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M-banking: current legal frameworks across global jurisdictions

Ewa Butkiewicz

*Publications Officer, Banking Law Committee; Wardynski and Partners, Warsaw
ewa.butkiewicz@wardynski.com.pl*

We are observing a growing interest from financial institutions in establishing payment solutions that would be an alternative to payment systems that use payment cards. The alternative solutions, although very attractive for consumers, require very complex legal structures that involve different areas of law, such as banking, telecommunications, electronic money, and data protection law. They are, as such, an immense challenge for lawyers.

The IBA Banking Law Committee prepared and distributed among IBA members early this year a questionnaire on key issues related to possible implementation of m-banking in local jurisdictions. I would like to take this opportunity to express my gratitude to all survey respondents and thank them for their excellent work.

The main purpose of the survey was to explore whether current legal frameworks in different jurisdictions allow the application of the alternative payment solutions – namely m-payment, which involves using mobile phones as payment instruments – on a similar basis as debit or credit cards. Reports on m-payments legislation from 16 different jurisdictions give an excellent opportunity to assess the challenges, tendencies and difficulties surrounding the implementation of m-payment solutions.

The survey indicated that the degree of readiness of legal systems to use m-payment solutions differs in countries that have already developed an

continued overleaf

Contributions to this newsletter are always welcome and should be sent to the Publications Officer, Ewa Butkiewicz, at the address below:

Wardynski & Partners
Al. Ujazdowskie 10
00-478 Warsaw, Poland

Tel: +48 (22) 437 8200/537 8200. Fax: +48 (22) 437 8201/532 8201
ewa.butkiewicz@wardynski.com.pl

International Bar Association

10th Floor, 1 Stephen Street, London W1T 1AT, United Kingdom
Tel: +44 (0)20 7691 6868. Fax: +44 (0)20 7691 6544
www.ibanet.org

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COMMITTEE OFFICERS

BANKING LAW COMMITTEE

Co-Chairs

André Andersson
Mannheimer Swartling Advokatbyrå
PO Box 1711, Stockholm 11187, Sweden
Tel: +46 (8) 5057 6500. Fax: +46 (8) 5057 6501
aa@msa.se

Gwendoline Godfrey
DMH Stallard
40 High Street, Crawley RH10 1BW, England
Tel: +44 (1293) 605 551. Fax: +44 (1293) 415 716
gwen.godfrey@dmhstallard.com

Vice-Chair and Secretary

Tarja Wist
Waselius & Wist
Etelaesplanadi 24A, Helsinki 00130, Finland
Tel: +358 (9) 668 9520. Fax: +358 (9) 6689 5222
tarja.wist@ww.fi

Publications Officer

Ewa Butkiewicz
Wardynski & Partners sp.k
Al. Ujazdowskie 10, 00-478 Warsaw, Poland
Tel: +48 (22) 437 8200/537 8200. Fax: +48 (22) 437 8201/532 8201
ewa.butkiewicz@wardynski.com.pl

Young Lawyers Liaison Officer

Adrian Farrell
McCann Fitzgerald
Riverside one, Sir John Rogerson's Quay, Dublin 2, Ireland
Tel: +35 316 071 312
adrian.farrell@mccannfitzgerald.ie

Academic Liaison Officer

Lars Gordon
Karlavagen 94
Stockholm 11522, Sweden
Tel: +46 (8) 736 9197. Fax: +46 (8) 311 768
rvlg@hhs.se

SUBCOMMITTEE OFFICERS

Legal Opinions

Co-Chairs

Stephen Powell
Slaughter & May
One Bunhill Row, London EC1Y 8YY, England
Tel: +44 (20) 7090 3131. Fax: +44 (20) 7090 5000
stephen.powell@slaughterandmay.com

Hames Vallikivi
Tash & Co
Roosikrantsiz 2, Tallin 10119, Estonia
Tel: +37 (2) 611 0900. Fax: +37 (2) 611 0911
hames.vallikivi@tashw.ee

Financial and Banking Law Conferences

Chair

Thomas Schirmer
Binder Grösswang Rechtsanwälte
Sterngasse 13, Vienna 1010, Austria
Tel: +43 (1) 5348 0340. Fax: +43 (1) 534 808
schirmer@bgnet.at

Vice-Chair

Mr Russell J DaSilva
Lovells, 590 Madison Avenue, New York, NY 10022, USA
Tel: +1 (212) 909 0668 - (212) 909 0668
Fax: +1 (212) 909 0660 - (212) 909 0660
russell.dasilva@lovells.com

Innovations in Financing Transactions

Co-Chairs

Roberto Emilio Silva
Marval, O'Farrell & Mairal
Av Leandro 928, 7th Floor, Buenos Aires 1001, Argentina
Tel: +54 (11) 4310 0100. Fax: +54 (11) 4310 0200
res@marval.com.ar

Giuseppe Schiavello
Macchi di Cellere Gangemi
Via Giuseppe Cuboni 12, Rome 00197, Italy
Tel: +39 (06) 362 141. Fax: +39 (06) 3608 4490
g.schiavello@macchi-gangemi.com

International Financial Law Reform

Chair

Klaus M Loeber
European Central Bank, Haizerstrasse 29
Frankfurt am Main, 60311, Germany
Tel: +49 (69) 1344 7225. Fax: +49 (69) 1344 7406
klaus.loeber@ecb.int

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m-banking system compared to those countries that lack the legal background for such a system.

There is also an interesting tendency: those jurisdictions where the concept of e-money has been recognised have relatively fewer legal obstacles to implementing m-payment solutions. The regulations on e-money were innovative and have, in effect,

prepared the legal ground for more advanced payment solutions.

It would, at present, be very difficult to adopt a universal m-payment system. Regulations, even within the EU, are not harmonised. Moreover, differences exist in jurisdictions on the role of non-banking entities in m-payment structures. That all indicates that there are areas of law that still need

FROM THE CO-CHAIRS

Banking Law Committee update

André Andersson

*Mannheimer Swartling Advokatbyrå AB,
Stockholm
aa@msa.se*

Gwendoline Godfrey

*DMH Stallard LLP,
Gatwick
gwen.godfrey@dmhstallard.com*

It gives us great pleasure to have this opportunity to update members of the committee. As you will see, our new Publications Officer, Ewa Butkiewicz has produced this newsletter as the result of the questionnaire on m-banking which she prepared and circulated earlier this year. It is a good example of a way in which you can become involved in committee activities.

Whilst we have a number of new committee officers, such as Ewa, you will see from the list of our committee officers that we have a number of vacancies. If you would be interested in becoming a committee officer or if you have any suggestions for us with regard to our committee and its activities please let us know.

We always welcome emails and telephone calls, but we hope to have an opportunity to see many of you at the 26th Annual International Financial Law Conference in Rome (13-15 May 2009) which our committee is co-presenting with the Securities Law Committee with the support of the IBA European Regional Forum (see page 80 for further details).

As you will have seen from the programme, there is an interesting and varied selection of working sessions, coupled with what promises to be some very enjoyable social and networking events. Our thanks go to all those who have worked so hard on the preparations for this conference. We look forward to seeing you there.

Once again, a young lawyers' workshop will be held in conjunction with the conference. It is one of the ways in which we seek to encourage younger lawyers to join our committee, although we appreciate that in these troubled times it may not be very easy for firms to finance this sort of activity.

We are all living and working in turbulent economic times. In this fast moving globalised business world it is difficult to predict what will have happened by the time this newsletter is published. Whilst many of us may be finding that there is less transactional work to be done than in the past, we hope that the economic problems are opening up new areas of work and opportunities for you and that our committee is and will continue to be a useful source of contacts and know-how for you.

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The aims of the m-banking survey

The main aim of this survey is to explore whether the current legal framework allows for using mobile phones as payment instruments on a similar basis to debit or credit cards. The IBA Banking Law Committee wanted to find out the main obstacles that make it impossible to use mobile phones as payment instruments or, if such use is already possible, what changes in law may make it easier.

Taking into consideration the growing interest in such 'm-payments' among non-banking participants in the market, we would like to explore the possibility of establishing m-payments systems for non-banking entities (such as telecommunications operators).

Finally, bearing in mind that as long as m-payments remain local initiatives they will not effectively replace PIN credit or debit cards, we would like to learn more about the possibility of the implementation of a worldwide m-payment system.

How do we understand m-payments?

The term 'm-payment' is broadly used as a name for different technologies and procedures that allow consumers to make payments using mobile devices. For the purposes of this survey, we propose to limit the scope of m-payment to payments made with the use of mobile phones using Near Field Communication (NFC) solutions. NFC is a short-range high frequency wireless communication technology which enables the exchange of data between devices on a contactless basis. In such solutions, the mobile phone plays the role of a PIN debit or credit card. Payment at point of sale is made by waving the mobile phone over a special reader. In the case of higher-value transactions and payments the client may be required to provide his PIN code on the phone keyboard to confirm the payment.

We would like to emphasise that m-payment, in the meaning presented above, is something more than widely known m-banking services. The latter usually give clients access to funds deposited in their banks account through mobile communication channels, including mobile phones. Such access allows the client to perform typical banking and brokerage activities, including traditional money transfers (the execution of which may last up to a few days). Instead of that, m-payment solutions provide for the possibility of making instant payments at points of sales, based on the legal framework already used in relation to traditional PIN debit and credit cards.

M-payment initiatives are in many cases based on the electronic money concept. For the purposes of this survey, we will refer to the e-money definition established by EU Directive 2000/46. According to this definition, 'e-money shall mean monetary value as represented by a claim on the issuer which is:

- (i) stored on an electronic device;
- (ii) issued on receipt of funds of an amount not less in value than the monetary value issued; and
- (iii) accepted as means of payment by undertakings other than the issuer.'

As noted above, in the survey we are focusing mainly on the possibility of using mobile phones as a payment instrument. For the purpose of this survey, 'payment instrument' shall mean any instrument (such as PIN debit or credit card) or procedure that allow for the initialisation of payment. Please note that we are interested mainly in solutions that are based on traditional money rather than on solutions based on e-money being an equivalent to cash. However, due to the fact that e-money is used in practise in some m-payments solutions, we decided to also dedicate some of the questions to this issue.



IBA Annual Conference Madrid 2009: Banking Law Committee sessions

Post application financing

Joint session with the Insolvency, Restructuring and Creditors' Rights Section (SIRC).

