in the previous cases it is delivered on the handset). Therefore, also the schemes described sub c) and d) should be considered as fulfilling all the basic requirements to be an e-money transaction.

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

6.1.2. Legal relationships and payment structure

If it has been established that there are three actors, it must be assessed when a pre-paid e-value becomes e-money in the light of the definition provided by the EC law.

- The e-value should be considered as e-money if there is a direct *legal* relationship between customers and merchants. Of relevance are: who is the creditor, i.e. the subject legally entitled to ask for the payment and when? Who is legally responsible for the payment to the merchant? Who is responsible for a defective service or a defective delivery? What are the obligations of the customers vis-à-vis the content provider in case of a trilateral scheme, as described in models c), d) and e) and towards whom?

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?**

- A second way of a “third undertaking” (merchant) accepting the e-value as means of payment can also be made by examining the *payment scheme*. This happens when:
 - there is a direct transfer of the e-value from the customer to the merchant (depending on the technology used for the storage device and for crediting the merchant). Although this technology might not be available or used at present, there is no doubt that such case implies the use of e-money.
 - there is no direct transfer, but both parties are connected via a remote system and the mobile operator operates as a central platform. In the remote system, the e-value belonging to the customer is automatically reduced and a corresponding e-value is contemporarily transferred to the merchant’s storage (sort of e-wallet collecting customers’ payments). The merchant does not receive money in real time, an e-value is stored in the computer memory of the mobile operator⁶ and, at this stage, the payment is complete.

This scheme must not be confused with what occurs in a later phase when, according to an agreement between the mobile operator and merchants, the e-value is re-converted into scriptural money on a bank account. This phase mirrors the practice of traditional e-money institutions, where banks accounts are used to redeem the e-value and the transfer is not made for each transaction but on a periodical basis.

Question:

(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

6.1.3. The case of PRS

The Commission services experienced difficulties in classifying “Premium Rate Services”, for which the customer pays an overall price including the communication service (to order and receive the digital content) as well as the content. They constitute certainly the most diffused services purchased via the GSM and the interconnection between the communication service and the content is considerable. As far as the Commission services understand they also constitute the most controversial issue in the discussion on whether mobile operators are or are not e-money issuers.

A strong link between the communication and the content is not sufficient to demonstrate that:

- a) they are a purely communication service and therefore the value of the pre-paid card is an advanced payment of pre-established communication services
- b) the customer never has counterparty other than the mobile operator.

⁶ The same scheme has been describe a typical e-money by the European Central bank of May 2003, “Electronic money system security objectives, according to the common criteria methodology”, available on the ECB website: <http://www.ecb.int/pub/pdf/emoneysecurity200305en.pdf>

Again, understanding the functioning of the business model applicable becomes the key element.

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?*

6.2. Interaction with other provisions regulating the telecommunication sector

The Commission services are fully aware that the telecommunication sector is already covered by Community and national legislation concerning very different aspects of the activity (technical aspects, competition, consumer protection, etc). In order to complete the regulatory landscape and avoid unnecessary overlap of provisions aiming at the same objective or having the same effect it would be useful to have more information on if and how this sectoral legislation at national level, addresses the same general interests that the financial regulatory framework intends to protect.

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?*
- (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?*

6.3. A supplementary regulatory framework for mobile operators

The requirements for e-money institutions may raise concerns for mobile operators in five areas in particular:

- Redeemability;
- Restrictions on the use of liquidity (the "float") for investments;
- Prudential supervision (minimum capital requirements, reporting obligations);
- Anti-Money laundering obligations
- Prohibition of other activities.

Some of these issues are considered in more detail below.

- *Redeemability*

Pre-paid cards are not generally redeemable. Changing this would raise considerable legal, operational and logistical problems. Redeemability of e-money increases the confidence of users in the acceptance of payments and against the risk of losing money. However, in the case of pre-paid mobile phone cards users can always spend the value of the card for paying airtime communications.

Two possible solutions therefore deserve attention. First, the Directive allows operators to refuse redemption for amounts under €10. Second, as pre-paid cards are intended for “hybrid” use, contracts could specify that when it is not clear in advance to what extent the card is used for additional services, it remains exhaustible for ordinary airtime communications.

Questions:

- (14) ***What would the operational and business consequences be, if full redeemability of pre-paid mobile phone cards was required?***
- (15) ***Are the possible solutions presented above viable; are there alternative solutions to redeemability that would satisfy user’s confidence?***

• *Money laundering*

Initial comments from industry indicate that the money laundering obligations are too burdensome and impracticable. They require adaptation of personal data collection systems, internal administrative practices and - importantly – operators would lose users that prefer pre-paid cards because of their anonymity. In addition, industry has commented that, given the low value of pre-paid cards and average amount of single payments, there is no real risk of money laundering.

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?***

• *Float*

At present, there are no specific obligations on the investment of the income of pre-paid mobile phone cards. The Directive limits the use of the float because of the redeemability requirement, the need for liquidity for exposures to credit merchants and for transactions requiring immediate account balances and re-conversion of scriptural money. The effective credit is balanced

weekly or monthly, according to information available to Commission services.

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?*
- (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?*

6.4. General economic impact of the regulatory framework

In addition to specific costs arising from an obligation to observe the specific requirements of the E-Money Directive, the application of an additional regulatory framework could have a negative impact on commercial models and business opportunities and introduce administrative burdens for *mobile operators and connected industries*. This negative impact may concern some existing services, as well as the development of new ones in all the value chain, from providers of technological platforms to companies developing content for distribution to end-users.

