



GSME comments on the communication concerning a new legal framework for payments

1. General comments

GSME welcomes the review of the new legal framework for payments in order to adapt the legal framework to new technological developments. We agree with the Commission that the main contribution to the new legal framework is to identify legal or regulatory barriers hindering improvements in the efficiency of payment markets, systems, service providers and instruments.

The purpose of mobile operators is to provide telecom services. As telecom services have been evolved from pure voice services to richer data services, mobile operators have developed the means to satisfy the demand of the market, making possible the contracting of such services.

The ambition of mobile operators is not to enter in the market of payments services but to enable the new mobile generations services.

The fact is that current financial regulation in force (which was not intended to regulate our activities) introduces legal uncertainty to our sector due to, among other things, the rapid evolution of services. If interpreted inconsistently or not modified timely this could unintentionally lead to the disappearance of current services or the discouragement of future services.

Therefore, mobile operators would like to see clarification which will allow us to render our services in a proportionate regulatory environment.

1.1. The new legal framework for payments from the mobile perspective

The mobile industry was from the start of its existence competitive and dynamic. Mobile operators are primarily regulated by sector-specific telecommunications regulation. According to this regulatory framework 'emerging markets' are not to be regulated. Mobile micro-payments are clearly an 'emerging market' in the view of GSME; and regulation of emerging markets has an adverse effect on the incentive for innovation and investment.

However, the prudential requirements in the financial sector come from a different tradition (high-value payments, person-to-person transactions, higher risks for consumers) which is now 'meeting' the mobile sector exactly at its very early stage of development as an emerging market.

Financial regulation is not designed for the risk levels of micro-payments (there is in fact no experience of the risks involved in mobile micro-payments which could be addressed). Furthermore, it has not been designed with the development of mobile services in mind. For example, the e-money directive is simply

not designed to take account of 'hybrid' service providers (i.e. operators who offer the third party services in addition to existing own services).

The main task and challenge for the success of the new legal framework on payments in GSME's view is a thoughtful 'convergence period' where two completely different traditions of regulation are allowed to grow together in a way which allows for proportionate prudential regulation and the incentive to continue to offer more choice of mobile payment mechanisms to its consumers. This is a creative process which should respect legal obligations while at the same time avoiding the increase of current problems even further. GSME would therefore encourage the Commission and national regulators to refrain from decisions which do not take into account the bigger picture of tasks, aims and current market developments.

1.2. Guiding principles of the new legal framework

GSME fully supports the proposed guiding principles of the new legal framework: efficiency, security, competition on the basis of a level playing field, consumer protection, technological neutrality and value-add of new payment legislation.

In addition, GSME would like to elaborate below on proportionality, competition and level playing field.

1.2.1. Proportionality

Previously appropriate regulation becomes an inappropriate regulatory obstacle when it disregards new developments and is applied to new technologies and services without taking into account the differences and characteristics of those new services.

The main challenge is therefore to avoid extending traditional financial regulation and instruments on new market players and services. Instead the regulatory framework has to allow for flexibility to treat new services in an appropriate manner. The principle of same services, same risks, same regulation has to be applied while at the same time ensuring that flexibility and proportionality remain consistent throughout the regulated industry. The risks for consumers are very different between prepay and postpay in the mobile context. Any attempt to start treating those with same regulatory requirements should be avoided.

Proportionality therefore plays a vital role and should be added as a guiding principle for the improvement of the legal framework. It is the most effective tool to remove regulatory obstacles in a technologically-neutral way and allowing for the necessary flexibility of the legal framework. Given the dynamic technological developments resulting in increased payment choices for consumers, there is a clear need to make the legal framework more flexible and appropriate for new innovative means of payments.

There is a need to attribute different levels of regulation to different levels of risk. Therefore, proportionality criteria to be considered for the mobile sector are:

- What are the differentiating characteristics of the new services in question? (e.g. an important characteristic of the new market players, which is not catered for in current regulation, is that they are 'hybrid' players). What risks follow from those new characteristics and how can they be treated in a proportionate manner?
- How can those services and players be regulated without suffocating their entire development and having a negative effect on core/unregulated services of the 'hybrid' service provider?
- What are the differences in inherent risks of the new services (i.e. in the case of mobile prepaid services, no person-to-person payments are offered, lack of cash refunds reduces risks for money laundering, low-value payments instead of high-value payments, etc)

1.2.2. Competition and level playing field

The majority¹ of GSME members accept financial regulation as long as it is appropriate to the risks posed by the specific service.

As pointed out below, the effects of the E-Money Directive on mobile communications sector were not examined when the Directive was drafted. Therefore, a cost-benefit analysis should be undertaken in order to determine the appropriateness of regulation. A balance should be struck between legal obligations and their benefit for the efficiency of payment markets, systems, service providers and instruments.

The review, interpretation and application of regulation should be justified on the basis of a clear benefit and value add for both the market and the consumers. Instead of looking at services when deciding regulation, financial regulators should look at the inherent risk of services in order to decide for an appropriate regulatory tool. This is also consistent with the principle of technological neutrality.

2. Comments on Annex 1

The consultation document proposes to introduce a new specific category of licensing for payment activities to include services such as: money transmission services, prepaid and stored value accounts used for third party payments and services not covered by the e-money regime. However, it is unclear from the text what these lighter regulations would entail and the benefits of such a transmission licence need yet to be explained in the communication.

