

CEBS Technical Advice: Review of Article 8 of Directive 2000/46/EC

1. On 10 May 2004, the European Commission ("the Commission") published a consultation paper¹ on the application of the E-Money Directive² ("the Directive") to mobile phone operators. Among the issues discussed in the paper was how to determine when electronic money is created by mobile phone operators whose customers use prepaid cards to purchase products or services from third-party merchants. The consultation did not produce a clear consensus on this point, among mobile phone operators, third-party content providers, existing electronic money institutions, or other interested parties. Thus the issue remains unsettled as the Commission undertakes its broader review of the Directive.
2. On 24 November 2004, the Banking Advisory Committee discussed a call to CEBS for advice on the implementation of Article 8 of the Directive, which authorises waivers from the provisions of the Directive under specified conditions. The position taken at that meeting was that "although the monetary amounts quoted in Article 8 of the Directive are possibly low for mobile phone operators (total electronic money liabilities of less than EUR 6 million and less than EUR 150 of stored value per customer), it should be possible for Member States' authorities to exempt a large part of the prepaid business of mobile phone operators from the scope of the Directive, at least over the short to medium term. However, in order for mobile phone 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. Exchange of information between supervisors will be critical here. Work on this issue could therefore usefully be undertaken by CEBS."
3. CEBS received a draft call for technical advice in February 2005 and a final call for advice in March 2005. The Call for Advice³ asked CEBS to review

¹ European Commission, Application of the E-money Directive to mobile phone operators – Consultation paper of DG Internal Market, May 2005.

² Directive 2000/46/EC of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions (E-Money Directive; hereafter the "Directive").

³ Call for Advice (No. 2) to CEBS on the review of Article 8 of Directive 2000/46.

the implementation of Article 8 of the Directive and to respond to a set of specific questions. It also invited CEBS to put forward additional issues for consideration at its own initiative. CEBS was asked to provide its advice by 30 June 2005.

4. This tight timeframe did not permit CEBS to follow its regular procedures for providing advice,⁴ and made it necessary for CEBS to adopt fast-track procedures.
 - Input from CEBS Members was obtained by administering a questionnaire consisting of the questions contained in the Call for Advice. CEBS received responses from 26 countries (24 EU Member States and 2 EEA countries).⁵
 - No public consultation was conducted. Instead, the Consultative Panel was asked to provide initial feedback on an earlier draft of the Paper, and provided useful input.
5. CEBS' technical advice on the implementation of Article 8 of the Directive is presented below. While the specific questions in the Call for Advice apparently did not leave much room for digression, CEBS Members made extensive use of the invitation to raise additional issues. In the opinion of CEBS, this indicates that Members have already invested considerable effort in exploring the regulatory and prudential issues related to mobile phone operators and other hybrid issuers of electronic money, which they apparently feel are not satisfactorily covered by the current European legal framework.

Question 1

1.1 Whether and how the optional waiver article been implemented in national law.

6. Article 8 has been implemented in a majority of Member States.
 - Eleven Member States and one EEA Country have implemented all of the waiver possibilities enumerated in subparagraphs (a) through (c) of Article 8(1) of the Directive. One Member explained that it has not followed the Directive's categorisation, but has instead implemented the waiver in a more general fashion.
 - Two Member States and one EEA Country have implemented all of the waiver possibilities, but have modified the Directive's thresholds

⁴ See Articles 4.1 and 5.10 of CEBS' Charter and Points 4 and 5 of CEBS' Public Statement on Consultation Practices.

⁵ Where a figure is given for a number of Member States, the figure relates to the total number of responses received: i.e., twelve Member States means twelve of the 26 Member States that responded.

for total electronic money liabilities or maximum stored value per customer.

- Five Member States have implemented only some of the waiver possibilities enumerated in Article 8(1) of the Directive.
 - Six Member States have not implemented the waiver.
7. The predominant view of the Members was that the redeemability requirement of Article 3 of the Directive cannot be waived. However, applying the redeemability requirement is problematic for mobile phone operators and other hybrid issuers, since the electronic money 'float' to which the redeemability requirement applies (i.e., that part of the total value stored on prepaid cards that is ultimately used to purchase goods or services from third parties) can only be determined after the fact. CEBS recommends that further work on these issues be carried out as part of a broader effort to develop common guidelines or a common prudential regime specific to mobile phone operators and other hybrid issuers (see paragraphs 30 – 44).
 8. Five Member States include redeemability in the provisions that can be waived under Article 8 of the Directive. In one Member State, the right of redeemability is stated in national law, but may be waived on a contractual basis (for example, when the remaining value is less than EUR 10).

