

The E-Money Directive and MNOs: Why it All Went Wrong

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M-commerce, as part of the electronic commerce environment, with its recent growth plays a major role in e-commerce. It has been stated that the mobile communication sector has grown at a faster rate than the internet and that despite the burst of the 'dot com' bubble, mobile communications are still growing rapidly.¹ The number of mobile owners is greater than the number of people who own a computer, and even greater than those who have a fixed telephone line.² It is estimated that the global income from mobile entertainment alone will rise from 15.8 billion US\$ to 40 billion US\$ between 2005 and 2010. It has been stated that this growth has led to growth in the economy and stimulated employment.³

Having a suitable method of payment assists in the development of a commercial activity,⁴ as the development in a commercial activity will lead to economic growth, employment opportunities and further innovations in the relevant sector.⁵ One of the methods of payment employed in m-commerce is the use of prepaid credit to pay for third party goods or services,⁶ the prepaid method is when the price of the item purchased is deducted from the prepaid credit of the purchaser.

This method of payment has caused considerable uncertainty in regards to the applicability of the E-Money Directive⁷ ('the Directive') to mobile network operators ('MNOs') and is considered to be the most controversial issue in this regard. The Commission states that "*there was considerable uncertainty about how the Directive should be applied to mobile network operators (MNOs)*"⁸ and

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¹ Srivastava, L. & Kirwan, R. "Key Issues in the Evolution to Always-On Mobile Multimedia Environments: Part 1" [2006] 12(7) Computer and Telecommunications Law Review 243. 247

² It is stated that by the end of 2005 a third of the world's population had a mobile phone, a total number reaching 2.14 billion people. See Lehner, F. & Watson R. "From E-Commerce to M-Commerce: Research Directions", in the E-Business Forum. Url: <http://www.ebusinessforum.gr/content/downloads/ResearchDirections.pdf> accessed on Sept. 11th, 2006.

³ Srivastava, *op cit*

⁴ Recital (5) of the Directive 2000/46/EC 'Electronic Money Directive'.

⁵ See Recital (2) of the Directive 2000/31/EC of the European Parliament and Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Electronic Commerce Directive). Although, this is in regards to electronic commerce however it can be considered to be applicable to m-commerce, as m-commerce is a part of e-commerce.

⁶ The two main methods are postpaid and prepaid. The postpaid method of payment is when the consumer pays the price of the goods or services he has purchased alongside with the price of the mobile telephony services, such as regular voice calls and text messages, used in the monthly bill. In both methods of payment the goods or service can be provided through the MNO itself or through a content provider.

⁷ Directive 2000/46/EC on the taking up, pursuit of and prudential supervision of the business of electronic money institutions often referred to as the 'Electronic Money Directive'

⁸ Commission Staff Working Document on the Review of the E-Money Directive (2000/46/EC), Brussels 19th Sep. 2006. SEC (2006) 1049 (Commission Staff Working Document), 1

that “the most controversial issue in this context [applicability] is the question of the [Directives] applicability to MNOs.”⁹

This paper looks into the potential problems caused by applying the Directive to MNOs and why these problems occur. However, it first discusses why the prepaid method of payment plays an important role in m-commerce.

The role of the prepaid method of payment in m-commerce:

It was mentioned above that having a suitable method of payment is important for the development of a commercial activity. The development of commercial activity should lead to economic growth, employment opportunities and further innovations in the relevant sector. The Commission stated that the development of e-money is crucial for the development of electronic commerce.¹⁰ Hence, having a suitable method of payment for m-commerce is important to facilitate the transactions and to develop the industry.

The importance of the prepaid method of payment to m-commerce can be attributed to a number of points. Firstly, most goods or services purchased through a mobile phone, such as ring tones, pictures and logos, are of low cost or micropayments.¹¹ The process of collecting payment and processing the transaction make the use of credit or debit cards unviable in regards to micropayments. However, the prepaid method of payment does not require these costs to occur, thus, maintaining the low cost of services and goods which can be purchased. Secondly, these transactions are ‘distance selling’ transactions, and by the use of this method of payment, persons who are unable to obtain credit or debit cards can purchase the required goods or services.¹² This point can be essential when recognising that a large portion of m-commerce users are people under the age of 18 who are not able to obtain certain bank cards. Thirdly, the prepaid method is an easy and simple method of payment which does not require entering pin numbers or security codes.¹³ GSM Europe comments that the progress of services in regards to m-commerce “clearly depend on the availability to customers of simple payment mechanisms”.¹⁴ It can be seen from the above that the prepaid method of payment does fulfil this condition. Fourthly, the use of this mechanism can facilitate several other services which are currently not fully introduced in Europe, such as transferring prepaid credit from one phone account to the other which is sometimes used as an alternative to paying with cash.¹⁵ It has been suggested that reason for not introducing such kinds of services in Europe is due to the current European regulations, especially the E-money Directive, which hinders the application of these services in

