



**Mobile Broadband Group**  
PO Box 34586, London SE15 5YA

**Response of the Mobile Broadband Group to HM Treasury's consultation on the Payment Services Directive.**

**Introduction**

The Mobile Broadband Group ("MBG", whose members are O2, Orange, T-Mobile, Virgin Mobile, Vodafone and 3) welcomes the opportunity to respond to HM Treasury's consultation on the Payment Services Directive.

The MBG supports the European Commission's aim to lower barriers to entry into the payment market and promote competition within and the competitiveness of the European Union. We also support the Commission's desire to create certainty in relation to mobile services by making specific carve out provisions in the Directive and its stated intent (as expressed in recital 6) that the Directive should only apply to providers whose main activity is the provision of payment services to payment service users.

That said, despite the Commission's welcome intent, the proposed Directive still threatens to bring within the scope of financial regulation services provided by the mobile sector where there is no any evidence that financial regulation is necessary for the protection of customers either now or going forward. We do not expect that mobile payment services would particularly benefit from a single European payments area.

In the last few years, the mobile industry has been through a very similar debate in relation to the e-Money Directive, which caused a great deal of uncertainty and a severe chilling effect on the development of services for mobile customers. In the end the Commission acted pragmatically and took a very sensible approach to the regulation of pre-payment cards, taking the view that these cards are primarily issued for the purchase of telecommunications services and that their subsidiary use for the purchase of other third party goods presents no threat to consumers.

The arguments that held true in relation to e-money also hold true for the Payments Directive. In particular:

- The use of pre-payment cards and the mobile account (for contract pay monthly customers) is still pre-dominantly for the purchase of basic telecommunications services – voice telephony, texting, internet browsing. In the UK in 2006 mobile operators' gross call revenue was £13.1 billion<sup>1</sup>. The estimated spend on

---

<sup>1</sup> Ofcom: The Communications Market 2006

premium rate services (the predominate method for purchasing value added services over a mobile, such as voting, ring tones and video-clips) was about £1billion. This is not to suggest that the Directive will bring all these services into scope. It just serves to illustrate that the value-added content element is a limited proportion of total business. The 'off handset' purchase of physical goods is presently a small and embryonic proportion of the overall premium rate market. As such, these services are a very long way off from being candidates for mobile operators "core activity".

- The mobile account is not used for the simple transfer of cash value between third parties. It is always associated with the purchase of goods or services.
- The mobile operator acts as a facilitator in the payment mechanism in such a way that the customer and merchant do not have a direct debtor-creditor relationship.
- Moreover, this type of transaction is used exclusively for the convenience of mobile customers. Transactions are primarily within country and the MBG does not anticipate that the Directive will deliver significant benefits in terms of making it easier to make cross border payments.

For all these reasons, the MBG urges that common sense will prevail and that the purchase of value added services through a mobile in this way will stay outside the scope of the Directive (i.e. benefit from the negative scope in Article 3).

### **Consultation Questions**

Of the options presented by the Treasury, the MBG believes that the UK Government should pursue Option 3 – support the general thrust of the EC proposal but push for changes in some areas.

The MBG makes the following responses to the direct questions posed in the consultation document. Where a question has not been addressed, the MBG has no comment.

***• Do companies that would have to become licensed as 'Payment Institutions' believe the licensing regime is appropriate, and do they already have the relevant systems and controls in place to comply with it?***

We do not believe that payment for services using the mobile account, for all the reasons set out above, should require the acquisition of a Payment Institution licence.

However, notwithstanding that the Directive seeks to provide a light touch regime for micro payments (a general principle which we support), in the event that it would become necessary to acquire a Payment Institution licence, it would be a major project to put in place all the elements for compliance (including for micro payments). We discuss this further under our comments under the Regulatory Impact Assessment. Furthermore, it is not just the systems and controls required by the Directive that would need to be accommodated, the other key area are the systems and controls that would potentially be triggered under the Money Laundering regulations.

One final point on the appropriateness of the proposed licensing regime. The MBG does not believe that any requirement for payment institutions to meet both capital requirements and ring-fencing of funds would be proportionate. If any, only one protection measure should be in place, not both. Therefore we support the principle of choice – providing flexibility for licensed payment institutions to choose the most effective measure.

