

Note**ERG Plenary****ERG 16-17 June 2004****Discussion note – payments from a ICT perspective**

9 June 2004

**National IT and Telecom
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At the ERG meeting 1 April 2004 NITA proposed that ERG and the Commission discuss issues related to the development of new mobile services in relation to the regulatory framework (e.g. issues related to Micro Payments).

In order to facilitate discussions at the ERG meeting NITA has briefly below described some considerations related to the development of mobile services.

Consultation documents from the Commission on “Application of the E-Money Directive to mobile operators”, May 2004 is attached for information.

- 1) The Commission is invited to address the challenges related to the development of mobile services in the light of the regulatory framework and provide information on the planned future work on this issue**
- 2) NRA's are invited to share experiences and views on the challenges and issues described based on national experiences**

1. Introduction

In Denmark there has been concerns in the ICT sector regarding the consequences of the European rules about e-money and distance selling. The rules are not updated to accommodate the technological development in the ICT sector, especially the new types of payments via the mobile phone.

The eEurope action plan, several Commission communications and Council conclusions call for a multi platform approach when setting the information society agenda. The development of attractive new services is one of the top priorities of eEurope 2005. A priority that will be reinforced at the Council meeting 10th of June and the issue of payments will be included in the Council's conclusions.

It is important to ensure that European rules - legally, practically and economically – can be applied on all relevant electronic platforms.

A major new market is emerging in electronic micro services, for instance the coming 3G-market. To ensure the competitiveness of the actors in the European markets it is necessary that the legal framework is designed in such a way that it allows these markets to evolve. Cheap and flexible payment solutions will be fundamental to improve the conditions of the European producers of electronic content services and thus strengthen Europe's strategic position in the global market. At the same time competition in the ICT sector and the financial sector will be improved.

EU is about to pass new legislation in this field (a new legal framework for payments in the internal market – a directive is on its way) As a consequence it is of major relevance that the issues are to be addressed as soon as possible.

2. Legal issues - electronic services – the distance selling directive's rules on consumer protection

The information requirements in the distance selling directive are not designed for easy use in the field of electronic communications. Provisions on information to be given prior to the conclusion of the contract, on the consumer's right to withdraw, on durable media and exceptions from the regime which apply only if in addition to being a service provider you are also an infrastructure provider.

However in the analysis it is necessary to distinguish between onetime delivery services and services that are delivered as part of a subscription agreement.

As regard services delivered, as part of a subscription agreement the concerns related to consumer protection are higher and the information requirements therefore relatively less burden full. This applies also to electronic services such as subscriptions to traffic information, sports results etc. Even if SMS is not considered a durable medium, obstacles can be overcome by providing the information on a locked web-site on paper or by e-mail to an address chosen by the customer. In these situations the balance between the expenses arising from the information requirements and the price of the service provided is more equitable

However, there is a barrier to the provision of onetime delivery micro services because:

- The services include logos, music and ringing tones etc. Services that are consumed the moment they are received.
- Sale of these services resembles sales from automates, which are explicitly excluded from the scope of the distance selling directive (97/7/EF) (art. 3. 2 indent).
- This implies that the consumer's right to withdraw from the contract gives no meaning.
- However according to the directive (art. 6.3) an explicit agreement in which the consumer denounces his or her right to withdraw from the contract is necessary.

- The exception in article 5.2. only applies to sales invoiced by the operator.
- These services are not part of the exception of "audio and video recordings or computer software, which were unsealed by the consumer" because of the qualifying condition, that the good must be unsealed. Such a condition has no meaning in many parts of the online electronic field.
- Before the service is delivered the consumer must receive the required information (art. 4)
- Thus it is necessary to carry out individual communication to the consumer to get consent prior to the delivery of the service
- This information must be delivered
 - via SMS or
 - via e-mail, on a locked web-site on paper or through another durable medium which is accessible to the consumer. The information required is so extensive that it cannot be included in just one SMS. More likely a fulfilment of the information obligations will require 4 or 5 SMSs

Apart from being red tape it is a costly procedure compared to the average price of the services sold and the consumer will most likely consider this annoying spam.

3. Market implications

Electronic services are of major importance to business in general and EU's ICT sector in particular. M-commerce has a potential of becoming a major driver of the innovation and growth to the benefit of both general business and the ICT sector. Thus it is necessary to be able to use payment solutions in a flexible way, at minimum cost and with reasonable levels of consumer protection.

Today the abovementioned legal issues create negative market implications.

The consumer's right to withhold payment until the service provider has proved that the service is delivered distorts the market, because the secrecy obligations on the mobile operator make it difficult to lift the burden of proof. Furthermore these services will often be characterised by being onetime deliveries with a low economic value.

Currently such services are often invoiced by the mobile operator due to the fact that the operator does not have to comply with the payment rules. As a consequence the competition on the market for electronic services will be distorted to the benefit of the mobile operator which supply both the content and the "transport" of the content and to the alternative suppliers of payment systems (for instance banks). The losers will be the "pure" content providers.

This situation contradicts the general competition rules and the strategic goals of the eEurope 2005 action plan, supporting the Lisbon process, and aiming at developing a prosperous market for content providers based on principles of technological neutrality, open platforms and interoperability.

4. Legal issues - electronic services – the e-money directive’s rules on consumer protection

10th of May The European Commission has published a consultation paper on the definition of when mobile phone activity involves issuance of “electronic money”, how the E-money Directive applies to mobile phone operators (prepaid phone cards) and whether changes to that directive are needed to better reflect industry needs and cover risk. The Commission has initiated the hearing to make sure that EU rules are clear, proportionate and are applied consistently throughout all the Member States with a view to encourage investment in the electronic communication sector and the development of new and innovative services.

This issue has been discussed in several Member States and these interpretations of the E-Money Directive has not been similar. The consequence might be uneven competition across borders. In some countries the mobile operators will be seen as issuers of electronic money and as a consequence they are obliged to comply with the rather strict rules of the financial sector. This might cause, that prepaid phone cards and other kind of payment models are not a viable business model.

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This will have negative consequences for levels of innovation and competition in the content provider industry in general. Furthermore it will strengthen the inclination for content providers to sell electronic services through a mobile operator because the e-money-rules will not apply in this situation. In terms of proportionality it might seem irrational that micro payment solutions (characterized by small value/amounts and onetime-delivery) should be obliged to comply with the entire European regime for the banking sector.

5. Perspectives of a new micro payment regime

A supportive regime of micro payments will stimulate a positive development of the market of content providers and the market of telecom operators and will procure access to different payment channels. These effects will further stimulate the general development of the internal market and the take-up of e-business.

Thus it seems reasonable to pursue a strategy that supports consistent, general legislation (distance selling and e-money/e-payments) across different sectors, in particular with regard to the 3G market etc. As part of the ongoing analysis of the implications of the current legislation it makes sense to suggest a regime, based on sectoral and technological neutrality, proportionality (risk and value assessment), acceptable consumer protection/usability, interoperability and security. If necessary, a revision could include a special micro regime.