⁹ Commission Staff Working Document, *op cit*, 1

¹⁰ Directive 2000/46/EC on the taking up, pursuit of and prudential supervision of the business of electronic money institutions often referred to as the ‘Electronic Money Directive’. See also, Durie, R. “Challenges Faced in Providing Mobile Broadband Services”. [2005] 11(3) Computer and Telecommunications Law Review 66. 66

¹¹ ‘Micropayments’ “are payments ranging from a fraction of a pence up to a few pounds”. See Miller, S. “Payment in an On-Line World.” In Edwards, L & Waelde, C. (Editors) “Law & the Internet: a Framework for Electronic Commerce”. 2nd Ed. Hart Publishing. 2000

¹² Scroggs, C. & Nugent, R “M-Commerce: Payments and Security”. [2003] 13(6) Society of Computers and Law

¹³ Although this does raise some questions regarding the security, however, the main objective of this paper does not lay here. For a reference on the security of this method of payment see The Mobile Data Association (MDA) & The Mobile Entertainment Forum (MEF) responses to the “A consultation paper on the treatment of mobile operators under the E-money Directive” (the ‘Consultation’) Issued by the European Commission in April 2004.. See http://ec.europa.eu/internal_market/bank/e-money/index_en.htm accessed on Nov. 19th, 2006.

¹⁴ GSM Europe response to the Commission regarding “a consultation paper on the treatment of mobile operators under the E-money Directive” (‘the Consultation’) in April 2004 http://europa.eu.int/comm/internal_market/bank/e-money/index_en.htm , accessed on Sept. 15th , 2006.

¹⁵ These services are used in several countries in Asia, Jordan, Saudi Arabia and UAE, and Africa, such as Kenya.

Europe.¹⁶ However, the necessity of such services is a question which still needs to be answered, especially with the availability of other services in Europe which can perform the same act.

The connection between the prepaid credit method of payment and the E-money Directive is established due to the fact that this method of payment, when used to purchase third party goods or services, was considered by Member States experts and the Commission services to be a form of electronic money.¹⁷ This matter led the European Commission to issue a consultation in 2004 regarding the treatment of MNOs under the Directive.¹⁸ As mentioned above, applying the Directive to MNOs has caused uncertainty in the sector and has raised several issues in this regard.

Potential Problems:

In the previous section, the importance of having a suitable method of payment for the development of m-commerce was highlighted. However, it is also equally important to have suitable regulations that recognize the special characteristics of m-commerce and the methods of payment used. The applying of inadequate regulations could lead to undesired results; Merry states, *“Mobile transactions are a unique proposition and by relying upon broad legislative approaches, law makers risk destroying the burgeoning mobile payments industry and innovative payment model development.”*¹⁹

The first of the problems that are caused by applying the Directive to MNOs is in regards to Article 3 of the Directive, which provides that e-money should be redeemable. It is a well known fact that prepaid phone credit is not redeemable as the value of unused credit will not be returned to the costumer. MNOs argue that if unused credit should become redeemable they would have to implement a two way payment mechanism, a matter which would lead to a resultant call on their liquidity reserves, which may become onerous.²⁰ Furthermore, the cost of implementing the two way payment mechanism could lead to the increase of prices which would affect the consumer and in return affect the industry.²¹ Moreover, this call on their liquidity reserves may lead to a decrease in MNOs investments in future developments in the sector.²² However, the commission observes in this regard that *“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.”*²³ Nevertheless, this problem has been acknowledged by the Commission as it states, *“The issue of redeemability at par value... would appear to pose problems for MNOs... if they fall within the scope of the Directive.”*²⁴ If the Directive should be changed or amended *“suitable accommodation will therefore be necessary.”*²⁵

Another set of problems are related to Articles 4 & 5 of the Directive, which set the amount of liquidity reserves and investments. The purpose of these restrictions was to ensure that electronic money issuers (ELMIs) had sufficient backup liquidity in case of bankruptcy and also to limit the

¹⁶ GSM Response, *op cit*; MDA Response, *Op cit*. Also see, Merry, P. *“E-Money Directive and Mobile Commerce”*. [2004] November 12 IT Law Today 10

¹⁷ See http://ec.europa.eu/internal_market/bank/e-money/index_en.htm accessed on Nov. 19th, 2006.