**• Do the information requirements in the Directive pose any particular problems to specific types of firm and if so, why?**

The MBG takes this question to refer to Title III of the Directive, which sets out the requirements to provide information to consumers, in order to ensure transparency.

If Title III were ever to apply in a mobile context, single payment transactions would be for one-off purchases. Framework contracts are most likely to be subscription type services. In either context, it would be impractical to comply with the Prior General Information requirement to send a ‘*user on paper or on another durable medium available and accessible*’ (Articles 25 and 30, respectively), unless it is clearly spelt out that information being made accessible on a web-site is a ‘durable medium’, as is the case in other contexts.

The vast majority of users mobile content/payment purchases are low value purchases and customers are not generally interested in the full set of conditions. In any event, this requirement would be too cumbersome to arrange easily on a mobile and not proportionate.

We would prefer these articles to be changed to ‘must make readily available to’ rather than ‘communicate to’.

This is much more consistent with the way that on-line payment services are presented now. It is by far the most practical approach for all concerned.

**• Do the rights and obligations under Title IV pose any particular problems for the smooth execution of payments or create any unintended consequences?**

Articles 52 (a) & (b) present some difficulties.

With respect to part (a), there may be occasions where the full cost of a service is not known in advance, at the time the authorisation is given, but only the rate at which a service will be charged. Take the example of a parking service, where a customer may not know in advance for how long he or she will be parking. Article 52(a) needs to be able to cope with this situation by inserting an extra bit of text: ‘the authorisation did not specify the exact amount of the payment or the unit charge for the goods or services being consumed.’

Part (b) should be deleted. If all other parts of the Directive have been fulfilled and the customer is fully aware of the cost or unit cost of what is being purchased, then this should be sufficient. There is also other legislation (e.g. Distance Selling and Unfair Contract terms) which covers this aspect of the trade between buyer and seller.

***• Do stakeholders believe the Directive maintains an appropriate balance between user protection and the proportionate regulation of providers?***

The MBG is concerned that the Commission's draft unnecessarily brings into scope some mobile payment services. We urge the treasury to press for changes to the negative scope in Article 3.

Where the conditions that prevailed in the e-money discussions (i.e. there is no direct transfer of value between third parties and the mobile operator is interposed between customer and vendor, so that no debtor/creditor relationship is established between them), then the negative scope should ensure that such systems do not require a payment institution licence.

In addition, when mobile operators sell their own goods and services (where a debtor/creditor relationship naturally exists between them and the customer), they should not need a payment licence.

In striking an appropriate balance the Directive should also ensure a proportionate regime for micro payments. We urge Treasury to support measures which remove excessive requirements for purchases of low value goods and services and promote cost effective and easy to use payment systems.

***• Do respondents agree with our partial assessment of the benefits of the Directive? Are there any other significant benefits that we need to consider? Also, why and to what extent do you think the Directive will achieve its aims of creating an EU internal market in payments and removing legal and technical barriers to SEPA?***

The MBG does not expect that customers using mobile payment systems will benefit significantly from the Single European Payment regime. Pretty much every customer contracts directly with a mobile operator in his or her country of residence. Where mobile operators have to source goods and services from outside the UK, this is done through normal commercial processes and then they can make them available to their customers in their domestic market. For example, it is not hard to sell a CD via a WAP site (mobile equivalent of a web site) from any country in the world (providing underlying commercial agreement is in place) and pay for it through one's mobile account.

***• Overall, do you agree with our partial assessment of the costs of the Directive? Are there any significant impacts that we need to consider, other than those that can be smoothed out through drafting changes? If so, are you able to quantify the impact?***

In section 4.17 the Treasury estimates that the cost of compliance would be £100,000 in the first year (£50k for licence application and £50,000 for ongoing compliance costs, including the employment of a compliance officer).

If a mobile operator had to obtain a licence to operate as a payment institution as result of this directive, the costs will be considerably higher than this. How much higher would depend on the scope and requirements of the final Directive and the UK's implementation thereof. For example, if there were any requirements to carry

out money laundering type identity checks on all customers using a service, this would have a very high cost impact. Roughly 65-70% of customers in the UK use pre-pay accounts. While mobile operators encourage customers to provide identity information, there is no absolute requirement to do so. It would be very expensive to require it and customers would not like it. It might have the socially undesirable impact of removing access to telephony from particular groups such as students, who don't always have the necessary ID.

