

Statement to Consultation Paper of DG Internal Market

“Application of the E-money Directive to mobile operators”

by

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1. Preliminary Remarks

This paper contains no confidential information. The focus of this statement is the overall regulatory impact of the proposed new and wider e-money definition. Specific questions of the Consultation Paper are not considered.

2. Comments on the understanding of the Consultation Paper of payment instruments of mobile operators

The Consultation Paper considers a payment system of mobile operators based on prepaid cards ("scratch cards") as "value stored on prepaid cards" (p. 6) or as e-value stored in a computer-memory of the mobile operator not in the hands of the bearer (p. 7). If indeed such systems existed, they would have to be considered as e-money.

But the crucial question is, is there any **stored value** or are we just talking about accounts?

The specific number on the scratch card (or in more advanced card-less systems also on a paper slip of a POS-terminal) allows the user to a one-time loading of its payment account at the mobile operator. After this unique transaction the number is worthless. The card plays no role as access instrument¹. The GSM is the access instrument to the credit balances of the GSM-specific account for buying airtime or other purchases. There is no e-value

stored on a card or on a computer memory either. The payment system is **account-based** like a traditional bank account. The payment functionality of this account is certainly limited, but there is no systemic difference compared to a bank account.

Whether or not prepaid balances of mobile operators or e-money is a question of definition. Condition 2 of the E-money Directive defines e-money as "stored on an electronic device". But if a credit balance of an account at a mobile operator fulfills this e-money-condition, the deposits of a traditional bank account are e-money too!

One can say that at the time before the account was filled-up by the prepaid amount, the value was stored on the card or on the paper slip. But at this stage this card or piece of paper can hardly be used for immediate payments. It is only a medium to increase the credit balances of the account. Therefore there is a basic difference to the traditional e-money based on cards (electronic purses like GeldKarte in Germany or ChipKnip in the Netherlands) or former pilots of network-based e-money (like DigiCash) where e-value is stored on a chipcard or hard disk of a PC.

Conclusion: In the EU-market there are no prepaid payment systems of mobile operators where the e-value in form of a specific and unique string of bits (like the former DigiCash e-money) is stored on cards or in a (remote) memory of the operator.

¹ In contradiction to the Consultation Paper the card serves **not** as a remote access instrument to the stored e-value (p. 7 of the Consultation Paper).

3. Dilemma of regulators

Traditional **card-based** e-money (in the sense of a bearer instrument like coins or bank notes) is negligible within the EU and predominantly issued by traditional banks. Traditional **network-based** e-money has failed (until now). So, we have a sound regulatory framework based on the E-Money Directive but non-banks obviously do not want to climb on the bandwagon. But there are non-banks with successful **account-based** payment systems like the so-called prepaid cards of mobile operators, PayPal and prepaid gift cards.

The evolution of money and payments obviously takes a different path than expected a few years ago. It was a long and difficult way to create and implement the E-Money Directive. So, the easiest way for some regulators in the EU (like UK and the Netherlands) was to use the existing (but not longer market-relevant) "regulation light" for traditional e-money and to apply this regulation to the new emerging payment schemes. These regulators with a pragmatic approach maintained a very permissive interpretation of the e-money condition "stored on an electronic device" by looking at account-based systems (see above). This "**pragmatic**" **approach** of some national regulators is the reason for this Consultation Paper.

The other way - at first sight probably the more burdensome way - would be a new EU-wide regulatory framework for account-based systems or a harmonisation of the already existing national waiver practise and "regulation light" of deposit-taking business for non-banks. In this "**fundamentalistic**" **approach** the E-Money Directive would only apply to the traditional e-money. This approach would also reduce the regulatory gap between the EU and the

US, where these account-based products (like the very popular prepaid gift cards) probably would be subject to a (special) regulation as deposits.²

	PRO	CON
Pragmatic Approach	<p>no change of laws required</p> <p>just a re-inter-pretation or amendment of the definition of e-money</p>	<p>blurred border-line between e-money and deposits</p>
Fundamentalistic Approach	<p>“clean”, clear and adequate e-money definition</p> <p>in line with prospected US-regulation of limited account-based systems</p>	<p>change of <i>de facto</i> e-money regulation necessary in some EU-countries</p> <p>new laws or harmonisation of existing regulation for limited account-based systems required</p>

² See Charles Davis, Gift cards to be treated as deposits?, in: Card International, Issue 821 of June 29th 2004, p. 5.

4. Consequences of the pragmatic approach

By following the pragmatic approach – as suggested in this Consultation Paper – we need either a common agreement that these account-based payment systems are e-money or an amendment of the E-Money Directive by adding new criteria of e-money complementing the existing definition of e-money. An amendment of the Directive is the more decent way without violation of the e-money criteria. But the consequence of this approach would be the regulatory confusion on the question what the criteria for deposits are. It would be necessary to distinguish between traditional bank deposits and “new” deposits. What is the difference between a bank account of a remote internet bank with only payment services and a PayPal-account? No one would say that its balance of the PayPal-account is “e-value stored in the computer memory of PayPal”. But at the same time PayPal is issuing e-money in accordance with the UK law!

It would be difficult to find a clear and unambiguous line of demarcation. This line of demarcation has to be common sense within the EU otherwise we will have the same regulatory confusion with deposits in the future as we have now with e-money. So at the end of the day, the pragmatic approach could be the more problematic way to reach regulatory harmonisation within the EU.