Every large insolvency administration tends to require substantial sums to be advanced by existing or new financiers to keep the troubled entity afloat for the period of a restructure or liquidation. Many difficult questions arise in this context around the interaction between the existing lenders and the existing priorities when new financiers come in. Generally speaking the new financier will require a super priority to secure their fresh lending. Practices vary as to the approach to post application financing. In the current climate the availability of this type of financing can become an issue. The example that springs to mind here is that of the US auto makers and the sheer size of their working capital requirements if debtor in possession funding were to be required under Chapter 11.

This session will consider the issues that can arise with post application financing from a number of perspectives, including from the financier's perspective (old and new); from employees and other priority creditors and from management and the insolvency practitioner administering the insolvency.

TUESDAY 1000 – 1300

Class of 2008: the contentious herds of stakeholders taking action in the aftermath of the financial crisis

Joint session with the Securities Law Committee.

One of the consequences of the financial crisis in 2008 was an increase in class litigation with respect to financial disputes. Class actions attracted enormous attention, both in practice by the contentious herds of disappointed stakeholders, and *iure condendo* by many legislators in those jurisdictions where such a procedural tool is not yet in place.

Which class actions were initiated in the context of the financial crisis? What were their consequences? More generally, what are the implications of admitting class actions for small investors/stakeholders? What are the risks of abuse? Are there better alternatives, particularly when cross-border activity is involved? Can we speak of international standards in the field yet? Also, does class litigation affect the financial market and the way of operating of the financial players?

The speakers, based on their experience and in light of their different professional and geographical backgrounds, and drawing on their experience of 2008, will give an overview of the situation and address the pros and cons of class litigation in the financial sector. In particular, they will focus on some of the most relevant aspects of collective redress procedures, such as the issue of class certification, as well as recognition and enforcement in cross-border litigation.

TUESDAY 1500 – 1800

Bank bailouts: out on bail for the future?

Joint session with the Corporate and M&A Law Committee.

This session will look at the actions taken by governments and others during the banking financial crisis. It will consider what happened to the banks, the structures implemented, and what this will mean in the future for the banking industry.

WEDNESDAY 1000 – 1300

Can I rely on it? Reliance is the best word when it comes to legal opinions, comfort letters and due diligence reports

This session will focus on reliance issues in respect of legal opinions and other letters and reports issued by law firms. Who could and should be able to rely on these? To what extent is it acceptable to allow unidentified parties to rely on the letters and reports? This session will give an overview of recent practice relating to legal opinions.

THURSDAY 1000 – 1300

New age financing – what are the options?

Gazing into the crystal ball, what have we seen and what do we expect to see of new financing techniques and new structures post-credit crisis? This very topical session will look at the future of financing based on recent experiences.

FRIDAY 1000 – 1300

Bulgaria

Hristo Raychev

Tsvetkova Bebov & Partners
(Landwell Bulgaria), Attorneys-at-Law, Sofia
hristo.raychev@bg.landwellglobal.com

Kamena Valcheva

Tsvetkova Bebov & Partners
(Landwell Bulgaria), Attorneys-at-Law, Sofia
kamena.valcheva@bg.landwellglobal.com

Maria Urmanova

Tsvetkova Bebov & Partners
(Landwell Bulgaria), Attorneys-at-Law, Sofia
maria.urmanova@bg.landwellglobal.com

Regulatory issues and payment solutions

1. Please provide a short description of legal acts in your jurisdiction that regulate the following issues related to m-payments (please describe briefly the main ideas of specific acts):

a) *banking activities;*

The basic legal act with respect to bank activities is the Credit Institutions Act (Promulgated State Gazette No 59/21.07.2006 with later amendments) (Credit Institutions Act). It regulates, among others, incorporation and licensing of banks, internal organisation and management of banks, bank supervision, termination and liquidation procedures. The Commerce Act (Promulgated State Gazette No 48/18.06.1991 with later amendments) provides general rules on the main banking transactions.

b) *payment instruments;*

The Funds Transfers, Electronic Payment Instruments and Payment Systems Act (Promulgated, State Gazette No 31/8.04.2005 with later amendments) (Payment Instruments Act) provides rules for issuance of electronic payment instruments, settlement, issuer's obligations and liabilities. More detailed rules are set out in Regulation No 16 on Electronic Payment Instruments (Regulation No 16) issued by the Bulgarian National Bank.

c) *e-money;*

The regulation of e-money is systematised in two legal acts. The first one is the Credit Institutions Act which sets out rules for incorporation, licensing and supervision of e-money companies. The second one is the Payment Instruments Act regulating the characteristics and issuance of e-money, as well as the issuer's liability.

d) *data protection;*

The Personal Data Protection Act (Promulgated State Gazette No 1/4.01.2002 with later

amendments) (Data Protection Act) regulates the collection and processing of personal data. It also contains rules on the compulsory registration of personal data administrators and the supervision thereon by a regulator.

e) *bank secrecy;*

The Credit Institutions Act contains a special chapter regulating bank secrecy. The latter is defined as any data related to the transactions and status of client accounts or deposits with the bank. The said legal act provides for certain limited cases where disclosure of bank secrecy is possible.

f) *telecommunication activities;*

The telecommunication activities and the supervision thereon are regulated by the Electronic Communications Act (Promulgated State Gazette No 41/22.05.2007 with later amendments) (Electronic Communications Act).

g) *any other act that may apply to m-payments.*

The general rules set out in the Obligations and Contracts Act (Promulgated State Gazette No 275/22.11.1950 with later amendments) may apply to those aspects of the contracts for m-payment which are not regulated by special legal provisions.

In addition, two laws providing rules for client protection may be applicable to m-payment contracts – Consumers Protection Act (Promulgated State Gazette No 99/09.12.2005 with later amendments) and Distance Marketing of Financial Services Act (Promulgated State Gazette No 105/22.12.2006 with later amendments).

Several regulations issued by the Bulgarian National Bank in addition to the above laws may also be applicable in certain cases.

The majority of the above-listed legislation is based on EU regulations.

2. *Does your legislation provide for possibility of issuing and using the following payment instruments:*

a) *debit cards;*

Yes, the issue of debit cards is regulated as one of the possible activities carried out by banks in accordance with the Credit Institutions Act. It is worth noting that Bulgarian legislation does not allow debit cards to be issued by non-banking financial institutions. The Payment Instruments Act regulates the issuance and usage of debit cards.

b) *credit cards;*

Yes, credit cards may be issued under the same legal regime as specified above for debit cards.

c) *pre-paid cards?*

Yes, issuance of pre-paid cards is possible but only for a limited scope of services (mainly telecommunication services).

3. *Please describe the possibility of using a mobile phone as a payment instrument in your jurisdiction.*

Bulgarian legislation does not contain explicit provisions regulating the use of mobile phones as payment instruments. However, the existing provisions are general enough to cover different payment structures.

Under the Payment Instruments Act there are two categories of payment instruments: payment instruments with remote access and e-money instruments. The payment instruments with remote access are defined as instruments which allow their user to access his/her funds held in bank accounts by using electronic or other technical devices such as: (i) bank cards; and (ii) e-banking facilities

These two devices are not exhaustively listed which suggests that other technical devices could be used as well. Therefore, taking into consideration the broad definition of payment instruments with remote access, it could be concluded that it includes mobile phones as well. It needs to be emphasised that under Bulgarian legislation the only m-payment structure possible is the one combined with a bank account wherefrom the funds are transferred.

If mobile phones are subsumed in payment instruments with remote access, an important question which would arise is whether the legal provisions concerning bank cards and e-banking facilities would apply with regard to mobile phones. For example, bank cards (ie, credit and debit cards) may be issued only by banks. In this relation it is not clear which entities would be allowed to offer the m-payment structure and what type of

license or authorisation would be required.

We are aware of one Bulgarian company which is currently developing an m-payment structure and plans to launch it by the end of 2009. According to our discussions with experts from that company the project foresees that a special hardware will be installed on the mobile phone and this will allow users to order payments with funds extracted from their bank accounts. In this scenario the mobile phone plays a role similar to a debit or credit card – the payment at a point of sale is made by waving the mobile phone over a special reader and confirming the payment through the special application installed on the mobile phone.

4. *If there is no possibility of using a mobile phone as a payment instrument, or if there are some legal difficulties in application of m-payments solutions, please indicate the main legal obstacles.*

The main legal obstacle is the absence of clear statutory regulation of the m-payment structure; this could be overcome by introducing amendments to the existing legal regime. The respective provisions of the Payment Instruments Act need to be adapted and supplemented in order to cover the m-payment structure too. In particular, rules need to be adopted about payment instruments with remote access other than bank cards and e-banking facilities.

It should be noted that a Bill for a new Act on Payment Services and Payment Systems is currently pending in the Bulgarian Parliament. The Bill is intended to transpose into Bulgarian law the EU Payment Services Directive and is projected to become effective as of 1 November 2009. The Bill introduces the definition of payment instruments as per the said Directive – ‘any personalised device(s) and/or set of procedures agreed between the payment service user and the payment service provider and used by the payment service user in order to initiate a payment order’. The broad provisions set out in the Bill will probably solve some of the difficulties related to the usage of the m-payment structure. However, it needs to be underlined that the Bill is in its early phase of discussion and there is no certainty on the final texts which will be adopted.

5. *Does your legislation limit categories of entities that may issue payment instruments? If so, could a telecommunication operator issue a mobile phone as payment instrument in your jurisdiction?*

Pursuant to the Payment Instruments Act the two categories of electronic payment instruments (please refer to Answer 3 above) have a limited

range of possible issuers. The payment instruments with remote access may be issued only by banks while the e-money instruments may be issued only by e-money institutions. There are no explicit regulations specifying the entities which are authorised to issue mobile phones as payment instruments. Therefore, under the existing Bulgarian legislation it is not clear whether a telecommunication operator could issue a mobile phone as a payment instrument.

Mobile payments

6. *Please describe briefly elements that need to be included in a consumer contract for using a mobile phone as a payment instrument. Please describe briefly rules of liability for issuer and holder of the instrument.*

Under Bulgarian law, there is no explicit regulation of a consumer contract for using a mobile phone as a payment instrument. The Payment Instruments Act contains provisions applicable to a contract for issuance and usage of electronic payment instruments whose broad definition, as commented in Answer 3 above, could be interpreted to subsume mobile phones as well.

Under the Payment Instruments Act a contract for issuance and usage of electronic payment instruments shall be concluded in writing. This contract has to be accompanied by the General Terms and Conditions of the issuer which shall have a minimum of statutory contents, as follows:

- description of the electronic payment instrument and any amount limits applied thereto;
- description of mutual rights and obligations of the issuer and the user of the electronic payment instrument;
- key information on the technical facilities required for using the electronic payment instrument;
- information on the terms and methods of settlement;
- information on all fees and commissions due by the user; and
- description of the procedures and terms for rejection of transactions and for dispute settling, etc.