For this solution to be acceptable, it would be essential that no type of mobile payment service could be caught by the E-Money directive as well. It would be impossible for the sector to develop smoothly if some of our services were subject to the new licence, while others required an e-money institution licence. Consequently we would require the E-Money directive to be amended or repealed to take account of the new licensing system so that mobile payment services would not be included in both categories. This is also in line with the Commission's principle of "Better Regulation". The Commission would also have to ensure that member states correctly transpose the rules governing this new licence, as well as any waivers, so that pan-European players would be able to take advantage of its mutual recognition regime.

However, given the timescales required to draft and adopt a new directive, GSME sees this as a long-term solution only. In the meantime, a clearer interpretation/adaptation of the existing E-Money directive, which makes it more suitable for the requirements of the industry should have priority.

The E-Money Directive is currently being discussed at EU level in the Banking Advisory Committee. GSME assumes that the E-Money Directive is currently being dealt with in another consultation. However, since the directive is addressed by this consultation as well, GSME would like to reiterate that the E-Money Directive currently has a very negative effect on the mobile industry and its ability to offer its customers new services. The reasons for this are:

- 1) The intention of the Directive with regard to the mobile sector is being discussed now² as opposed to during the drafting period. The result is a discussion of legal definitions, which do not fit with the reality of the market place or the initial purpose of the Directive of promoting more choice for consumers
- 2) The legal uncertainty, which is likely to result in more regulation as opposed to removing regulatory barriers. The lack of legal certainty since almost 2 years has already had a stifling effect on the development of new services
- 3) The regulatory conditions to comply with the Directive are not proportional. The money laundering regulations are a striking example of this as they were initially designed for dealers of high-value goods. Their application as result of the e-money directive to providers of micro-payments (i.e. less than €10) is therefore wholly disproportionate

¹ With the exception of Bouygues

² The reason for this is that the mobile industry is extremely dynamic and fast paced. The very fact that the EU Commission and national financial regulators had to invite the mobile industry (in order to understand mobile services) to the GTIAD meeting on 27 November 2003 showed that it was not envisaged that mobile operator services such as premium rate services would or should fall under the e-money directive at the time of the adoption of the Directive.

- 4) The Directive does not take into account providers of hybrid accounts such as mobile operators who potentially offer e-money services in addition to their own services. This results in over-regulation on mobile operators regulating the whole prepaid account rather than just that part used for e-money services. Considering the investment requirements of the directive, regulation of the whole prepay account would cause considerable cash flow problems for mobile operators. In addition, any attempt of trying to separate ex-ante e-money and telecommunications services within the prepay account would make the prepay product unviable because consumers would not accept a product, which is too complicated to use.

GSME's experience shows that efficiency gains and new developments in mobile micro-payments are currently being lost and innovation is being slowed down through disproportionate regulation. There are currently indications that the final interpretation of the E-Money Directive could result in premium rate services being considered as e-money. This would completely undermine the viability of mobile operators offering these services to their prepaid consumers. It is GSME's view that premium rate services do not raise any new consumer protection issues which would require special legislation in addition to the general consumer protection rules already applicable to operators. Finally, premium rate services should be considered as a "single purpose activity" and not as a general-purpose payment instrument. With all this taken into account, GSME considers that the [new] legal framework should not apply to premium rate services.

Comments on Annex 2

GSME is in favour of the approach taken by the Commission to keep information requirements for consumers consistent with already existing e-commerce and distance selling regulation. This is especially important to ensure trust in e- and m-commerce. However, the approach will only be beneficial where the information requirements are reasonable. Therefore, there should be a clear distinction between information requirements at the beginning of a contract and information requirements in connection with each transaction. In case of mobile micro-payments, the suggestion that payment service providers will provide consumers with a raft of information after each transaction (in this case on the mobile device) will reduce market efficiency, will cause consumer dissatisfaction and place unnecessary burden on payment service providers.

GSME would therefore like to suggest that information requirements should be reasonable and proportionate based on the type of service and its associated risks for consumers.

Comments on Annex 8

Provisions in this annex propose a directly applicable legal instrument (regulation) on the requirement to provide full originator information. These requirements should be balanced against the actual risks of money laundering with regard to the actual services provided.

The obligations of this proposed legal instrument (based on SRVII) are completely disproportionate to the amounts involved for mobile payment services, and were they to apply to micro-payments would render such services uncommercial. GSME supports the idea of a "de minimis threshold" for payment services falling under such a regulation and would therefore wish to see the euro amount in paragraph (3) set well above the amounts used for mobile payment services.

Comments on Annex 11

The Commission reasons (Annex 11, page 46) that the Payment Service Provider's responsibility in case of a dispute could be strengthened in order to improve the customers trust in e-commerce.

Intermediary players that merely provide a technical platform to the relationship between the customer and a merchant must not be liable in the case of a dispute between the two contracting parties. Such regulation would lead to inefficiencies in and extra costs for the execution of payments.

Comments on Annex 21

The Commission also invites (Annex 21, page 69) for "arguments in favour or against the liability of a Payment Service Provider towards the customers and/or the merchants in case of breakdown of a payment network, as well as any other suggestions in this area."

It is important that liabilities can be anticipated and that the level of liability should be proportionate and reasonable, so that the regulation does not prejudice the deployment of payment networks.