1.2 If the waiver has been implemented, what has the experience been?

9. The responses to this question focussed mainly on the number of waivers granted. In several Member States, however, the implementation of Article 8 of the Directive allows the provisions of the Directive to be waived automatically – without explicit approval on the part of the competent authorities – if the conditions of Article 8(1) of the Directive are met. While it may be assumed that some waivers have been granted in these Member States, it is difficult to state their exact number, since the authorities may not be informed that an electronic money issuer has claimed a waiver.
10. In Member States where waivers require explicit approval, only a limited number of waivers have been granted.⁶ In ten Member States, no waivers have been granted to date.

1.3 For those Member States who have not yet implemented the waiver article, what is the scope for implementing a waiver in national law?

11. Six Members reported that Article 8 of the Directive was not implemented into national law. Three of these Member States do not contemplate, or do not yet contemplate implementing the waiver. The other three will implement, or are considering implementing the waiver. One Member

⁶ Please refer to the Annex for an overview of the waivers granted to date.

State which has already implemented some of the waiver possibilities enumerated in Article 8(1) of the Directive is considering implementing the rest of the possibilities.

Question 2

2.1 How similar are the ways in which the waivers have been implemented in practice?

12. In five Member States, waivers apply automatically if all conditions are met, without the need for explicit supervisory approval. In two Member States, the supervisory authority grants approval explicitly but has no discretion to deny a waiver if all conditions are met. All other Members reported that waivers require an explicit decision on the part of the supervisory authority. One Member remarked that it usually grants a waiver if the conditions are met. The reason given for not having an automatic waiver system is to preserve discretionary power on the part of the supervisory authority.
13. Some supervisory authorities may conduct an examination of the issuer in the course of granting a waiver. The scope of these examinations varies. For example, authorities may inspect the issuer's program or its organisational structure. They may also determine precisely which requirements of national law will be waived. Some Members reported that a waiver can be granted only after a licence has been issued, in order to ensure that electronic money institutions do not operate in the dark.
14. Most of the Members that have not adopted automatic waiver systems – i.e., that retain discretionary power in granting waivers – also retain the power to add conditions to a waiver. In five Member States competent authorities do not have the authority to impose conditions.

2.2 What are the opportunities for aligning the scope and coverage of the waivers between Member States?

15. It is clear from the results of CEBS's survey of its members that Article 8 of the Directive has not been implemented in a harmonised fashion across EU and EEA countries. Some Member States have not implemented the waiver provisions at all. Others have done so, but there is considerable divergence in the way the waivers are applied. In some Member States, waivers are granted automatically, while in others they require an explicit decision on the part of the supervisor.
16. One approach to aligning the scope and coverage of the waivers more closely across Member States would be to institute a legal obligation to implement the waiver into national legislation. Seven Members are in favour of this approach. Ten Members prefer the current optional approach as best serving the purpose of minimum harmonisation. Two Members argue for consistent application if there is agreement in favour for an obligatory application of the waiver. Dropping the optional character of

Article 8 of the Directive would reduce national discretion, infringing on the responsibility of Member States for prudential standards.

17. The principal problem posed by the application of the Directive to mobile phone operators and other hybrid issuers seems to be not the lack of convergence in implementation of the Directive's waiver provisions, but rather conflicting interpretations of the definition of electronic money as it applies to these undertakings. The background to the discussion on the implementation of waivers is rooted in these questions, and in the fact that mobile phone operators and other hybrid issuers do not fit into the 'normal' waiver regime for traditional (i.e., non-hybrid) electronic money issuers. Issues of alignment and coverage of the waivers must be seen in this light.
18. CEBS concludes that the degree of uniformity in whether and how Article 8 of the Directive has been transposed into national law is not an issue from a supervisory perspective. CEBS notes, in particular, that waivers cannot be seen as a way of permitting electronic money institutions to conduct cross-border transactions, since they do not benefit from a European passport. The more important issue is the lack of clarity in the definition of electronic money. A clearer and more uniform picture of what constitutes issuance of electronic money is likely to contribute more to promoting supervisory convergence among Member States.

Question 3

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

19. This question assumes that the waiver regime needs to be implemented uniformly.
20. One simple and flexible approach to ensuring uniform application of waivers would be to lay down a common set of guidelines on the application of the waiver provisions. Each supervisory authority would be free to develop and apply its own waiver regime, as long as it was consistent with the guidelines. Information on waivers that had been granted could be sent, or at least made available to other Members along with other information, such as the scope of exemptions, particularly as they relate to limitations on activities, redeemability, and money laundering. This information could be communicated through the established channels of CEBS or the Groupe de Contact.
21. Since waivers do not confer a European Passport for the waived entities, CEBS sees little need for formal information exchange arrangements or for a common framework for information exchange. Any information on waivers that needs to be exchanged can be handled bilaterally at the national level.

Question 4

Are the thresholds in Article 8 set at an appropriate level for 'hybrid' issuers of electronic money, or should they be reviewed?