According to the Payment Instruments Act, the issuer shall be liable for any delay or failure to execute a transaction validly authorised by the user. The issuer shall also assume liability for transactions not authorised by the user and for errors and discrepancies committed by the issuer in the client accounts. The liability in case of illegal use of a payment instrument by an unauthorised person depends on whether the user has fulfilled his/

her obligation to notify the issuer of the relevant circumstances (loss, theft, misappropriation by other means, destruction of the instrument, etc). Before the said notification the user shall bear any loss up to the amount specified in the contract (which cannot be more than BGN 300).¹ After the notification is made any liability or loss shall be covered by the issuer.

7. *Is it possible, under your jurisdiction, for a telecommunication operator to provide a mobile phone holder with a loan? In such a scenario, payment is made with use of mobile phone and, subsequently, the client is charged for the transaction together with an invoice for telecommunication services.*

The current Bulgarian legislation does not contain explicit and sufficient regulation of the possibility for telecommunication operators to give loans to their clients in the above scenario.

8. *Assuming that it is technically possible to have a mobile phone integrated with multiple accounts in more than one bank (just as a consumer may have several PIN debit/credit cards, a mobile phone holder may use one mobile phone and choose between the bank accounts used for specific payments), do you think that such a structure would be possible in your jurisdiction?*

Such a structure could be possible, however, the legal obstacles discussed in Answer 4 above would exist with regard to it. In our opinion in this scenario legal and technical guarantees need to be introduced, among others, in order to ensure that the different accounts are clearly identified and separated one from another when being indebted through electronic payment instruments.

Data protection

9. *Does your legislation provide for any requirements as to security of data transfer when mobile phones are used for making payments? If yes, please briefly describe such requirements.*

Bulgarian legislation does not contain specific rules for data transfer when mobile phones are used for performing payments. In our opinion, the following regulations would apply respectively:

- the provisions of the Data Protection Act;
- the bank secrecy rules set out in the Credit Institutions Act; and
- the provisions for security and confidentiality of electronic messages contained in the Electronic Communications Act.

Mobile payment by e-money

10. *Does your legislation recognise the concept of e-money, as defined in the introduction of the survey, or similar? What are the legal limitations of e-money payments (eg, amount of money transferred in one transaction, per day) and requirements for entities issuing e-money (eg, licence by an administrative body, notification to such body, minimal value of share capital). Please describe briefly other elements of legal framework for using e-money.*

Bulgarian legislation recognises the concept of e-money as defined in the introduction of the present survey. According to the Electronic Payment Instruments Act instruments for e-money may be issued by two groups of entities: banks (commercial banks, branches of foreign banks whose licenses encompass issuance of electronic payment instruments, as well as the Bulgarian National Bank) and e-money institutions. The latter represent non-banking financial institutions regulated by the Credit Institutions Act.

An e-money institution may be established only as a joint stock company with a minimum share capital of BGN 2,000,000. In order to have the right to carry on their activities e-money institutions need a licence from the Bulgarian National Bank. In general, the Bulgarian National Bank follows the same licensing and supervision procedures as those established for banks, unless otherwise specified in the law. E-money institutions have a limited scope of activities – they can only carry on issuance of e-money and, on an ancillary basis, the financial activities related thereto.

Legal limitation of e-money payments is provided for in Regulation No 16 which sets out that the maximum value which can be stored on a single electronic payment instrument is BGN 300.

11. *Does your legislation provide that a mobile phone may be recognised as an e-money payment instrument?*

Bulgarian legislation does not contain explicit provisions specifying whether a mobile phone may be used as an e-money payment instrument. However, the legal definition of an e-money payment instrument is broad enough and could be interpreted to cover mobile phones as well.

12. *If there is no possibility of using a mobile phone as an e-money payment instrument or there are some legal difficulties in application of m-payments solutions within e-money, please indicate the main legal obstacles.*

The legal obstacles specified in Answer 4 above would be applicable to the use of mobile phones as an e-money payment instrument.

Open question

13. *Please provide any other comments on the possibility of using a mobile phone as a payment instrument or e-money payment instrument. Feel free to point out any legal issues arising from such use of mobile phones which have not been included in this survey.*

Based on the above answers it could be summarised that the possibility of using a mobile phone as a payment instrument or e-money payment instrument does not have explicit and sufficient regulation in the law. Provisions that currently regulate the functioning of payment instruments other than e-money instruments refer, in practice, only to bank cards (credit and debit cards)

Therefore, although the law allows the existence of payment instruments, other than bank cards and e-money instruments, it almost does not regulate their functioning. Due to this gap in the law, there might be difficulties in creating m-payment solutions in Bulgaria involving the use of mobile phones as payment instruments, without respective amendments to the existing legislation. At the same time, the need to transpose the EU Payment Services Directive in Bulgaria as from 1 November 2009 creates an excellent opportunity to make necessary amendments to the existing legislation with regard to the possibility of using mobile phones as payment instruments.

Notes

- 1 Under the currency board existing in Bulgaria the Bulgarian Lev is fixed to the Euro at the rate of EUR 1 = BGN1.95583.

Colombia

María Luisa Peña

Peña Rodríguez & Asociados, Bogotá

mpeña@mlpabogados.com

Regulatory issues and payment solutions

1. Please provide a short description of legal acts in your jurisdiction that regulate the following issues related to m-payments (please describe briefly the main ideas of specific acts):

a) *banking activities;*

The Finance System Act issued by Decree 663 of 2 April 1993 (as amended), known as the *Estatuto Orgánico del Sistema Financiero* (EOSF) contains the main regulations on banking activities. It regulates the activity of the banks and other financial institutions, the supervisory bodies and the permitted activities for the banks and other financial institutions, including the possibility of making payments.

In addition, the *Circular Básica Jurídica* or *Circular Externa 007* of 1996 (CBJ) issued by the Banking Superintendence (today Superintendence of Finance) regulates in particular many of the activities of the financial institutions, including the issuance of credit and debit cards.

b) *payment instruments;*

As explained above, the CBJ regulates debit and credit cards.

c) *e-money;*

This matter is not expressly regulated yet by Colombian regulations, except for some aspects of credit and debit cards.

d) *data protection;*

Article 15 of the political constitution is the fundamental regulation on both data protection and bank secrecy. In addition, Law 1266 of 2008 enacted on 30 December 2008 regulates habeas data protection in Colombia (Habeas Data Act). It develops the right of the individuals to know their information contained in data basis and to correct it and update it. In addition, legal regulations on bank secrecy also apply to data protection.

e) *bank secrecy;*

The main regulation in this matter is Article 15 of the political constitution, as explained above. In addition, Articles 61 to 67 of the commercial code or Decree 410 of 1971 provide that the books and records of the merchants are confidential and only can be made known to third parties as indicated in the political constitution and by an order of a competent authority.

f) *telecommunication activities;*

There are several regulations applicable to the telecommunications activities in Colombia most notably: Law 142 of 1994 which regulates in-house public telecommunication services, Law 555 of 2000 that refers to personal telecommunication services and Law 37 of 1993, Decree 741 of 1994 and Decree 555 of 2000 that are the three main regulations on mobile phone services.

g) *any other act that may apply to m-payments.*

Law 527 of 1999 (Electric Commerce Law) recognises electronic documents and regulates the certification entities. In accordance to the law, electronic commerce involves any commercial transaction using electronic messages. It also regulates the digital signature of documents and includes the legal requirements for those signatures.

In addition, Colombian law has allowed local financial institutions to render some services acting through agents, known as 'correspondents' (*corresponsales no bancarios*) as provided for in Decree 2233 of 2006 that permitted banks and commercial finance companies to use correspondents, and Decree 303 of 2007 and Decree 2965 of 2006 that extended such authorisation to other types of entities.

Finally, on 4 December 2008 the Colombian Government issued Decree 4590 of 2008 which regulates the so-called electronic savings accounts (*cuentas de ahorro electrónicas*), which are savings accounts that can be used using cards (both debit and credit), cell phones, ATMs or any other mean

as determined by the parties. These accounts were established in order to promote access to banking services for low income population.

2. *Does your legislation provide for the possibility of issuing and using the following payment instruments:*

a) *debit cards;*

Yes, as explained above.

b) *credit cards;*

Yes.

c) *pre-paid cards;*

Not expressly regulated but they are implemented by the mobile companies.

3. *Please describe the possibility of using a mobile phone as a payment instrument in your jurisdiction.*

Colombian law does not provide for express regulations in connection to using mobile phones as payment instruments. Current regulations imply that any payment instrument must be related to a cash account in a bank (either current or savings accounts). Pre-paid cards issued by the mobile companies currently in place are permitted because they correspond to the provision of minutes to be used in mobiles. Issuing pre-paid cards by non-financial institutions and that do not correspond to either a provision of goods or a rendering of services can be understood as a felony: massive and habitual deposit taking.

4. *If there is no possibility of using a mobile phone as a payment instrument, or if there are some legal difficulties in application of m-payments solutions, please indicate the main legal obstacles.*

If mobile phones used as payment instruments are not related to a cash account in a bank, a new act issued by the Colombian Congress shall be required.

5. *Does your legislation limit categories of entities that may issue payment instruments? If so, could a telecommunication operator issue a mobile phone as payment instrument in your jurisdiction?*

No. However, applicable general rules state that massive and habitual deposit taking can only be developed by financial institutions. Consequently, payment instruments that do not correspond to the provision of goods or the rendering of services directly related to the corporate purpose of the issuer of the instrument is not an authorised activity for any entity different from a financial institution.

Mobile payments

6. *Please describe briefly elements that need to be included in a consumer contract for using a mobile phone as a payment instrument. Please describe briefly rules of liability for issuer and holder of the instrument.*

The agreement for using a mobile phone as payment instrument must be evidenced in writing. The contract shall include the following provisions:

- i. transactions to be made using the mobile phone;
- ii. obligations of the parties;
- iii. term;
- iv. applicable law; and
- v. dispute resolution mechanisms.

In general terms, the holder of a payment instrument is liable for transactions entered into using his/her payment instrument, or using his/her personal identification number (PIN).

The issuer of the instrument is liable in case the instrument cannot be used as payment instrument by the holder for acts different from those qualified as force major.

7. *Is it possible, under your jurisdiction, for a telecommunication operator to provide a mobile phone holder with a loan? In such a scenario, payment is made with use of a mobile phone and, subsequently, the client is charged for the transaction together with an invoice for telecommunication services.*

Providing loans is not an activity authorised only to financial institutions. Hence, telecommunication operators could provide loans to their clients, if permitted within its corporate purpose.