¹⁸ “A consultation paper on the treatment of mobile operators under the E-money Directive” (the ‘Consultation’) Issued by the European Commission in April 2004.. See http://ec.europa.eu/internal_market/bank/e-money/index_en.htm accessed on Nov. 19th, 2006.

¹⁹ Merry, P. *“E-Money Directive and Mobile Commerce”*. [2004] November 12 IT Law Today 10. 10

²⁰ MDA response, *op cit*

²¹ *Ibid*

²² MD response, *op cit*. MEF response, *op cit*

²³ DG Internal Market E-money and mobile operators -Commission Guidance note (Guidance Note) (18 Jan 2005, *Para 16*

²⁴ Commission Staff Working Document, *op cit*, P 12

²⁵ *Ibid*

possibility of money laundering.²⁶ It has been argued that the application of these articles to MNOs would cause unnecessary burdens and would have similar affects on consumers and the industry as the redeemability requirement.²⁷ The Commission is aware that these limitations if applied on MNOs, would cause inconveniences to them. However, so far there is 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 MNOs.²⁸ It further states that *"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."*²⁹

A further problem is in regards to Article 1 (4)(5) of the Directive prohibiting anyone but ELMIs from issuing e-money. It also restricts the ELMI from undertaking other business activities only to the provision of closely related financial and non-financial services and the storing of data on behalf of other undertakings or public institutions.³⁰ These restrictions, if imposed on MNOs, would either mean that the MNOs withdraw from the market, which could have severe affects as mentioned above, or to take on the solution provided by the Committee of European Banking Supervisors (CEBS). This solution requires MNOs to set up subsidiaries whose sole activity would be to manage e-money issuance and related matters.³¹ This solution does, however cause restraints on the liquidity of the MNO and would have the same affects as the problems above. However, this solution was only provided as a short term solution which would leave the future of the market under further uncertainty. Moreover, regarding the problem of limiting the activities of ELMI, the Commission does not only recognise this to be a problem regarding all ELMIs but a more specific problem to the hybrid issuer.³² The Commission provides that *"the Commission services are of the view that the restriction of activities represents a significant constraint for E-Money institutions and is problematic in the case of businesses which issue E-Money as a "non-core" part of their business."*³³

Further problems which may be caused by applying the Directive to MNOs would also extend to the consumer and the merchant. If the Directive is applied, there will be a difference in the rules applied to the consumers. One set of rules will apply to postpaid subscribers and another to prepaid subscribers. The provisions of the contract with the MNO and telecommunication laws will govern the transaction performed by postpaid subscribers purchasing third party goods or services. However, e-money regulations will govern the transaction performed by prepaid subscribers who perform the same transaction with the same medium (mobile phone). This problem could lead service providers to hesitate when providing the goods or services, as it will be unclear for them which set of rules apply.³⁴

The uncertainty and controversy over applying the Directive to MNOs has led to different views regarding this matter within Member States. When looking at the Evaluation of the E-Money

²⁶ Working Staff Document, *op cit*

²⁷ McCartney, M. "E-Money – Mobile Operators Beware?" [2004] 6(7) Electronic Business Law 8. Also, Walker, C. "E-Money Three Years On: EU Commission Urges Light Touch." [2005] 7(2) E-Commerce Law and Policy 4. 5

²⁸ DG Internal Market E-money and mobile operators -Commission Guidance note (Guidance Note) (18 Jan 2005), See http://europa.eu.int/comm/internal_market/bank/docs/e-money/guidance_en.pdf accessed on Sep. 12th 2006

²⁹ Guidance Notes, *op cit*

³⁰ For an overlook into these restrictions and their implications on ELMIs see. Kohlbach, M. 'Making Sense of Electronic Money', 2004 (1) The Journal of Information, Law and Technology (JILT). <http://elj.warwick.ac.uk/jilt/04-1/kohlbach.html>.