22. Five Members considered the level of the thresholds to be appropriate. One Member considered the EUR 6 million limit on total electronic money liabilities to be too low. Two Members thought it should be lower.
23. One Member also described the way in which they calculate thresholds. This Member does not include liabilities that the issuer itself receives as payment when calculating whether "the amount of financial liabilities related to outstanding electronic money" exceeds the thresholds of EUR 5 and EUR 6 million. The term 'normally' in Article 8(1)(a) of the Directive is defined as a six-month average. Specifically, the issuer calculates a weighted average of the amounts of outstanding electronic money in each of the previous six months. The weight that is applied to each month is the previous month's total payments of electronic money to undertakings other than the issuer, divided by the previous month's total spending from prepayments. When determining whether total liabilities exceed the EUR 6 million ceiling, the issuer calculates the amount of outstanding electronic money, multiplied by the sum of the latest month's electronic payments to undertakings other than the issuer, and then divided by the latest month's total spending from the prepayments. These calculations are used only to assess whether an issuer of electronic money needs to obtain a licence, or can benefit from a waiver.
24. Two Members considered the EUR 150 limit on maximum stored value to be high for hybrid issues. Seven Members did not raise any problems with the EUR 150 limit, or did not consider it too large.
25. Two Members stated that the EUR 150 limit is too low for mobile phone customers, especially if this amount includes charges for airtime. It should be noted that charges to prepaid mobile phone cards do not necessarily constitute electronic money if they do not represent payment for goods or services purchased from third parties. There is clearly a need for clear guidelines on what prudential requirements should be adopted for hybrid issues and how they should be applied. Indeed, nine Members called for a review of the thresholds with a view to establishing a level playing field.
26. In interpreting these responses, it should be kept in mind that many Members do not have any practical experience with which to judge the appropriateness of the thresholds – among other reasons because they do not allow waivers.
27. Similarly, Members have little basis on which to judge the degree to which the EUR 150 or EUR 6 million thresholds are limiting factors for businesses contemplating applying for a waiver. Four Members reported that they do not consider the thresholds to be limiting factors. One Member remarked that, in its experience, undertakings were either within these limits or well outside them, and that it was not aware of any borderline cases. Some Members did, however, report that the thresholds were limiting factors.

Their responses suggest that the EUR 6 million threshold on total electronic money liabilities may pose a greater problem than the EUR 150 threshold on stored value, and one member expressed that view explicitly.

28. One Member reported that businesses had applied for licences as electronic money institutions because they had been denied waivers.

Conclusion

29. Based on the responses to its questionnaire, CEBS concludes that there may be no need to adjust the legal framework governing the application of Article 8 of the Directive. This conclusion refers explicitly to a banking supervisory perspective. A review of the thresholds may be appropriate from a different perspective.

The application of the E-Money Directive to mobile phone operators and other hybrid issuers

30. In response to the Commission's invitation to raise additional issues, CEBS would like to offer some general remarks on the application of the Directive to mobile phone operators and other hybrid issuers of electronic money such as public transportation operators and retail outlets. Many of the reactions that CEBS received in the process of preparing this advice indicated a strong interest in developing a common European position on whether such undertakings should fall within the scope of European electronic money legislation, and common guidelines or a common prudential regime that would apply to them.
31. The overall objective for harmonisation in this area is to promote a level playing field between electronic money institutions that are regulated under the Directive and other service providers that may issue electronic money as a non-core part of their business.
32. The Commission services have suggested that authorities should consider the form of direct payment relationship between mobile customers and third-party vendors in evaluating whether a mobile operator or other hybrid issuer is engaged in the issuance of electronic money. A direct payment relationship may be established when there is a direct transfer of e-value between the customer and the merchant, or when the mobile operator acts as a facilitator (or intermediary) in the payment mechanism in such a way that the customer and the merchant have a direct debtor-creditor relationship.⁷
33. Some Members consider this interpretation to be too narrow. In their view, the 'direct transfer' condition is too restrictive and does not

⁷ European Commission, Application of the E-Money Directive to Mobile Operators, MARKT/1075/04.

correspond to the business models developed by mobile phone operators and other hybrid issuers (e.g. affiliated transport companies). These Members feel that when prepaid payment devices are used to purchase goods or services from third parties, this activity should fall within the scope of the Directive.