8. *Assuming that it is technically possible to have a mobile phone integrated with multiple accounts in more than one bank (just as a consumer may have several PIN debit/credit cards, a mobile phone holder may use one mobile phone and choose between the bank accounts used for specific payments), do you think that such a structure would be possible in your jurisdiction?*

Yes, current regulations do not limit or restrict this possibility.

Data protection

9. *Does your legislation provide for any requirements as to security of data transfer when mobile phones are used for making payments? If yes, please briefly describe such requirements.*

Yes, Circular Externa 052 of 2007 issued by the Superintendence of Finance and which is part of the CBJ, requires to use FIPS-140-2 (Federal Information Processing Standards) for remote banking, which we understand is not complied for

by most of the mobile devices currently being used in Colombia.

Mobile payment by e-money

10. Does your legislation recognise the concept of e-money, as defined in the introduction of the survey, or similar? What are the legal limitations of e-money payments (eg, amount of money transferred in one transaction, per day) and requirements for entities issuing e-money (eg, licence by an administrative body, notification to such body, minimal value of share capital). Please describe briefly other elements of legal framework for using e-money.

E-money is only regulated in some provisions of CBJ which refer to some aspects of debit and credit

cards always related to cash accounts maintained in banks and other financial institutions. Pre-paid cards are not legally regulated and those already issued always correspond to the sale of minutes by the telecommunication companies. There are not regulations on the entities issuing e-money, but if any of the payment instruments does not correspond to the provision of goods or the rendering of services, the issuer can only be a financial institution.

11. Does your legislation provide that a mobile phone may be recognised as an e-money payment instrument?

No.

Denmark

Claus Bennetsen

ACCURA Advokataktieselskab, Copenhagen

claus.bennetsen@accura.dk

Regulatory issues and payment solutions

1. Please provide a short description of legal acts in your jurisdiction that regulate the following issues related to m-payments (please describe briefly the main ideas of specific acts):

a) banking activities;

The Financial Institutions Act of 4 September 2008 no 897 (with later amendments) is the main regulatory act for financial activities, including banking. It provides rules for establishing and supervising banks, the activities that banks may undertake and allows them to issue e-money as a payment instrument. The Danish FSA supervises compliance with the act. If credit is granted to consumers the Credit Act of 13 June 1990 no 398 (with later amendments) applies, which defines specific requirements to the level of necessary information.

b) payment instruments;

The Payment Instruments Act of 28 March 2008 no 259 regulates the different payment instruments (eg, debit and credit cards, digital codes, digital registered claims and e-money). It also provides rules regarding the safety and the functioning of a dynamic payment system. Moreover, the liability is regulated, as is the criminal sanction for breaching the rules. Prior

legislation regarding payment cards in particular has now been revoked and incorporated in the current Payment Instruments Act, which thereby covers a broader area of payment.

c) e-money;

The Payment Instruments Act contains regulation on e-money which refers to the special chapter dedicated exclusively to this subject in the Financial Institutions Act (chapter 19), which then implements EU Directive 2000/46 into Danish legislation. These rules contain requirements for the establishment of an e-money entity. Rules regarding e-money as a payment instrument are as mentioned above.

d) data protection;

The Act on Processing of Personal Data of 31 May 2000 no 429 (with later amendments) regulates rules of collection and processing of personal data done electronically. The Danish Data Protection Agency supervises compliance with the act.

e) bank secrecy;

Requirements to bank secrecy are regulated in the Financial Institutions Act (chapter 9), which regulates the kind of information that can be distributed amongst financial institutions and for

what purpose. The Act on Processing of Personal Data does also apply in regards of banking activities.

f) telecommunication activities;

The Telecommunication Act of 28 June 2007 no 780 (with later amendments) regulates the telecommunication markets to ensure an open competition for the consumers. It provides rules for the treatment of personal information that telecommunication operators may come across during their activities. The Danish IT and Telecommunication Directorate supervises compliance with the act.

g) any other act that may apply to m-payments.

M-payments are regulated by additional legislation, as are most of the payment instruments. General contract law may apply. The Contract Act of 26 August 1996 no 781 regulates the contractual relationship between parties. It provides rules for when an agreement is legally binding and to what extent. General sectors of the act regulate unreasonable agreements in whole and more specifically in relation to consumers.

Contracts between consumers and professional parties are regulated in the Consumer Contract Act of 9 June 2006 no 451. It protects the private sphere against unwanted business contacts by largely outlawing cold-calling on consumers whether in person or on the phone. The act defines remote sales. M-payment will most frequently be defined as such because the communication between the professional party and the consumer is not physical. Therefore, professional parties are obligated to provide information on the terms of contract, etc. Different rules apply to financial and non-financial services. Moreover, the act provides rules concerning a cancellation right within a timeframe of 14 days. Such obligations may provide additional obligations to the issuer of payment instruments, especially to that of m-payments.

The Sales of Goods Act of 28 March 2003 no 237 (with later amendments) regulates different purchases of goods. It covers almost all types of sales and also m-payments may fall within the act. It provides rules for protection of consumers and it regulates requirements to the goods themselves, warranty, remedies due to lack of performance or quality and the issue of liability.

To some extent the E-commerce Act of 22 April 2002 no 227 may apply to m-payment structures. As the name indicates, the act regards services delivered electronically. It regulates the level of

information that the service provider must present. It supplements the requirements mentioned in the Consumer Contract Act.

M-payments may be subject to the Marketing Act of 21 December 2005 no 1389 (with later amendments) as well. It includes a general clause that requires professional parties to act in respect of good trading practice. Such requirements would especially be relevant in the case of commercials in relation to the level of information provided. The consumers are thereby to be ensured a transparent and objective basis to base their decisions upon.

The Money Laundering Act of 11 May 2007 no 442 (with later amendments) may to some extent apply to m-payments depending on the characteristics of the transaction. The act regulates payment made by debit/credit cards, e-money, mobile phones or other digital equipment, etc. Certain criteria determine in whether transactions are subject to the act or not. The required level of information is stated in EU Regulation 1781/2006. This information is to prevent money laundering and financing of terrorism.

The majority of the above-listed legislation is based on EU regulation.

2. Does your legislation provide for the possibility of issuing and using the following payment instruments:

The Payment Instruments Act provides the possibility of issuing and using cash, debit and credit cards as payment instruments. Cash cards are defined as an electronic savings account, where no payment or transactions can be made from the card. The use is limited to ATMs operated by the issuing financial institution. The Payment Instruments Act only applies partially to cash cards.

a) debit cards;

Debit cards are linked to an account of the depositor. Transactions and payments can be made and are usually debited the following day. Debit cards are issued by financial institutions. The most common debit card in Denmark is the 'Dankort', which is developed by a collaboration of Danish financial institutions. The card is accepted nationwide. It can be combined with a credit facility (eg, Visa).

b) credit cards;

Credit cards give the holder an access to credit limited to an amount and timeframe based on the terms of the agreement. Credit cards may be issued by financial institutions and by non-financial institutions as well (eg, gasoline companies, department stores or malls).

c) *pre-paid cards?*

Pre-paid cards can also be issued. Such cards are defined as payment instruments that are not linked to an account owned by the holder.

3. *Please describe the possibility of using a mobile phone as a payment instrument in your jurisdiction.*

The technological improvements of the mobile phone and especially its alternative use as payment instrument in various ways have made the existing legislation unclear. The legislation originally never foresaw the use of mobile phone as being so distinctive. Therefore, the question remains as to whether m-payments can be subject to existing legislation or whether amendments are necessary.

It is necessary to differentiate between what are means of payments and what are payment instruments. The former is defined as notes, coins, pre-paid cards or in most cases a deposit account. These means of payment need no infrastructure to convey transactions between parties.

Payments instruments on the other hand do not themselves represent an economic value, but are merely a form of infrastructure making the payment possible, thereby working as an access key for the account holder. Many different forms of payment instruments are represented in Denmark (eg, cheques, paying-in forms, payment services). The following focuses on payment instruments regulated by the Payment Instruments Act, and whether this legislation can be applied to mobile phones in regard to m-payments.

It distinguishes among four overall categories of payment instruments, these being:

- i) cash and credit cards;
- ii) other physical forms of identification (eg, electronic transponders, multiplication cards or SIM-cards);
- iii) code based systems with identification (eg, online banking, online stores, digital signature or mobile phone codes with the object of payment); and
- iv) electronically registered claims (eg, stored in chips which are placed in cards, computers, watches or mobile phones – the so-called micro payment systems).

Neither of these categories clearly ascribes mobile phones as being a payment instrument, although there seems to be no doubt that they can be treated as such.

The technological possibilities of a mobile phone seem to be endless, and accordingly it may fall within more than one category. It has the technology to work as a credit card

through software where the user confirms the purchase with a PIN-code, as an online unit fully comparable to a computer, as a payment instrument via SMS or as a micro payment instrument with the use of a chip. The different methods depend on the technology within the mobile phones which are different from model to model. A legal classification of mobile phones may therefore be necessary in order to ensure the use of legislation. On the other hand, the four categories do not explicitly state what kind of payment instrument is subject to the act or not. The wording is kept in general terms, whereas the scope of the act may be developed through case law and interpretation as the technology progresses.

As the definitions of payment instruments in the act are held in general terms regulating commonly known technologies, it seems, however, that newly discovered payment instruments may be included as well, making additional legislation unnecessary.

4. *If there is no possibility of using a mobile phone as a payment instrument, or if there are some legal difficulties in application of m-payments solutions, please indicate the main legal obstacles.*

Existing and commonly known payment instruments may work within the same legal framework as that of m-payments, as pointed out in Answer 3. In the Danish Parliament draft legislation (L119) has recently been put forward for a new Payment Services Act which will regulate a broader variety of payment instruments than the existing Payment Instruments Act. The Payment Instruments Act is to be revoked if the Parliament gives the draft its approval. The draft includes the same liability and responsibility rules as known from the Payment Instruments Act (more in Answer 6).

The Payment Services Act proposal is rooted in the broad protection of consumers. Previously unregulated payment services such as credit transfers from one account to another, money wires, withdrawal and deposits will now be subject to this legislation. The payment instruments known from the existing act will also be included in the draft. Moreover, the draft also implements EU Directive 2007/64 regarding Payment Services within the Internal Market. It is to be implemented in Denmark by 1 November 2009, which coincides with the proposed act coming into force, provided that it is approved.