³¹ Technical advice from CEBS to the Commission Working Staff, seen in the Working Staff Document, *op cit*

³² "Hybrid" is a term used to describe a service provider whose core activity is not the issuing of e-money, but it is an accessory activity

³³ Working Staff Document, *op cit*

³⁴ Walker, *op cit*

Directive³⁵ it has been reported that Several Member States (Czech Republic, Denmark, Estonia, Finland and UK) have followed the EC Guidance Notes, whereby schemes where there is no direct debtor-creditor relationship between the third party merchant and the customer are not e-money. This means that MNOs are exempt from the Directive as long as this condition is met.³⁶ In the UK the main points of the Guidance Notes were incorporated into the FSA rulebook.³⁷ Several other Member States (France, Germany, the Netherlands, Poland, Portugal) report that they have decided not to apply the Directive to MNOs for the time being, but are awaiting further guidance and clarification at the EU level as the situation is currently unclear from a legal point of view.³⁸ As for Belgium, all prepaid schemes are classified as e-money.³⁹ This difference in views in itself contradicts with one of objectives of the Directive, which is to harmonise Member State laws, regulations and administrative provisions relating to e-money.⁴⁰ Achieving the objective of 'free movement' could also be under question due to differences on application of the e-money Directive to MNOs. An MNO could operate in one member states without an electronic money issuer license; however, it would need such a license in another state to perform the same operation.

Why the Problems Occurred:

The reason given by the Commission on why applying the Directive to MNOs caused such controversy and uncertainty is that "*The E-Money market has ... evolved in ways which were not foreseen at the time of the Directive's adoption*".⁴¹ The Commission further states in the Guidance Notes that the Directive "*although a recent piece of legislative work, was arguably conceived at a time when it was difficult to foresee the potential for widespread and innovative uses of electronic purses*".⁴² However, there is no justification provided on why this evolution in the market was not foreseen or why it was difficult to foresee especially considering that, at the time of the Directive's adoption Premium Rate Services (PRS) were existent and purchased through mobiles using prepaid credit. Nevertheless, other arguments will be put down which could aid in finding the reasons why applying the Directive to MNOs has caused such controversy. The first is that prepaid method of payment is not a form of e-money; therefore the Directive should not be applied to MNOs.⁴³ The second is that, even if accepting that this method of payment is a form of e-money, MNOs are not ELMIs in the sense provided for in the Directive and thus the Directive was not intended to be applied to them.⁴⁴

Regarding the first issue, whether the prepaid method is a form of e-money or not, it is suitable to look at the definition provided for in the Directive and analyze the method of payment to see if it is a form of e-money.

The Directive defines e-money in Article 1, Paragraph 3(b):

"... a monetary value represented by a claim on the issuer, which is:
(1) stored on an electronic device

³⁵ "EVALUATION OF THE E-MONEY DIRECTIVE (2000/46/EC) Final Report", for the DG Internal Market the European Commission. Submitted on the Feb. 17th, 2006

³⁶ *Ibid*, p 65

³⁷ The Financial Services Authority's Handbook of Rules and Guidance (ELM 4.4.1R).

³⁸ *Ibid*

³⁹ The Belgian authorities take what they consider a teleological approach to the issue of the E-money Directive applicability to MNOs, and have interpreted that even in prepaid schemes where there is allegedly no direct relationship between customer and a third party merchant, such products would have to be classified as e-money. See the Evaluation of the E-money Directive, *op cit*, 67

⁴⁰ Recital 4 of the E-Money Directive 2000/46/EC

⁴¹ Working Staff Document, *op cit*, p3

⁴² Guidance Notes, *op cit*, Para 6

⁴³ The Mobile Broadband Group response to the Consultation (MBG response), http://europa.eu.int/comm/internal_market/bank/e-money/index_en.htm, accessed on Sept. 15th, 2006.

⁴⁴ Merry, P "E-Money Directive and Mobile Commerce". [2004] November 12 IT Law Today 10

- (2) *issued on the receipt of funds of an amount not less than the monetary value issued, and*
 (3) *accepted as a means of payment by undertakings other than the issuer.”*

The first criterion in the definition provides that the monetary value must be stored on an electronic device. There is no definition provided for the term ‘electronic device’ which could include a wide range of devices; the most common of these are computers and chip cards.⁴⁵ Prepaid credit is stored either on the MNOs’ network or on the Subscriber Identity Module (SIM) card⁴⁶. Depending on the method used by the MNO both of them would qualify to be an ‘electronic device’. However, it has been argued that this type of storage is not what is intended by the term ‘electronic device’.⁴⁷ This type of storage is more similar to bank account details stored on the bank’s computer network, as this storage will only show how much credit has been spent or how much credit is remaining.