34. However, contrary to the stated views of the Commission, the view that mobile phone operators are electronic money institutions and therefore fall within the scope of the Directive is not held unanimously by CEBS Members. A distinction needs to be made between the use of prepaid phone cards to pay the mobile phone operator for airtime and other mobile phone services, and their use to purchase products or services from third-party merchants.
35. This distinction is critical to determining whether mobile phone operators and other hybrid issuers of electronic money are electronic money institutions meeting the criteria listed in Article 1(3) of the Directive. This is a key point in reviewing the implementation of Article 8 of the Directive, since the waivers authorized by Article 8 apply only to electronic money institutions.
36. The Directive does not provide any legal basis for recognising undertakings that satisfy only some of the Article 1(3) of the Directive criteria as electronic money institutions. In particular, the means of payment must be accepted by undertakings other than the issuer in order for the issuer to be considered an electronic money institution.
37. If the supervisory authority determines that this is not the case, then the operator cannot be recognised as an electronic money institution and there is neither the occasion nor the legal authority for applying a waiver. Such operators could, however, be regulated under Community and national legislation relating to consumer protection, e.g. in the telecommunications sector.
38. If, on the other hand, prepaid payment devices issued by mobile phone operators or other hybrid issuers can be used to purchase goods or services from third parties, then in most cases the criteria for electronic money will be fulfilled. This issue may be discussed in the course of a possible review of the Directive. Such a review, if conducted, should take prudential considerations into account, since electronic money creates prudential risks.
39. Applying all of the requirements of the Directive on the basis of the global amount of liabilities the prepaid cards could be considered too onerous relative to the actual risk posed by such hybrid means of payments, since only a very small part of the value stored on prepaid cards is ultimately used to purchase goods or services from third-party merchants and could therefore be qualified as electronic money. However, since there is no way to know in advance how much of the stored value will be used to purchase third-party content, there is no simple formula for determining how much of the stored value should be redeemable.

40. One possible solution would be for mobile phone operators and other hybrid issuers of prepaid cards that are used as a means of payment to set up subsidiaries whose exclusive activity would be to manage the financial liabilities of electronic money issuance. Prudential requirements could be adapted to this structure. In particular, the subsidiary would apply for a license as an electronic money institution and would be fully subject to the provisions of the Directive, but only for the amounts of electronic money issued by the subsidiary.
41. This proposal, which has attracted considerable support, would ensure effective supervision of electronic money activities without the need to amend the current Directive. However, this approach would not solve the problem that the amount of the 'float' cannot be determined in advance. It could impose excessive administrative burdens on hybrid issuers.
42. Another solution proposed by some Members, which at the same time would meet industry interests, would be to apply the thresholds of Article 8 of the Directive on an ex post basis. Mobile phone operators and other hybrid issuers would be required to report the amount of their 'float' to supervisors on a regular basis. They would qualify for waivers if the amount of the 'float' in some preceding period (such as the previous six months) did not exceed the thresholds set in Article 8 of the Directive. If the amount of the 'float' exceeded the thresholds, the entire 'float' would be treated as electronic money.
43. This approach needs careful consideration in order to avoid conferring an unfair advantage on mobile phone operators and other hybrid issuers. If such undertakings were deemed not to be electronic money institutions, they could benefit from the free use of their float for investment during the interval since the most recent ex-post calculation.
44. This problem could be avoided by using data from the detailed business plans and budgets of the undertakings to calculate, after the fact, the limits and thresholds that determine if they require a licence or if a waiver may apply. Entities of the size and complexity of mobile phone operators are required to prepare such data on a regular basis and in a prudent manner, including precise predictions for the growth of each business line which could be used to estimate the portion of their liabilities that represent electronic money issuance. The calculations could be along the lines of those described by one Member in its response to question 4 (paragraph 23) above.

Summary

45. CEBS members are of the opinion that the approach outlined above could provide a temporary solution that is appropriate for the activities of hybrid issuers (including mobile phone operators), while awaiting a broader review of the Directive that specifies the prudential treatment of such hybrid issuers explicitly. This review should amongst other achieve a workable solution to the problem of defining electronic money issued by

hybrid issuers, as discussed in the preceding section and under question 2.2 (paragraph 18).

46. This temporary solution would enable supervisors to deal with mobile phone operators and other hybrid issuers while remaining faithful to the provisions of the Directive. The New Legal Framework for Payments in the Internal Market could serve as a possible vehicle for applying prudential requirements to payment institutions, provided that it is complemented by prudential requirements that are not overly burdensome for the industry.

Annex

The following list contains an overview over granted waivers:⁸

	Art 8 (1)(a)	Art 8 (1)(b)	Art 8 (1)(c)(i)	Art 8 (1)(c)(ii)
CZR		In conjunction with lit (a): 1		In conjunction with lit (a): 10
DEN (aut ⁹)	no exact numbers available			
	2			
GER	Art 8 categories not applicable; 3 waiver			
LAT (aut)	1			
NLD (aut)	no exact numbers available:			
	ca 6		sometimes	
NOR	3			
POL (aut)	no numbers available			
SWE	1			
UK	25			

⁸ Survey as of 28 June 2005.

⁹ "aut" means an automatic application of the waiver if the conditions are met and does not need a special approval (see also sub 2.1).