Thus in the near future all different kinds of payment services are to be regulated by the same

act, ensuring a single legal framework that will also cover m-payments. The EU harmonisation of the legislation will make it easier for national as well as foreign regulators to deal with the future aspects of m-payments, because they will likely be of a cross-border nature. Furthermore, the proposed legislation will also make it more certain whether m-payments are regulated by law or not.

5. *Does your legislation limit categories of entities that may issue payment instruments? If so, could a telecommunication operator issue a mobile phone as payment instrument in your jurisdiction?*

Issuers of payment instruments who are regulated by the Payment Instruments Act are obligated to report such a system to the Director-General of Fair Trading. Thereby, the Director-General can supervise the different systems and ensure their legal compliance. The Payment Instruments Acts states no maximum entities that may issue a payment instrument.

The Financial Institutions Act states that entities which issue e-money may not perform other financial activities that are not related to that of e-money. For instances, it is not possible for such an entity to grant out credit facilities. E-money issuers are thereby limited from establishing additional types of payment instruments.

Mobile payments

6. *Please describe briefly elements that need to be included in a consumer contract for using a mobile phone as a payment instrument. Please describe briefly rules of liability for issuer and holder of the instrument.*

There are no requirements to the form of contract in Danish contract law. M-payments are defined as being remote in the sense of parties not communicating physically and subject to that definition the Consumer Contract Act applies. It regulates the information requirements specific to financial and non-financial services. Financial services are defined as banking, credit, individual pension, investment or payment services. M-payments are presumably covered by the latter definition. (Please note that the same legislation is relevant to SMS-loans).

The issue refers to whether terms of contract are legally binding or not when an agreement is made via mobile phones, most likely in the form of SMS. The act states that all required information needs to be accessible to consumers on paper or on a durable medium, prior to the contract. The Director-General of Fair Trading does not define SMS as a durable medium although it may be

technically possible to provide information in the same manner to that of the computer. References to secure web-pages or emails in the SMS seem to solve such issue. The information can be provided after the contract if the initial contact is made by the consumer.

The Consumer Contract Act exempts the requirement of information stored on a durable medium if the service is delivered all at once, the payment is made to the service provider (telecommunication operator), the price is no higher than DKK75 (€10) and if the consumer is aware of the price and his right to cancellation. This exemption is frequently used by especially TV shows.

The requirement of information is to make the consumer capable of using the payment instrument in a safe and appropriate manner. The level of detailing of this information is not explicitly stated in the Instrument Payments Act, but varies with different kinds of payment methods. For instance, if the payment instrument has a credit facility attached to it, the information requirement is accompanied by the Credit Act or if the contract is remote, it is accompanied by the Consumer Contract Act.

The Payment Instruments Act regulates the rules of liability. The issuer is liable for losses due to unjustified use of a holder's payment instrument. The holder is liable for DKK1.200 (€150) if the personal identification code has been used. This limit is raised to DKK 8.000 (€1.050) if the holder has acted negligently. If the holder has provided the identification code to the person who executed the unjustified transaction, the limitation of liability will not apply. Current legislation regulates the above-mentioned payment instruments, which mobile phones may likely be regulated by. In the proposed Payments Service Act the liability rules are very similar (see Answers 3 and 4).

7. *Is it possible, under your jurisdiction, for a telecommunication operator to provide the mobile phone holder with a loan? In such a scenario, payment is made with use of mobile phone and, subsequently, the client is charged for the transaction together with an invoice for telecommunication services.*

It is possible for telecommunication operators to provide consumers with a loan; the so called SMS-loan. Most frequently the telecommunication operators only establish the technological connection to the provider of the loan. If loans are within a three-month timeframe and do not exceed DKK1.500 (EUR€200) the Credit Act does not apply.

The SMS-loans have recently received great attention in the Danish media in regard to high annual costs and lack of transparency. Therefore, the Director-General of Fair Trading, in collaboration with the relevant trade association prepared guidelines for short term loans that are not regulated. These guidelines require compliance with good trading practice, information regarding interest, payments and a total annual cost reference noted in per cent. Moreover, the credit issuer must provide a satisfying evaluation of the consumer's credit rating. The guidelines are in effect from 1 March 2009.

Given that SMS-loans are most frequently based on technical communication between the professional part and the consumer (no physical communication is present), the Consumer Contract Act and its information requirements apply. Please see Answer 6 for additional information.

It has furthermore been discussed whether SMS-loans should be locked to a maximum percentage of the total annual costs. Such measures are thought of due to sky high percentages in the three digits range. No regulation has been put into place as yet.

8. *Assuming that it is technically possible to have a mobile phone integrated with multiple accounts in more than one bank (just as a consumer may have several PIN debit/credit cards, a mobile phone holder may use one mobile phone and choose between the bank accounts used for specific payments), do you think that such a structure would be possible in your jurisdiction?*

Such a possibility seems most likely if an application is stored on the mobile device, thereby giving the consumer freedom to choose from different accounts when a payment is made. Traditionally, online banking systems for computers where the user uses an identification code are regulated by the Payment Instruments Act. Given that software for the mobile phones is considered as being the same, it may be regulated by the act as well.

Data protection

9. *Does your legislation provide for any requirements as to security of data transfer when mobile phones are used for making payments? If yes, please briefly describe such requirements.*

There is no specific regulation for data transfer when using mobile phones. The Payment Act regulates many different types of payments, including e-money and micro payment systems. The purpose of the Payment Instrument Act is to ensure the safety of the consumers when using

different payment systems which indicates an extensive scope, thus are m-payments most likely to be covered as well.

The payment system has to insure consumers with transparency, voluntariness and protection against abuse. These requirements are stated as a general provision which makes certain that the proper legal measurements are taking along with technological improvements in order to uphold a well functioning payment system. Moreover, the Act on Processing of Personal Data Administration applies, protecting the privacy of the consumers. In the narrow aspect of banking activities, the specific requirements in the Financial Institutions Act apply. These rules regard the activities themselves, thus making it applicable to all sorts of devices capable of performing transactions, payments etcetera.

Mobile payment by e-money

10. *Does your legislation recognise the concept of e-money, as defined in the introduction of the survey, or similar? What are the legal limitations of e-money payments (eg, amount of money transferred in one transaction, per day) and requirements for entities issuing e-money (eg, licence by an administrative body, notification to such body, minimal value of share capital). Please describe briefly other elements of legal framework for using e-money.*

Danish legislation recognises the concept of e-money and EU Directive 2000/46 has been implemented in the Banking Act (part 19). E-money payment instruments may only be issued by non-financial institutions and financial institutions that have the status of e-money institutions. The establishment of such an e-money institution requires an authorisation issued by the Danish FSA. E-money institutions applying for an authorisation must have a minimum share capital of €1,000,000 or the DKK equivalent.

If an e-money instrument has a mechanism that limits the amount to €150, the above requirements do not apply to that e-money institution.

Moreover, the e-money institution must not have a total of outstanding e-money that exceeds €6,000,000, or the e-money must only apply as payment between group related companies or between few entities that can be identified through financial or business relations. Such e-money institutions are required to state their financial activities to the Danish FSA on an annual basis.

E-money institutions may not issue e-money with a value of more than €300. Nor may the e-money institution hold capital shares in other entities.

Throughout the validity period and one year after its expiration the holder of the e-money can request the issuer to redeem the amount into coins and notes, if it is clearly stated in the agreement.

11. Does your legislation provide that a mobile phone may be recognised as an e-money payment instrument?

In our opinion there are no problems with using a mobile phone as an e-money payment instrument. The definition of e-money is rather broad. E-money is to be considered as an electronic replacement of notes and coins which are then stored on an electronic medium. Such a medium would most obviously be a computer, but there are no restrictions regarding the use of mobile phones or other media for that matter. In many cases a mobile phone is the equivalent to a computer in that it too can attain access to e-money.

12. If there is no possibility of using a mobile phone as an e-money payment instrument or there are some legal difficulties in application of m-payments solutions within e-money, please indicate the main legal obstacles.

There seems to be no legal obstacles to overcome in order to use the mobile phone as an e-money payment instrument. E-money is stored on a digital medium which may very well be a mobile phone. Such situation does not differ from when e-money is stored on computers or in a watch for that matter.

Open question

13. Please provide any other comments on the possibility of using a mobile phone as a payment instrument or e-money payment instrument. Feel free to point out any legal issues arising from such use of mobile phones which have not been included in this survey.

The Danish Eastern High Court (*Østre Landsret*) has recently ruled on the question if consumers bear the right to have issued e-money redeemed into real money when a third party is involved.

A Danish consumer purchased intangible goods via the internet from a trusted seller. This purchase was made using his credit card (Visa) as payment to PayPal, which then issued e-money equivalent to the debited amount. PayPal is used as an intermediary to increase the safety of both parties. This ensures no direct flow of sensitive information between buyer and seller. PayPal then transferred the e-money to the seller, but the consumer never received his goods. Instead his e-money was lost.

The dispute was between the consumer and the bank which made the transaction to PayPal. The

consumer wanted the bank to perform a charge-back, which the bank denied. The Director-General of Fair Trading had recently given guidelines on the subject, but only in respect of payments made with debit or credit cards. This payment was initially made by credit card, but the final transaction was made with e-money. The court stated that since the initial payment occurred as it should, by the consumer receiving his e-money, which he then passed on to the seller, the bank was in its right not to perform a charge-back. The situation would have been opposite, had the consumer not received his e-money. Thus in conclusion, what the e-money is used for does not concern the bank accordingly. PayPal could not be held accountable as they clearly state in their terms of contract that they are not liable for the purchase of intangible goods and the seller was to deliver some computer games for downloading.

The ruling regarded payment with the use of a computer, but it seems that it has no different precedent if payment had come from a mobile phone or from a third type of medium. Many consumers are therefore not protected when purchasing products via the internet with e-money. This shows that some challenges await the regulating of payment to make it coherent with other commonly known payment methods.

