

# Legal Alert

Telecommunications operators as payment institutions

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**Member states of the European Union have until November 2009 to implement the Payment Services Directive. This directive, long anticipated by the financial services market, was adopted by the European Parliament and the Council at the end of 2007.**

The scope of regulation of the new directive covers some services provided by operators of telecommunications networks. This concerns - what are commonly referred to as "mobile payments" or "m-payments" - payment services made using mobile phones.

## Mobile payments as payment services

The directive defines **payment service** to include, among other items, a payment transaction where:

- the consent of the payer (owner of the telephone) to execute a payment transaction is given by means of a telecommunication device,
- the payment is made to the telecommunication operator, and
- the operator acts only as an intermediary between the owner of the telephone and the supplier of the goods and services.

This involves situations where the owner of a mobile phone purchases goods or services from a third party, that is, a seller other than the operator of the network, using a Premium Rate SMS for payment. The payment made by the owner of the phone is included by the network operator in the bill for mobile phone charges. The operator thus becomes an intermediary in the payment transaction between the phone owner and the third party, and obtains the status of a **payment institution** within the meaning of the directive.

Purchase of such digital goods and services as mobile phone ringtones, wallpapers, games, music and digital media, however, remains **outside the scope of regulation of the directive.**

## New obligations

Assuming that every payment institution is subject to the full array of duties provided for in the directive, if an entity legally qualifies as a payment institution this will generally entail:

- an obligation to obtain a permit to act as a payment institution
- activity involving payment services becoming subject to state supervision
- entry of the activity in the register of payment institutions maintained by the designated supervisory body
- requirements concerning initial capital and own funds
- certain informational duties toward customers
- certain duties applicable to the actual payment services performed.

The directive provides for grace periods when entities already operating will have time to adapt their activity to the provisions of the directive.

## Who is entitled to eased restrictions?

The directive provides for the possibility of exemption from the requirements of the directive, or significant restrictions on applicability, if the average total value of payment transactions made by an entity does not exceed **EUR 3 million per month** (average for the previous 12 months). Further easing of the requirements of the directive is possible in cases where payment services are performed involving small amounts, that is, as proposed in the directive, up to EUR 150. Services offered by telecommunications operators will probably fit within those limits.

## Everything is up to the parliament

The final scope of application of the directive to telecommunications operators depends on the will of the Polish lawmakers implementing the provisions of the directive into national law. **One thing that is certain is that they will be subject to the registration requirement and precautionary supervision.** This is a regulatory minimum where the directive does not permit exemption from application of its provisions.

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