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?*

7. APPROPRIATE SOLUTIONS

The Commission Services are firmly of the view that any future initiative and solution must take into account the following key principles:

- 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

The following section considers possible solutions and approaches, measured against these guiding principles, in the short and the long term.

7.1. Short-term approach

There are clear concerns in the Commission services about the consequences of the legal assessment that certain parts of mobile operators' pre-paid card operations are covered by the E-Money Directive. Some of the rules may not fit easily with their businesses and could possibly hamper the development of new business and innovation⁷.

In order to apply the E-money Directive in a proportionate way, it appears important to take into account that any issuance of e-money is an ancillary activity for a mobile operator. Furthermore, not all of the value of prepaid cards will be used as e-money, while customers need this service only for micro-payments and, finally, for the moment the amount of such business does not seem significant.

It will also be necessary to fix the perimeter of the activity considered to be e-money issuance covered by the Directive. The criteria for the identification of the perimeter on a case by case basis ("segregation" of the e-money activity) have been described and commented in section 6. Following those criteria and on the basis of an *ex post* assessment industry may determine the amount of the e-money float and apply some of the obligations of the Directive (use of float, supervision, reporting, redeemability, money laundering) only to that specific part of the activity.

Once the e-money perimeter has been identified, different practical options are available, perhaps as a temporary solution.

A) Mobile operators could establish a subsidiary company which could exclusively manage the financial liabilities of electronic money issuance. The mobile operators would continue to issue and manage the pre-paid cards. This allows full compliance with the requirements of the E-money Directive and is compatible with the prohibition to carry out other activities other than the issuance of e-money. Waivers could be granted within a Member State.

B) Mobile operators may request the application of a waiver, if the float is below 5-6 million Euros. The final decision lies with the national competent authority, including which rules can be waived. If the application of the waiver does not affect the "statute" of electronic money institutions, it has the advantage that burdens for industry are considerably lower, but it would require a close and permanent monitoring of the float, in order to avoid that companies transcend the ceiling. This option would not be available in Member States that have not transposed Article 8 of Directive 2000/46⁸.

⁷ Industry has already noted that the main difficulties would arise from the redeemability principle and the application of anti money laundering rules.

⁸ Article 8, Waiver

1. Member States may allow their competent authorities to waive the application of some or all of the provisions of this Directive and the application of Directive 2000/12/EC to electronic money institutions in cases where either:

(a) the total business activities of the type referred to in Article 1(3)(a) of this Directive of the institution generate a total amount of financial liabilities related to outstanding electronic money that normally does not exceed EUR 5 million and never exceeds EUR 6 million; or

C) Mobile operators could “outsource” the issuance of e-money, according to different business solutions. The issuance of pre-paid cards that can be used to purchase additional third party products and services could be attributed to an e-money institution or a bank. Alternatively, the mobile operator could buy and convert pre-paid value usually intended for phone-calls and other typical communication services into e-money, when the customer decides to buy a third party content (“buy-on-the-fly”).

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)?*
- (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?*

7.2. Long-term approach

Leaving aside the need to rapidly conceive short-term solutions, the Commission services intend to examine in a longer-term perspective whether the E-Money Directive needs to be revised in order to ensure a proportionate application of the rules and to avoid unnecessary burdens for industry.

The Commission services are therefore interested in views from industry on how the Directive could be amended and improved to better suit current needs of the mobile phone sector and the future development of new business. This applies in particular to the issues raised in this paper: redeemability, use of the float, money laundering, prohibition of other activities, waivers.

(b) the electronic money issued by the institution is accepted as a means of payment only by any subsidiaries of the institution which perform operational or other ancillary functions related to electronic money issued or distributed by the institution, any parent undertaking of the institution or any other subsidiaries of that parent undertaking; or

(c) electronic money issued by the institution is accepted as payment only by a limited number of undertakings, which can be clearly distinguished by:

(i) their location in the same premises or other limited local area; or

(ii) their close financial or business relationship with the issuing institution, such as a common marketing or distribution scheme.

The underlying contractual arrangements must provide that the electronic storage device at the disposal of bearers for the purpose of making payments is subject to a maximum storage amount of not more than EUR 150.

2. An electronic money institution for which a waiver has been granted under paragraph 1 shall not benefit from the mutual recognition arrangements provided for in Directive 2000/12/EC.

3. Member States shall require that all electronic money institutions to which the application of this Directive and Directive 2000/12/EC has been waived report periodically on their activities including the total amount of financial liabilities related to electronic money.

Legal certainty and a proportionate and sustainable legal framework are essential to develop new business in the mobile phone sector. From this perspective it is important to consider the most propitious and realistic time span for the adoption of any amendments to the E-money Directive. Any such modification should be compatible with developments expected in the sector.

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?

(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?

8. CONCLUSION AND FOLLOW-UP

The outcome of this consultation will be presented and discussed with Member States. The Commission services also intend to publish feedback on the responses received to this paper. The objective is to obtain a clear consensus on interim solution and agree further actions, if appropriate and needed. Moreover, the information provided by stakeholders following this consultation will serve to the preparation of the Report due to the Council in 2005 on the application of the e-money Directive.