The second criterion, “*issued on the receipt of funds of an amount not less than the monetary value issued*”, is fulfilled when the subscriber buys credit⁴⁸ and the MNO increases the amount of the subscriber’s existing credit. It should be mentioned that it was feared that if an ELMI would issue funds more than it received, the Directive would not be applicable. However, to avoid such a loophole, a number of EU Member States in implementing the Directive resolved this issue in their relevant national legislations.⁴⁹

Purchasing third party goods or services by using prepaid mobile phone credit is said to fulfil the third criterion of the definition, as it is accepted by a person other than the issuer.⁵⁰ However, it has been argued that when analyzing the transaction, it is clear that the service provider does not accept the stored credit as a form of payment.⁵¹ This is due to the fact that there is no actual transfer of credits between the buyer and seller. Penn argues that the ‘transfer’ of e-money is also fulfilled for the purposes of the Directive if the transfer is done indirectly (through the MNO) and also if the issuer simultaneously debits the purchaser’s storage credit or account and credits the storage credit or account of the seller.⁵² The transaction performed when purchasing third party goods or services by using the prepaid credit method does not involve the transfer of units between buyer and seller. It also does not involve a mechanism where the accounts of the parties of the transaction is credited and debited simultaneously. The mechanism used when using the prepaid method is that when a customer buys a third party good, its value is erased from the buyer’s credit and the seller is paid on a later date when he presents his invoice to the MNO.⁵³ The goods or services are supplied on a risk basis to the customer by the third party prior to being paid.⁵⁴ In other words, the seller does not accept the monetary value issued but accepts a notification by the issuer (the MNO) that a transaction has occurred and a ‘promise’ that the

⁴⁵ Schuderlaro, I. “*To Be or Not to Be Electronic Money, That’s the Question*” [2003] 12 Information & Communication Technology Law 49, 49

⁴⁶ OFCOM defines a SIM card as “*small smart card type device that has details of the mobile subscriber including public telephone number and the numbers required by the network to recognise and authenticate the subscriber*”. See, www.ofcom.org.uk/consult/condocs/mobile_call_termination/wmvct/annexf/

⁴⁷ Schuderlaro, *op cit*, 50-55

⁴⁸ There are different ways by which a customer can purchase pre-paid phone credit, these forms may have different names depending on the MNO however, they are the same. These types of purchase methods can be found in every MNO website (e.g. <http://www.o2.co.uk/mobilestariffs/tariffs/topup/mobiletopup> accessed on Sept.15th 2006).

⁴⁹ For a detailed discussion on this matter see: Kohlbach, M. ‘*Making Sense of Electronic Money*’, 2004 (1) The Journal of Information, Law and Technology (JILT). <http://elj.warwick.ac.uk/jilt/04-1/kohlbach.html>.

⁵⁰ See http://ec.europa.eu/internal_market/bank/e-money/index_en.htm accessed on Nov. 19th, 2006

⁵¹ Schuderlaro, *op cit*. MDA response, *op cit*. MEF response, *op cit*

⁵² Penn, B. “*Commission Consults on the Revision of the European Electronic Money Regime*”. [2005] 13(4) Journal of Financial Regulation & Compliance 347. 352

⁵³ GSME response, *op cit*. MBG response, *op cit*. MDA response, *op cit*. MEF response, *op cit*

⁵⁴ MEF, *op cit*

issuer will pay him later. This mechanism according to the Guidance Notes issued by the Commission does not qualify as a form of e-money.⁵⁵

A further argument that the prepaid method is not in a form of e-money is that in Recital 3 of the Directive it states that e-money 'can be considered to be a surrogate for coins and bank notes and is generally intended for the purpose of effecting electronic payments of limited amounts'. However, when the consumers buying prepaid credit for their phones, they have no intention of using this credit as a surrogate for coins or bank notes, but as an alternative means of paying their mobile phone bill in advance and they can choose what to purchase with this credit.⁵⁶ Furthermore, buying third party products or services is a supplementary service and it is generally not the main reason for purchasing prepaid credit. Hence, the primary purpose of e-money, to be a surrogate for coins and bank notes and to be used as a method of payment, is not satisfied and so, this method of mobile payment should not be considered as e-money. However, the Commission states in the Guidance notes that "*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*".⁵⁷

It is still not agreed upon if using prepaid credit to purchase third party goods is a form of e-money or not. However, this could be considered as a reason why the application of the Directive to MNOs has raised such controversy.