Finland

Tuomas Tikkanen

Hammarström Puhakka Partners, Attorneys Ltd, Helsinki
tuomas.tikkanen@hpplaw.fi

Björn Nykvist

Hammarström Puhakka Partners, Attorneys Ltd, Helsinki
bjorn.nykvist@hpplaw.fi

Regulatory issues and payment solutions

1. Please provide a short description of legal acts in your jurisdiction that regulate the following issues related to m-payments (please describe briefly the main ideas of specific acts):

a) *banking activities;*

Generally, the banking activities in Finland are mainly regulated by the provisions of the Finnish Act on Credit Institutions (121/2007, as amended) (the Act on Credit Institutions) and the Finnish Act on Investment Service Firms (922/2007) (the Act on Investment Service Firms). The Act on Credit Institutions includes provisions on credit institution activities and so-called limited credit institution activities. The Act on Investment Service Firms regulates the offering of investment services. In addition, certain other acts (stipulating, inter alia, issues relating to the legal identity of the relevant credit institution, granting of real estate loans and issuance of bonds secured by real property pledges as well as protection of deposits) are also of importance.

b) *payment instruments;*

Payment instruments are regulated by several Acts, including but not limited to the Finnish Act on Promissory Notes (622/1947, as amended) (the Act on Promissory Notes), the Finnish Act on Bills (242/1932, as amended), the Finnish Act on Checks (244/1932, as amended) and the Finnish Act on Bank Account Transfers (821/1999, as amended).

c) *e-money;*

The issuance of e-money and related activities are generally regulated by the provisions of the Act on Credit Institutions. In addition, the rights and obligations of the parties of e-money transactions towards each other and *ultra vires* are regulated by, inter alia, the provisions of the Act on Promissory Notes, the Finnish Contracts Act (228/1929, as amended) (the Contracts Act)

and, should the counterparty of the relevant transaction qualify as a consumer, the Finnish Consumer Protection Act (38/1978, as amended) (the Consumer Protection Act).

d) *data protection;*

The provisions of the Finnish Personal Data Act (523/1999, as amended) (the Personal Data Act) set forth the general rules on the processing of personal data. In addition, the provisions of the Finnish Act on the Protection of Privacy in Electronic Communications (516/2004, as amended) (the Act on the Protection of Privacy in Electronic Communications) are applicable to electronic communications.

e) *bank secrecy;*

The bank secrecy issues are regulated by the provisions of the Act on Credit Institutions. According to the general rule, anyone who has, as a director, officer or employee of a credit institution or a related entity or undertaking obtained information on the financial position or private personal circumstances or a trade or business secret of a customer, shall be liable to keep it confidential unless the person to whose benefit the secrecy obligation has been provided consents to its disclosure. Notwithstanding the above, the rights of certain officials (including, inter alia, tax, police, prosecutor and recovery officials) to obtain information from credit institutions prevails over the above-referred bank secrecy obligation in certain circumstances.

f) *telecommunication activities;*

Telecommunication activities are generally regulated by the provisions of the Finnish Communications Market Act (393/2003) setting forth the rules on markets of network services, communications services and related services.

g) *any other act that may apply to m-payments.*

There are generally no other acts in Finland

regulating m-payments. However, it should be noted that the standards and interpretations of the Finnish Financial Supervisory Authority (the FSA) (relating, in particular, to the authorisation required by financial institutions for their activities) and other relevant authorities are also of importance.

2. *Does your legislation provide for the possibility of issuing and using the following payment instruments:*

a) *debit cards;*

Yes, debit cards may be issued and used in Finland. The provisions of the Act on Credit Institutions provide the legal framework for such activities which are subject to the authorisation of the FSA.

b) *credit cards;*

Yes, credit cards may be issued and used in Finland. The provisions of the Act on Credit Institutions provide the legal framework for such activities which are subject to the authorisation of the FSA.

c) *pre-paid cards?*

Yes, pre-paid cards may be issued and used in Finland. However, kindly note that the question whether the issuance of a pre-paid card is subject to the authorisation of the FSA (based on the provisions of the Act on Credit Institutions) is currently unclear. There is no relevant case law on the matter. The FSA has not directly taken any stand on pre-paid cards either.

3. *Please describe the possibility of using a mobile phone as a payment instrument in your jurisdiction.*

In Finland, there are no acts or regulations applying specifically to mobile phones as payment instruments. However, the provisions of the Act on Promissory Notes, the Contracts Act and the Consumer Protection Act (should the counterparty of the relevant transaction qualify as a consumer) and the other relevant acts and general principles of law apply to mobile phone payments also. Therefore, there is basically no obstacle for a payment receiver to allow the payer to make the payment using a mobile phone.

4. *If there is no possibility of using a mobile phone as a payment instrument, or if there are some legal difficulties in application of m-payments solutions, please indicate the main legal obstacles.*

Generally, there are no obstacles for using a mobile phone as a payment instrument.

5. *Does your legislation limit categories of entities that may issue payment instruments? If so, could a*

telecommunication operator issue a mobile phone as payment instrument in your jurisdiction?

As indicated above, basically any payment instrument agreed upon between the payer and the payment receiver (subject to the requirements possibly deriving from the Consumer Protection Act) may be used. However, it should be noted that if the mobile phone payment is based on the funds previously received by the telecommunication operator from the payer, such arrangement as a whole will likely qualify as a general payment transmission which requires the authorisation of the FSA. As regards the possibility that the mobile phone payment is based on a loan/credit granted by the telecommunication operator to the payer, please see Answer 7.

Mobile payments

6. *Please describe briefly elements that need to be included in a consumer contract for using a mobile phone as a payment instrument. Please describe briefly rules of liability for issuer and holder of the instrument.*

Under Finnish law, there are no specific requirements regarding a consumer contract for using a mobile phone as a payment instrument. However, the mandatory provisions of the Consumer Protection Act are applicable to such agreement and set forth the requirements for the payment services offered. In particular, should the service provider or a third party (such as a credit institution) offer loan/credit to the payer, the provisions of the Consumer Protection Act on consumer credits shall be applied. According to such provisions, an agreement on consumer credits must be made in writing and a counterpart of the agreement handed over to the consumer. In addition, the following items need to be included in the agreement:

- 1) the amount or limit of the credit, if any;
- 2) the payments, interest and other credit costs relating to the granting and use of the credit;
- 3) the due date of the credit or, if the credit is to be paid in instalments, the amount and due date of each instalment or the other repayment conditions;
- 4) the credit price, any down payment and the cash price if the agreement relates to a goods-or-services-related credit;
- 5) other terms of the agreement;
- 6) the right, based on the relevant provision of the act, to pay the credit before maturity and the determination of the compensation therefore, if any; and
- 7) the annual percentage rate of charge.

Moreover, under the Consumer Protection Act, a consumer who has the right to use a running credit shall be liable for the unauthorised use of a credit card or other means of identification providing the right to use a running account only if:

- 1) he/she has given the means of identification to another;
- 2) the passing of the means of identification into the possession of an unauthorised person is due to the negligence of the account holder and this negligence is not slight; or
- 3) after having lost possession of the means of identification in a manner other than that referred to in above subparagraph 2) and after having become aware of the same, the account holder has neglected to notify the creditor without delay.

However, the account holder shall not be liable for the unauthorised use of the means of identification in the cases referred to in the above paragraph if:

- 1) the means of identification is used after the creditor is notified that the means of identification has been lost or is in the possession of an unauthorised person; or
- 2) the seller or the party performing the service or a person who has accepted the means of identification as the representative of them has not been sufficiently careful in ensuring that the person in possession of the means of identification has the right to use such means.

7. *Is it possible, under your jurisdiction, for a telecommunication operator to provide the mobile phone holder with a loan? In such a scenario, payment is made with use of mobile phone and, subsequently, the client is charged for the transaction together with an invoice for telecommunication services.*

Yes, please see the Answer 6 with respect to the requirements of providing consumer credits.

8. *Assuming that it is technically possible to have a mobile phone integrated with multiple accounts in more than one bank (just as a consumer may have several PIN debit/credit cards, a mobile phone holder may use one mobile phone and choose between the bank accounts used for specific payments), do you think that such a structure would be possible in your jurisdiction?*

Basically, yes. However, we are not aware of actual solutions based on such technology or the view that the FSA and other relevant authorities would have on such solutions. Therefore, the feasibility of the individual contemplated structure should be carefully evaluated and discussed with the relevant officials beforehand.

Data protection

9. *Does your legislation provide for any requirements as to security of data transfer when mobile phones are used for making payments? If yes, please briefly describe such requirements.*

Under Finnish law, there are no specific requirements as to security of data transfer when mobile phones are used for making payments. However, the general requirements regarding processing of data, bank secrecy and electronic communications apply to mobile phone based payment systems also. In general, the provider of the service needs to treat all the relevant data confidential and take appropriate actions to guarantee the information security.

Mobile payment by e-money

10. *Does your legislation recognise the concept of e-money, as defined in the introduction of the survey, or similar? What are the legal limitations of e-money payments (eg, amount of money transferred in one transaction, per day) and requirements for entities issuing e-money (eg, licence by an administrative body, notification to such body, minimal value of share capital). Please describe briefly other elements of legal framework for using e-money.*

A definition of e-money based on the Directive 2000/46/EC is included in the Act on Credit Institutions. Under this Act, issuance of e-money is regarded either as 'credit institution activity' or 'limited credit institution activity'. Should (i) the e-money qualify as payment instrument only in companies belonging to a same consolidated group of companies as the issuer; or (ii) the funds received from clients during the previous financial year not exceed the aggregate of 5 MEUR on the average and 6 MEUR in any circumstances whatsoever, the activity is regarded as limited credit institution activity. Otherwise the issuance of e-money is regarded as credit institution activity.

The fundamental difference between credit institution activities and limited credit institution activities is that the former is subject to the authorisation of the FSA whereas the latter requires that only a notification is made to the FSA. In addition, the minimum capital requirements set forth in the Act on Credit Institutions (5 MEUR or 1 MEUR depending on the type of the relevant credit institution) apply to credit institutions only.

11. *Does your legislation provide that a mobile phone may be recognised as an e-money payment instrument?*

Yes, under the Act on Credit Institutions, basically any electronic device may be regarded as an e-money payment instrument.

12. *If there is no possibility of using a mobile phone as an e-money payment instrument or there are some legal difficulties in application of m-payments solutions within e-money, please indicate the main legal obstacles.*

Please see the Answers 10 and 11.

Open question

13. *Please provide any other comments on the possibility of using a mobile phone as a payment instrument or e-money payment instrument. Feel free to point out any legal issues arising from such use of mobile phones which have not been included in this survey.*

In Finland, only a few solutions based on mobile phone payments have been introduced so far. Moreover, according to the information received

by us, all such solutions have been based on the arrangement where the payment is made with use of a mobile phone and, subsequently, the telecommunication operator charges the payer for the relevant transaction together with an invoice for telecommunication services. Although it may be stated that the e-money concept and e-money solutions based on the relevant acts and regulations are already somewhat familiar in Finland, there is no relevant practice of the competent authorities on m-payment solutions based on traditional money (as referred to in this survey). Therefore, the feasibility of each such solution should be evaluated and discussed with the relevant officials separately and beforehand.

