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Director-General

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**Subject:** **Call for Advice (No. 2) to CEBS on the review of Article 8 of Directive 2000/46**

I am very pleased to send to you the Commission's second official call for technical advice from the Committee of European Banking Supervisors.

Following our consultation process on the Directive and its applicability to mobile phone operators, you will be aware that the Commission services have come to the view that e-money may be issued by mobile phone operators under certain circumstances. The guidance that we have issued constitutes a sensible compromise between those who believe that mobile payments should not be categorised as e-money under any circumstances and those who believe that mobile phone operators should be subject to the same capital requirements as are required for E-Money Institutions under the Directive. In line with our discussions at the BAC on 23 November 2004, I would be grateful if CEBS could review the current implementation of Article 8 of the Directive in order to see how it could be applied more consistently across Member States, and if so, what information exchange arrangements may be necessary between supervisory authorities.

The Commission itself will now proceed with a comprehensive review of the E-Money Directive in order to establish what amendments may be necessary to the text. The advice of CEBS on the practical implementation of Article 8 will form an important input into that review.

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Given the timetable for the review, I would be most grateful if CEBS could provide its advice to the Commission by the end of July 2005.

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EUROPEAN COMMISSION
Internal Market and Services DG

FINANCIAL INSTITUTIONS
**Banking and financial conglomerates**

Brussels, 21 February 2005

# CALL FOR TECHNICAL ADVICE (N0. 2) FROM THE COMMITTEE OF EUROPEAN BANKING SUPERVISORS (CEBS)

***Subject:*** ***Review of Article 8 of Directive 2000/46/EC***

## 1. Background

The Commission launched a consultation process in May 2004 on the question of the application of the E-Money Directive (Directive 2000/46) to mobile telephone operators. The responses to the consultation process did not give rise to any consensus view on the part of mobile operators, third-party content providers, existing e-money institutions or other interested parties as to how to determine precisely where e-money may be created by mobile phone operators whose customers use pre-paid cards to purchase third-party content. A broader review of the E-Money Directive will be carried out in 2005. This review will look at additional aspects of the Directive and will form the basis for wider discussions on the future scope and content of the Directive.

Although the consultation that took place was narrow in its scope and focus, looking solely at the mobile phone sector, it is clear that the issues raised in that process are broader in scope. Indeed, there are potentially a large number of suppliers or service providers who could choose to issue e-money. If so, the regulations that would apply ought to be not only proportionate to the risks involved, but also consistent between sectors in order to avoid any distortion of competition. In addition, any regulatory treatment of 'hybrid' e-money issuers, or other innovative issuers, will need to be consistent with any approach that may be taken under possible future legislation in the area of payments.

In framing its views, the Commission services had no wish to impose unwarranted constraints on mobile operators. On the other hand, it is important that a level playing field exists between e-money issuers already regulated under the E-Money Directive and other service providers who may be issuing e-money as a non-core part of their business. In line with publicly stated commitments, the Commission has published a 'feedback document' on the consultation and a guidance note. The guidance note summarises the Commission services' views on the issue of the applicability of the E-Money Directive to mobile phone operators and other potential 'hybrid' issuers of e-money. The guidance note is available on http://europa.eu.int/comm/internal_market/bank/e-money/index_en.htm.

## 2. Commission views

As technology improves and public confidence in the use of electronic purses grows, it is likely that new avenues for the issuance of e-money will emerge. The Commission services therefore believe it is imperative that any action taken by regulators at this early stage in the development of e-money does not constrain or inhibit the market potential of e-money. At the same time, however, banking supervisors and other relevant regulators need to ensure that the risks run by e-money issuers are adequately catered for and that consumers are protected within reasonable limits.

At present, however, the universe of e-money potentially issued by mobile operators is small. But it may grow with the gradual introduction of 3-G services and the more extended offer of payment facilities for non-digital services. In addition, there are a number of other potential issuers of e-money in the EU whose principal activity is not the provision of banking or payment services. These include transport operators and retail outlets.

The Commission services believe that a flexible approach needs to be adopted with regard to the issuance of e-money by mobile phone operators. Information received as a result of the recent consultation shows that market practice may change over time and the regulatory environment needs to take due account of this. In addition, while the current level of expenditure by pre-paid customers on third party services is small in both relative and absolute terms, it is possible that the current level and number of 'micro' payments may rapidly change as new services are made available to the public (e.g. payment for car parking, cinema tickets or vending machines using a mobile handset).

