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Consultation on the revision of the Electronic Money Directive.

A response from the Mobile Broadband Group to the Financial Services Authority's supplementary consultation on the FSA Handbook

The Mobile Broadband Group ('MBG'), whose members are the UK mobile businesses of O2, Vodafone, Three and Everything Everywhere (which operates under the Orange and T-Mobile brands in the UK) welcomes the opportunity to respond to the consultation by the Financial Services Authority on the update to the Handbook and Perimeter Guidance being proposed as a consequence of the transposition of the revised Electronic Money Directive into UK law.

The MBG response is concentrated on the sections where the FSA has directly referred to the mobile network operators, that is Q18 and Q23, which is referenced in the answer to Q18.

In the Q&A section of the FSA Handbook, in response to Question 23 (page 83 of 85), the FSA has used slightly different text to that which appears in the regulations. The most significant omission is that of 'payment service', as in '*payment service user*.'

Text in handbook:

- *the second covers monetary value used to make payment transactions executed by means of any telecommunication, digital or IT device where the goods or services are delivered to and used through such a device but only where the operator of the device does not act only as an intermediary between the user and the supplier*

Text in regulations:

- (b) *monetary value that is used to make payment transactions executed by means of any telecommunication, digital or IT device, where the goods or services purchased are delivered to*

*and are to be used through a telecommunication, digital or IT device, provided that the telecommunication, digital or IT operator does not act only as an intermediary between the **payment service** user and the supplier of the goods and services.*

The significance of this is that it is essential to make clear that the payment transaction to pay for the goods purchased is made in the context of a payment service. As is clear from Schedule 1 of the Payment Services Regulations:

“The following activities do not constitute payment services....

(b) payment transactions between the payer and the payee through a commercial agent authorised to negotiate or conclude the sale or purchase of goods or services on behalf of the payer or the payee;

In other words, where there is no direct payment relationship between the customer (payer) and the merchant (payee), the telecommunications provider is, first, acting as more than a mere intermediary and, secondly, cannot be said to have accepted e-money as a means of payment. Such situations would thus be covered by the exclusions from the Electronic Money Directive.

This situation has not changed and is completely consistent with the original EU perimeter guidance, which pointed out that *“that [many] mobile operators themselves arrange for the payment of third party content providers, either as a result of a contractual relationship under which the mobile operator assumes the liabilities of its pre-paid customer or through a revenue sharing arrangement ”* and that these situations do not give rise to e-money.

Without this clarification (i.e. the reinsertion of ‘payment service’ into the Handbook), there is the risk of there being a mismatch between the types of payment transactions that are in scope under the e-money regulations and those that are in scope under the payment services regulations, as well there being a significantly adverse and disproportionate impact on the mobile industry in the UK without any concomitant benefit to customers.

Indeed the MBG does not believe it is helpful for Q18 to focus on ‘mobile network operators’. There are four national mobile network operators in the UK (i.e. businesses with 2G/3G licences and nationally deployed mobile infrastructure). The experience in the UK so far is that mobile operators wanting to provide an e-money service have partnered with a financial institution and kept the e-money aspect completely separate from the basic airtime product. As explained above, there has not been a payment service relationship between customer and merchant for value added services acquired using a prepaid airtime product. Moreover, even if they were, the vast majority of transactions for third party services are covered by other types of exclusion, where the mobile operator is adding value in some other way, as described in Section 15.3 of the Perimeter Guidance Manual –*“Adding value may take the form of adding intrinsic value to goods or services supplied by a third party, for instance by providing access (including an SMS centre), search or distribution facilities.”* Examples would include such services music tracks or games downloaded to the handset. If there were any services not excluded by the ‘value added’

element of the perimeter guidance, they would, in all likelihood, account for a very small proportion of total transactions.

The follow on from this, is that it would be very disproportionate to base all the safeguarding and other regulatory requirements on total outstanding balances.

To give some illustrative data, the average annual spend per customer on a 'pay as you go tariff' is in the region of £100 and there are over 40 million prepaid subscriptions – annual sales of £4billion. Outstanding balances are typically of the order of £5-£10. Transactions relating to value added services for the whole market (post-pay and pre-pay) are in the region of £500m. As discussed above, if there were to be any services not excluded by the 'value added' element of the perimeter guidance, it would be a very small proportion of the £500m. Say for, the sake of illustration, it were 2%, the full regulatory compliance requirements would be brought down on a £4bn business for the sake of £10m worth of transactions. With the difficulties of compliance, the MBG would expect operators to continue to keep e-money business and airtime business completely separate. Nevertheless, if the Government wants providers to take advantage of opportunities resulting from the revision of the Directive, then a more proportionate way of dealing with prepaid cards that are purchased primarily for one activity (such as travel or telephony) but used in a subsidiary way for third party services (the so-called hybrid model) will have to be found.

The MBG's preference is for Q18 to be deleted, as it is not particularly useful for the Handbook to be covering such a small number of companies, none of whom operate e-money products with their prepaid airtime cards. If Q18 is to be retained, it should have more general application to the ICT industry. Moreover, a more proportionate way of dealing with balances than treating them as *'electronic money when the mobile device is charged with credit rather than when the electronic money is first used'* needs to be found. Under Section 19 of the Payment Service regulations, this has been handled by treating the relevant funds as an amount *"as may be reasonably estimated, on the basis of historical data and to the satisfaction of the Authority, to be representative of the portion attributable to the execution of the payment transaction"*. This would have the more proportionate impact, in the event that any provider was operating a business model that fell within scope of e-money regulations.