Considerable costs would also be very likely to be incurred in making changes to IT systems. What sort of changes, again, would very much depend on the requirements of the licensing regime, in terms of information requirements, settlement periods, transmission of consent, what to do with disputed authorisations, etc. etc. With over 60 million mobile devices active in the UK, systems costs could run into millions of pounds across the industry.

Factors such as the scope of the final Directive and the extent to which it will apply to existing generic mobile services and systems or only to a limited number of services designed specifically for payment will also impact on the length of time that changes will take to make. It often takes more time to change existing processes and structures which were not designed to be considered as a licensable payment activity than to deliver new ones which were designed for payment from scratch. As with any large organisation with significant numbers of customers being served by existing systems, changes in systems, processes and IT infrastructure would take some time. The MBG would estimate a minimum of about 24/30 months from the time that the Directive is transposed into UK law and the detailed requirements for compliance are established. This period could be longer if the Directive has a fairly wide scope and intrusive impact.

**• Do you support the proposed negotiating approach set out in the Partial RIA? Why?**

We agree with the Government's proposed approach to support the general thrust of the Directive, while pressing for changes in certain areas.

While the MBG finds it difficult to identify any direct benefits that will fall to our customers using mobile payment systems, we recognise that this is an important single market initiative for mainstream payment systems. However, we remain concerned that the Directive could require mobile operators to incur significant compliance costs, where none are now required or necessary for the protection of customers. Not only would this introduce unnecessary regulation, it would, we believe, be counter productive to the Directive's competitive intent. We urge the Government and Commission to follow the logic and good sense that was achieved during the discussions on hybrid systems and e-money.

Mobile payment systems that do not allow for the direct transfer of value and/or are not used in the context of a debtor/creditor relationship between customer and vendor should be included in the negative scope and not required to obtain a payment institution licence.

**• If you support the proposed approach, which changes do you think would be appropriate and what would be the costs and benefits of these changes?**

Article 3 (j) must be quite clear about what is out of scope of the directive. This is important to protect mobile operators not simply against paragraph 8 of the Annex

but also the other “in scope definitions” set out at paragraphs 1 – 7 of the Annex. For example, it is necessary to guard against any arguments that paragraph 3’s reference to “payment card or similar device” covers prepay phone cards or similar. *“Execution of payment transactions, including transfer of funds, on a payment account with the user’s payment service provider or with another payment service provider:*

– .....  
– *execution of payment transactions through a payment card or a similar device;”*  
There must be no possibility that the text will mean the use of prepay cards to buy basic telecoms services is an activity that requires the operator to acquire a payments licence.

It is essential that article 3j (negative scope) and paragraph 8 (positive scope) fit together properly. There should be no services or cases that fall between the two scopes. Our experience with the E-money Directive suggests that there is merit in having such a detailed provision about the scope of the Directive.

We do see some difficulties with the draft Directive text of paragraph (8) of the Annex. It is not clear what the distinction is between ‘facilitating the payment of’ and ‘simply arranging the transfer of funds to a third party...’. This section would be much clearer if the ‘either facilitating..’ section was deleted and the ‘or’ section was changed to simply arranging the transfer of funds to *between third parties* for the payment of goods or services where the third parties are in a direct debtor–creditor relationship. We understand this has been recognised by the European Commission and that any change to the article 3(j) will trigger some corresponding adjustments to paragraph (8) of the Annex.

Paragraph (8) of the Annex should be consistent with the e-money guidance and also make the scope and negative scope dovetail neatly.

The benefit of this whole approach (i.e. keeping the use of the mobile account to pay for goods and services out of scope) would be that customers that use their mobile account to buy value added services would be able to do so with convenience and simplicity. It would also avoid the necessity for mobile operators to incur significant compliance costs, which add inefficiency to the system and which, partially at least, are ultimately borne by customers.

**• Have you identified any drafting changes that need to be made? (Please provide clear justification for any proposed changes.)**

Yes. These have been supplied to HM Treasury separately.

**• Are you able to provide information on costs and benefits in the areas where we have requested it?**

See answers above.