Hungary

Judit Budai

Szecskey Attorneys at Law, Budapest
judit.budai@szecskey.com

David Kerpel

Szecskey Attorneys at Law, Budapest
david.kerpel@szecskey.com

Regulatory issues and payment solutions

1. *Please provide a short description of legal acts in your jurisdiction that regulate the following issues related to m-payments (please describe briefly the main ideas of specific acts):*

a) *banking activities;*

Banking activities, including the issuance of cash substitute payment instruments are regulated by Act CXII of 1996 on Credit Institutions and Financial Services (Bank Act), which mainly deals with licensing, operation and supervision of financial institutions.

b) *payment instruments;*

Payment instruments are defined by the Bank Act, and are mainly regulated by Government Decree 227/2006 on Money Transmission Services and Electronic Payment Instruments (Payment Instruments Decree), and Hungarian Central Bank Decree 21/2006 on Money Transmission Transactions (Money Transmission Decree).

c) *e-money;*

The notion of 'electronic money' (along with 'electronic money instrument' and 'cash-substitute payment instrument') is defined by the Bank Act, and its issuance and use is regulated by the Payment Instruments Decree.

d) *data protection;*

Data protection is mainly regulated by Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Information of Public Interest (Personal Data Act), containing provisions on the rules of collecting and processing personal data.

e) *bank secrecy;*

Bank secrecy is defined and regulated also by the Bank Act, including the stipulation of cases in which bank secrets can be disclosed to third parties.

f) *telecommunication activities;*

The main act governing telecommunication activities is Act C of 2003 on Electronic

Communications (Electronic Communications Act)

g) *any other act that may apply to m-payments.*

Act IV of 1959 on the civil code of Hungary (civil code) regarding the general provisions on civil matters and liability.

2. *Does your legislation provide for the possibility of issuing and using the following payment instruments:*

a) *debit cards;*

b) *credit cards;*

Yes. According to the Bank Act, debit and credit cards are to be regarded as a cash substitute payment. Cash substitute payment instruments may only be issued by credit institutions (such as banks, specialised or cooperative credit institutions).

c) *pre-paid cards?*

Pre-paid cards are not specifically regulated, and they are not deemed to be cash substitute payment instruments, since they do not serve to provide access to a holders' account; therefore their issuance does not require the involvement of a credit institution.

3. *Please describe the possibility of using a mobile phone as a payment instrument in your jurisdiction.*

The possibility of using mobile phones as m-payment solutions in Hungary is not expressly regulated in the laws of Hungary, and according to the following rules of the Bank Act it is not excluded.

According to the Bank Act there are three

types of cash substitute payment instruments:

(i) cheques; (ii) electronic money instruments;

(iii) any other device that enables its holder to access his/her account at a financial institution, withdraw cash from such account and to effect payment from such account to a payee for goods or services. According to the Bank Act, electronic money instruments are cash-substitute payment instruments, including primarily a stored-value card or a computer memory on which value units are stored electronically, enabling its holder to effect payment transactions directly. On the basis of the above definitions, it can not be excluded that these categories could cover mobile phones, since electronic money instruments can take the form of any kind of computer memory, and not just the form of a card. In principle a smartcard which would be inserted into the mobile phone, could qualify as computer memory.

It is also possible that a mobile phone could fall into category (iii), of the above specified cash substitute payment instruments, if the m-payment technology satisfies the above criteria, and the holder is able to

access his/her account via the mobile phone.

4. *If there is no possibility of using a mobile phone as a payment instrument, or if there are some legal difficulties in application of m-payments solutions, please indicate the main legal obstacles.*

From a technical point of view we are not aware of any legal concerns as to why a mobile phone could not be equipped with a smartcard (computer memory), thereby enabling it to effectuate payments. However, please be advised that only credit institutions are entitled to issue cash substitute payment instruments (eg, an electronic payment instrument), therefore the merger of mobile phones and payment instruments must be carried out in cooperation with a credit institution that can activate a smartcard, which may be placed into a mobile phone, as an electronic payment instrument.

5. *Does your legislation limit categories of entities that may issue payment instruments? If so, could a telecommunication operator issue a mobile phone as payment instrument in your jurisdiction?*

Yes. According to the Bank Act only credit institutions (banks, specialised or cooperative credit institutions) are entitled to issue cash-substitute payment instruments and provide the related services. Telecommunication operators are only entitled to issue pre-paid cards if they do not serve to access an account, but for a pre-payment for a telecommunication service (such as a phone card).

Mobile payments

6. *Please describe briefly elements that need to be included in a consumer contract for using a mobile phone as a payment instrument. Please describe briefly rules of liability for issuer and holder of the instrument.*

In our view and based on Answers 4 and 5, a consumer contract for using a mobile phone as a payment instrument would be concluded with the credit institution.

According to the Payment Instruments Decree, the contract for the issuance of an electronic payment instrument shall include mandatory elements such as (i) a description of the electronic payment instrument; (ii) information on whether the holder needs to have certain technical equipment (and its description) in order to use the electronic payment instrument;¹ (iii) the period within which, following payment, the client's account will be debited or credited; (iv) the respective obligations and liabilities of the issuer and of the client (holder); (v) method of processing of any complaint the client (holder) may have; (vi) the method of determining the exchange rate to be applied when converting foreign currency

into the currency of the bank account; (vii) any interest, commission, fees or charges payable, including annual charges; (viii) the formula for the calculation of interest relating to the bank account; (ix) the obligation of the issuer to provide information on transactions executed with the electronic payment instrument.²

The holder of a payment instrument is obliged to notify the issuer if (i) the electronic payment instrument is no longer in his possession; or if (ii) a third party becomes aware of personal information necessary for the use of the payment instrument; or (iii) if he becomes aware that the payment instrument is being used fraudulently.

In general the holder is liable for damages arising from theft or loss of the payment instrument up to the time of the notification, and following that the issuer is liable up to the amount of HUF15,000,000. The issuer is liable for other damages arising from the use of the card (such as carrying out a transaction not initiated by the client, faulty or non-performance of transactions).

Since the issuer of the electronic payment instrument is the credit institution the telecommunication operator shall not be held liable for the above mentioned damages.

7. *Is it possible, under your jurisdiction, for a telecommunication operator to provide the mobile phone holder with a loan? In such a scenario, payment is made with use of mobile phone and, subsequently, the client is charged for the transaction together with an invoice for telecommunication services.*

According to the Bank Act, (with certain limited exceptions) only credit institutions may provide loans in general. A telecommunication operator may only permit deferred payments.

8. *Assuming that it is technically possible to have a mobile phone integrated with multiple accounts in more than one bank (just as a consumer may have several PIN debit/credit cards, a mobile phone holder may use one mobile phone and choose between the bank accounts used for specific payments), do you think that such a structure would be possible in your jurisdiction?*

Yes, if it can be assured that the mobile phone is able to handle multiple access to different bank accounts securely, and assuming that the reading terminal is able to differentiate between the different smartcards (computer memories) per issuer banks respectively.

Data protection

9. *Does your legislation provide for any requirements as to security of data transfer when mobile phones are used for making payments? If yes, please briefly describe such requirements.*

Since this is a relatively new method of effectuating payments, there are no special provisions on security of data transfer when making payments via mobile phones, nevertheless the general rules on data management and bank secrecy together with the issuer's policy should apply. Credit institutions shall adopt and employ a strict security policy in connection with the handling of confidential information.

Mobile payment by e-money

10. *Does your legislation recognise the concept of e-money, as defined in the introduction of the survey, or similar? What are the legal limitations of e-money payments (eg, amount of money transferred in one transaction, per day) and requirements for entities issuing e-money (eg, licence by an administrative body, notification to such body, minimal value of share capital). Please describe briefly other elements of legal framework for using e-money.*

Yes, according to the Bank Act, electronic money is defined as monetary value stored on an electronic device issued on receipt of funds – in cash or by transfer from account – that is accepted as means of payment by entities other than the issuer. Since it is stored on an electronic payment instrument (see Answer 3 for definition), it can only be issued and managed by a credit institution.

The establishment and operation of a credit institution established in Hungary is subject to a license by the Hungarian Financial Services Authority (HFSA). To the issuance of cash substitute payment instruments, the preliminary opinion of the Central Bank of Hungary is also necessary to obtain the HFSA operation license. According to the Bank Act, a bank can only be established with a minimum capital of HUF2,000,000,000. (Credit institutions, however, may operate as branches and on a cross border basis.)

11. *Does your legislation provide that a mobile phone may be recognised as an e-money payment instrument?*

As already mentioned in Answer 3, there is no specific legal obstacle of using a mobile phone as an e-money instrument, since an electronic e-money instrument does not necessarily have to be a card, it can also take the form of a computer memory (such as a smartcard placed in a mobile phone).

12. *If there is no possibility of using a mobile phone as an e-money payment instrument or there are some legal difficulties in application of m-payments solutions within e-money, please indicate the main legal obstacles.*

Certain mobile payment solutions (see Answer 13) are currently applied in Hungary, and there are no relevant legal obstacles in connection with their application, however, such solutions may not be deemed real m-payment solutions.

Open question

13. *Please provide any other comments on the possibility of using a mobile phone as a payment instrument or e-money payment instrument. Feel free to point out any legal issues arising from such use of mobile phones which have not been included in this survey.*

Mobile phones are widely used in Hungary as e-money instruments via the SMS system where payment is either debited on the phone bill of the customer or on a separate virtual account, or phones can also be used as payment instruments via a downloadable and installed WAP application through which the customer can have direct access to the bank account.

Notes

1 This description could require the cooperation of the credit institution and a telecommunication operator the SIM card of which is placed in the relevant mobile phone.

2 Section 15 (1) of the Payment Instruments Decree

India

H Jayesh

Juris Corp, Mumbai

h_jayesh@jclcx.com

Regulatory issues and payment solutions

1) *Please provide a short description of legal acts in your jurisdiction that regulate the following issues related to m-payments (please describe briefly the main ideas of specific acts):*

(a) *banking activities:*

The Banking Regulation Act, 1949 (Banking Act) regulates banking activities in India. Furthermore, Section 6(1) of the Banking Act specifies the business, which a bank may carry on.

Under the Banking Act, the Reserve Bank of India (the RBI) has the power to issue directions as regards banking activities generally or as to mobile phones being used as pre-paid instruments. The Banking Act further sets out the powers of the RBI for the purposes of regulating banks in India.