It should first be noted that there has so far been no evidence presented of harm done to consumers or to the stability and good functioning of payment systems as a result of the issuance of e-money by mobile operators. Rather, the debate has centred on the obligations of mobile operators as issuers of e-money and the need to create a level playing field with existing e-money institutions. It would appear difficult to justify the imposition of all elements of the Directive (including the redeemability requirement and a limitation on investments) from a 'proportionality' point of view. However, a consumer protection or financial stability rationale for imposing the requirements of the Directive may become more apparent in future. Banking supervisors and other regulatory authorities therefore need to remain watchful in order to respond to any change in the profile of risks presented by mobile operators' provision of third-party services.

Although there is a school of thought that suggests that no e-money is created when pre-paid customers use their store of value with mobile operators to purchase third party services, other commentators agree that e-money is created when the monetary value stored on a pre-paid card is accepted as payment by a third party merchant in line with Article 1.3(b)(iii) of the Directive. The Commission services support this view, with some caveats.

First, given the fact that in many cases (though not all), it appears that 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 customers towards a merchant or through a revenue-sharing arrangement with a merchant, it is arguable that many purchases of third-party content do not give rise to e-money.

The Commission services believe that the conditions stipulated in Article 1 of the Directive have to be read in the light of the notion of e-money as an "electronic surrogate" for notes and coins (Recital 3). Although it is clear that e-money may not have all the functionality of notes and coins, it's primary purpose is still to be used as legal tender in a payment transaction with a third party. The Commission services therefore suggest that when Member State authorities conduct an analysis of whether a mobile operator or other 'hybrid' institution is engaged in the issuance of e-money, they consider the form of direct payment relationship between a mobile customer and a third party vendor. This payment relationship may be established when either:

- there is a direct transfer of e-value (as far as the Commission services understand, this may be technically feasible for mobile handsets); or

- the mobile operator acts as a facilitator (or intermediary) in the payment mechanism in such a way that customer and merchant would also have a direct debtor-creditor relationship.

Judging from the responses to the Commission's consultation, it seems that there are at present few instances where mobile operators act simply as payment agents for customers vis-à-vis third party merchants. The Directive would therefore only apply in a correspondingly limited number of cases.

A limit on the definition (or "perimeter") of e-money does not of itself, however, reduce the burden of requirements incumbent upon mobile telephone operators under the Directive. On the contrary, the more limited the definition of e-money under the Directive, the more costly the redeemability clause under Article 3 of the Directive and the prudential rules on the investment of assets under Article 5 become on a per transaction basis. Indeed, without a detailed risk analysis, it is difficult to see that the requirements imposed by the Directive are proportionate to the risks undertaken by either the operators themselves, or pre-paid consumers of third-party services.

Article 8 of the Directive, however, provides the possibility for "competent authorities" to waive the application of the Directive under certain circumstances. The waiver article is drafted in a restrictive manner. However, the Commission services believe there may be merit in applying the waiver provision in a more consistent manner across Member States. In order for mobile operators – or indeed other "hybrid" issuers of electronic money – to continue to conduct their business under conditions of fair competition with like service providers, it would be important that competent authorities take steps to ensure that waivers are applied with a similar scope.

Equally important will be an ongoing flow of information from mobile operators and other "hybrid" e-money issuers to banking supervisors in order for supervisors to be kept abreast of market developments and able to take early action if they consider that the risks to consumers or the payments system increase over time.

### 3. Specific call for technical advice

The Commission services therefore wish to seek the technical advice of CEBS on the following points:

1. Whether and how the optional waiver article been implemented in national law. If the waiver has been implemented, what has experience been? For those Member States who have not yet implemented the waiver article, what is the scope for implementing a waiver in national law?

2. How similar are the ways in which the waivers have been implemented in practice? What are the opportunities for aligning the scope and coverage of the waivers between Member States?

3. What information exchange arrangements between supervisory authorities might be necessary in order to ensure that the waivers were applied consistently?

4. Are the thresholds in Article 8 set at an appropriate level for "hybrid" issuers of e-money, or should they be reviewed?

CEBS may also wish to put forward additional issues for consideration on its own initiative.

## 4. Timetable

CEBS is invited to provide advice on the above issues by **30 June 2005** in order to feed into the Commission's broader review of the E-Money Directive scheduled for this year.

*Annex 1*

***Article 8, Directive 2000/46/EC***

***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*

*(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.*