Nevertheless, there is a point that most parties agree upon which is that electronic money, regarding prepaid phone credit, is only created when used for the purchase of third party products.⁵⁸ The Commission in the Guidance Notes states: "*other commentators agree that e-money is created when the monetary value stored on a prepaid 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.*"⁵⁹

This in itself could prove to be a cause for the controversy and uncertainty surrounding the application of the Directive to MNOs. In the Working Staff Document it states, "*The Directive represented a response to the emergence of new pre-paid electronic payment products*".⁶⁰ It can be seen that the Directive at the time of adoption, was a response to 'new pre-paid' electronic schemes at that time. When looking into the 'Evaluation of the E-money Directive'⁶¹, a report made for the DG Internal Market, it can be seen that the new schemes at that time were Damont, Mondex, Proton and Primeur Card. At that time they received attention because they were developed by non-banks and soon banks also issued cards of their own which lead to an increasing interest by national central banks and finance ministries. As they had to face this emergence of e-money and unsure of the implications that could result from wide spread use of it on monetary policy, they demanded for measures to be taken in order to regulate the issuance of e-money.⁶² When reviewing the above e-money schemes, which were available at the time of the Directives adoption and to whose emergence the directive was a response, it can be seen that e-money is created from its issuance and not from the moment it is used to buy third party products. Furthermore, the primary purpose of issuing credit in these schemes was for it to be used as a payment mechanism for third party goods or services. However, the primary purpose of issuing mobile phone credit is to pay for mobile telephone bills.

⁵⁵ Guidance Notes, *op cit*, Para 14

⁵⁶ MDA, *op cit*; MEF, *op cit*; GSME, *op cit*.

⁵⁷ Guidance Notes, *op cit*, Para 14

⁵⁸ See the response of MEF to the Consultation, *op cit* and also, Schuledero, *op cit*, 54

⁵⁹ Guidance Note, *op cit*

⁶⁰ Working Staff Document

⁶¹ . "Evaluation of the E-Money Directive (2000/46/EC) Final Report", for the DG Internal Market the European Commission. Submitted on the Feb. 17th, 2006. (The Evaluation Report) p 18

⁶² *Ibid*

Hence, it can be argued that the reason for the controversy could be attributed to the fact that the Directive was intended to cover different types of schemes. The Mobile Entertainment Forum⁶³ states: "... [We] contend that there are key differences between E-Money schemes originally conceived to cover electronic stored value cards and the evolution of a mobile payments market today."⁶⁴ It has been commented that relying on laws and regulations that were intended for other forms of transactions could prove to be burdensome.⁶⁵

Even with the acceptance of the argument that using prepaid mobile credit to purchase third party goods or products is a form of e-money, there is a further reason which could be the cause of controversy and uncertainty. This reason is that the Directive was not intended to cover MNOs or even hybrid issuers of e-money in general.⁶⁶ The commission states that "one of the primary purposes of Directive 2000/46 was to ensure fair competition between the banking sector and "non-hybrid" electronic money issuers".⁶⁷ Thus, one of the primary purposes of the Directive was not to establish a level playing field between all e-money issuers (ELMIs and hybrids) but only between credit institutions and ELMIs.

This point can be further strengthened by viewing the liquidity and investment restrictions imposed on the e-money issuer in the Directive in addition to the restrictions of activities.⁶⁸ It would be hard to imagine that these Articles were laid down if hybrid issuers were considered at that time. Moreover, as mentioned above, the Commission does acknowledge the problems caused to hybrid issuers by applying the Directive to them.⁶⁹ Furthermore, when reviewing the recommendations and the draft of the Directive it can be clearly seen that there was no mention of the probability of the Directive having such a controversial outcome and its applicability on MNOs or other hybrid issuers.⁷⁰

Conclusion:

The development of the m-commerce sector is currently facing difficulties due to controversy and uncertainty of applying the E-money Directive to MNOs. If the Directive should apply, it could prove to be damaging to the sector as it places too many restrictions on the MNO which could hinder current and future developments.⁷¹

From the above discussion, it can be argued that at the current time the laws and regulations that regulate prepaid phone credit when used to purchase third party credit fails to provide certainty for the parties and it also fails to provide adequate assistance for the development of this sector. The reason for this could be due to the fact that the Directive was not intended to govern hybrid issuers of e-money, that the prepaid method of payment is not a form of e-money or that it is a form of e-money but differs from former e-money schemes in regards to the time of the creation of e-money.

Most of these problems have been recognised by the Commission and it has provided short term solutions to them, such as advising Member States to avoid taking in action in this regard by national regulations as not to affect the development of e-money and to provide MNOs with

⁶³ The Mobile Entertainment Forum is an organization that includes over 120 members from across the mobile entertainment sector.

⁶⁴ MEF response, *op cit*

⁶⁵ Merry, *op cit*

⁶⁶ MDA response, *op cit*; MEF response, *op cit*; GSME response, *op cit*.

⁶⁷ Guidance Notes, *op cit*, Para 5

⁶⁸ Articles 1,4 & 5 of the Electronic Money Directive 2000/46/EC

⁶⁹ Working Staff Document, *op cit*, p12-14

⁷⁰ For the recommendations on the Directive and the draft see http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=134659 accessed on Nov, 21st, 2006

⁷¹ Walker, *op cit*

waivers to exempt them from most of the obligations in the Directive.⁷² The Commission does acknowledge that these solutions are temporary and more appropriate measures must be taken in the future to adequately deal with MNOs and other hybrid issuers of e-money.⁷³ However, no steps have been made to establish a long term solution until this moment. This is due to the recommendation made in the Working Staff Document to wait until finalizing the Directive on Payment Services in the Internal Market.⁷⁴

The Directive on Payment services in the Internal Market,⁷⁵ (The Payment Services Directive) has two main objectives; to enhance competition between national payment markets by opening up markets to all appropriate providers and ensuring a level playing field; and to provide a simplified and fully harmonised set of rules on information requirements and the rights and obligations of users and providers related to the provision and use of payment services.⁷⁶ The scope of this Directive would apply to all retail payment instruments, including both national and cross border transactions but would exclude transactions destined to or arriving from third countries. The Payment Services Directive focuses on credit transfers, direct debits, card payments and other payments made by electronic means.⁷⁷

However, it is still not clear when this Directive will be adopted and if it will provide solutions to the problems faced by MNOs in regards to the application of the E-money Directive to them. Furthermore, the Staff Working Document showed concern that there could be some overlapping between the Directive and the Payment Services Directive and emphasised the need for consistency regarding the said matter within EU regulations. The Commission states that *“the Commission services are fully aware of the need to ensure coherence and consistency with the PSD proposal”*⁷⁸ This matter was also echoed by the mobile industry, as they fear that they would have to go through the whole process regarding the Directive again but this time in regards to the Payment Services Directive.⁷⁹

Whichever solution is to be reached to resolve the problems caused by applying the Directive to MNOs it should take into consideration several points. Firstly, the significance of the prepaid method to the development of m-commerce, and therefore, the development of the e-commerce sector in whole. Secondly, is to recognize the special characteristics of this method of payment. Thirdly, it has to take into consideration the unique position MNOs and other hybrid issuers of e-money are in, which could aid the development of the e-commerce sector.

⁷² Guidance Notes, *op cit*. However, according to the Working Staff Document providing waivers by Member States has also caused the problem of inconsistency between Member States.

⁷³ Working Staff Document, *op cit*

⁷⁴ *Ibid*, 11-12

⁷⁵ Proposal for a Directive of the European Parliament and of the Council on payment services in the internal market and amending Directives 97/7/EC, 2000/12/EC and 2002/65/EC {SEC(2005) 1535} This proposal was published on December 1st, 2005. For an overview on the Directive See Annig, P. *“Payment Services Directive: A Detailed proposal by the European Commission for a New Legal Framework”* [2006] 21 Journal of International Banking Law and Regulation 344

⁷⁶ COM(2005)603

⁷⁷ *Ibid*

⁷⁸ Staff Working Document, *op cit*,

⁷⁹ MEF response, *op cit*

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