(b) *payment instruments:*

While per se there is no specific legislation dealing with payment instruments, the following is relevant:

- (i) The Payment and Settlement Act, 2007 (the Payment and Settlement Act) and the regulations notified under it provide for the

regulation and supervision of payment systems in India. Under the Payment and Settlement Act, the RBI has the power to inter alia, prescribe the following:

- (A) format of payment instructions and the size and shape of such instructions; and
- (B) the manner of transfer of funds within the payment system, either through paper, electronic means or in any other manner, between banks or between banks or other system participants;
- (ii) The Payment and Settlement Act, also provides for penalties in the event of non-compliance or contravention of its provisions.
- (iii) Guidelines issued by the RBI for debit/smart cards and credit cards (please see 2 below); and
- (iv) draft guidelines on pre-paid instruments.

(c) *e-money:*

There is no legislation on e-money. However the RBI in the Report of the Working Group on E-money¹ (the Report on E-Money) while acknowledging the growing significance of e-money in India, has proposed certain prudential requirements for issuers

of such instruments (please see Answer 10 below for further description).

(d) *data protection;*

There are no specific legislations dealing with data protection. However, the Reserve Bank Guidelines on 'Risks and Controls in Computers and Telecommunications'² (the Risk and Controls Guidelines) sets out certain measures banks need to comply with in order to address/mitigate various risks associated with computer and telecommunication systems. The Risks and Controls Guidelines will also apply to data protection. Certain provisions of the Information Technology Act, 2000 (the Act) are also relevant. We recommend that the service contracts place onus of ensuring adequate protection of data on the issuer of payment instruments. In relation to any dispute on data protection, the courts in India can also apply the principles of common law.

(e) *bank secrecy;*

The Banking Act does not have any specific provisions relating to bank secrecy. However, the common law principles applicable in this regard, have been recognised by Indian courts. Also:

- (i) As per the Code of Bank's Commitment,³ all personal information of customers is required to be treated as private and confidential. Such information or data is not to be revealed by the bank, other than in certain exceptional circumstances (viz, if required under law, pursuant to public duty, with the express consent of the customer, etc).
- (ii) Various guidelines issued by the RBI (in relation to payment instruments as set out in 2 below and more specifically the RBI guidelines on customer service⁴ and mobile banking transactions⁵ (the Mobile Banking Guidelines) have also stated that banks are required to maintain confidentiality of customer data, unless otherwise required to be disclosed under exceptional circumstances.

(f) *telecommunication activities;*

The Indian telecommunications system is governed by the provisions of the Indian Telegraph Act, 1885 and the Indian Wireless Act, 1933. The Telecom Regulatory Authority of India Act, 1997 has established the Telecom Regulatory Authority of India Act (the TRAI) which is a statutory body enacted, inter alia, for the purpose of regulating introduction of new service provider, protecting interest of the consumers of the telecom service providers, etc.

As per TRAI's 'Draft Recommendations on Growth of Value Added Services and Regulatory Issues'⁶

(the Draft Recommendations), value added services involving payment through mobile phones, shall be subject to the RBI guidelines, wherever applicable.

(g) *any other act that may apply to m-payments:*

The Consumer Protection Act, 1986 (the Consumer Protection Act) can apply to payments through mobile phones. The Consumer Protection Act provides for the better protection of the interest of consumers and for that purpose makes provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith. It provides protection to incorporated entities also.

Section 2(d) of the Consumer Protection Act defines the term 'consumer' as follows:

"Consumer" means any person who-

- (i) buys any goods for a consideration which has been paid or promised or partly paid or partly promised... but does not include a person who obtains such goods for resale or *for any commercial purpose*, or
 - (ii) hires or avails of any services⁷ for a consideration which has been paid or promised or partly paid and partly promised, ... but does not include a person who avails of such services *for any commercial purpose* (emphasis supplied).'
- 2) *Does your legislation provide for the possibility of issuing and using the following payment instruments:*
- (a) *debit cards:*
The RBI guidelines on 'Para Banking Operations'⁸ provide the legal framework for issue and usage of debit cards.
 - (b) *credit cards:*
The RBI guidelines on 'Credit Operation of Banks'⁹ provide the legal framework for issue and usage of credit cards.

(c) *pre-paid cards?*

While there is no law governing pre-paid instruments, the RBI has recently come out with draft guidelines on pre-paid instruments¹⁰ (the Draft Guidelines) in order to provide a framework for the regulation and supervision of all entities issuing pre-paid instruments. The Draft Guidelines lay down the eligibility criteria and the basic conditions for issuance of pre-paid instruments in India.

3) *Please describe the possibility of using a mobile phone as a*

payment instrument in your jurisdiction.

Presently different guidelines of the RBI regulate different categories of payment instruments (please see Answer 2 above). Hence, depending on the manner in which the mobile phone will be used as a payment instrument, the appropriate RBI guidelines will apply.

The aforesaid assumes significance in view of the fact that while non-banking financial companies (the NBFCs) can issue credit cards on their own, they cannot issue smart cards/debit cards. Similarly, if mobile phones are intended to be used as pre-paid instruments, then the Draft Guidelines on Pre-paid Instruments are required to be taken into consideration.

In our view therefore, while we do not see any restriction in using mobile phone as a payment instrument, it is essential that there exists sufficient clarity as regards the category of payment instrument, the mobile phone as payment instrument will fall under.

- 4) *If there is no possibility of using a mobile phone as a payment instrument, or if there are some legal difficulties in application of m-payments solutions, please indicate the main legal obstacles.*

It is possible to use a mobile phone as a payment instrument in India (please see Answer 3 above).

However, absence of an appropriate legal framework gives rise to the following ambiguities:

- (a) ability of a non-banking entity to do so;
- (b) the rights and liabilities of the issuer and holder of the payment instrument;
- (c) whether such instruments are multi-purpose in nature;
- (d) extent of KYC required to be conducted on the holder;
- (e) issues relating to safety and efficacy of the payment instrument; and
- (f) investor redressal mechanism.

- 5) *Does your legislation limit categories of entities that may issue payment instruments? If so, could a telecommunication operator issue a mobile phone as payment instrument in your jurisdiction?*

Yes, there are restrictions on categories of entities that may issue payment instruments.

As regards whether a telecommunication operator can use mobile phone as a payment instrument, it may be noted that under the terms of the universal access service license (granted to telecommunication operators for the purpose of providing basic telephone and mobile phone services), telecom operators are allowed to

provide value added services, which as per the Draft Recommendations can also include mobile payments, ie, use of mobile phones to make payments. The Draft Recommendations have clarified that mobile payments will be governed by the RBI guidelines.

However, given the existing RBI guidelines on payment instruments, telecom operators cannot issue mobile phone as a payment instrument, if the same is to be used in the form of credit cards or debit cards. However, as regards mobile phones being used as prepaid instruments, the RBI (in the Draft Guidelines), has stated that pursuant to the Payment and Settlements Act, all non-banking entities (which can include telecommunication operators) are required to obtain permission from the RBI before issuing pre-paid instruments. In order to provide a legal framework for all entities issuing pre-paid instruments, the RBI in its Draft Guidelines has proposed that entities (other than banks and NBFCs) can issue only certain specified pre-paid instruments (which are essentially limited in its use and coverage).

Hence in our view, a telecom operator can presently issue a mobile phone as a payment instrument, subject to prior approval of the RBI under the Payment and Settlements Act. Once the Draft Guidelines come into force, then there will be restrictions on the type of pre-paid mobile instrument that telecommunication operators can issue.

Mobile payments

- 6) *Please describe briefly elements that need to be included in a consumer contract for using a mobile phone as a payment instrument. Please describe briefly rules of liability for issuer and holder of the instrument.*

In our view the following clauses can be incorporated in the consumer contract (the contract) for using mobile phone as a payment instrument:

- (a) representation and undertaking from the issuer as regards continuous compliance with appropriate security measures and technology standards in accordance with applicable laws;
- (b) the transaction limit, frequency of transaction and such other limits as may be set by the issuer as part of the risk mitigation measures, including the various parameters for service charges and expiry period and terms and conditions pertaining to expiration of the instrument;
- (c) undertaking from the issuer that personal information of customers shall not be disclosed, subject to specific carve-outs; and
- (d) the contract should also set out the manner in

which customer complaints will be redressed. There are no specific rules covering rights and liabilities as regards issuer and holder of mobile phone as a payment instrument. It may be noted that as per the RBI guidelines on credit cards and debit cards/smart cards, the rights and liabilities of the issuing banks and their customers are mainly contractual. As per the Draft Guidelines, the prepaid issuers shall disclose all important terms and conditions to the holders in a manner comprehensible to the holders. In our view therefore, issuers of mobile phone payments would generally be required to observe customer confidentiality, data protection and ensure adequate security measures.

- 7) *Is it possible, under your jurisdiction, for a telecommunication operator to provide the mobile phone holder with a loan? In such a scenario, payment is made with use of mobile phone and, subsequently, the client is charged for the transaction together with an invoice for telecommunication services.*

Notionally, yes, because:

- (a) if the telecommunication operator is a foreign owned company, then it will be required to comply with the extant foreign direct investment policies relating to NBFCs in order to provide such services; and
- (b) secondly, if the business of providing loans to holders of mobile phones becomes the principle business of the telecommunication operator (as determined by the balance sheet size of such telecommunication operator), then such telecommunication operator will be deemed to be an NBFC and accordingly require registration as such.

Hence, invariably a telecommunication operator will be required to comply with laws relating to NBFCs and financial intermediaries.

- 8) *Assuming that it is technically possible to have a mobile phone integrated with multiple accounts in more than one bank (just as a consumer may have several PIN debit/credit cards, a mobile phone holder may use one mobile phone and choose between the bank accounts used for specific payments), do you think that such a structure would be possible in your jurisdiction?*

Yes, it is technically possible to have a mobile phone integrated with multiple accounts in more than one bank. As per the long term goals set out in the Mobile Banking Guidelines, a customer should be able to transfer funds from an account in one bank to any other account in the same or any other bank on a real time basis irrespective of the mobile network such customer has subscribed to. This would require interoperability between

mobile banking service providers and banks and development of a host of message formats. The RBI has prescribed message formats like ISO 8583, with suitable modification to address specific needs to facilitate inter-operability between banks and the mobile banking service providers.

Data protection

- 9) *Does your legislation provide for any requirements as to security of data transfer when mobile phones are used for making payments? If yes, please briefly describe such requirements.*

There is no legislation currently in place for security of data transfer, when mobile phones are used for making payments. However, in our view the following may be applicable:

- (a) The Act:

While there is no prescribed security procedure for data transfer, it may be relevant to note that under the Act, the central government is empowered to prescribe security procedure for commercial transactions. The Act also prescribes penalties, inter alia, in the event of any unauthorised access to computer or computer systems.¹¹ Further, certain statutory presumptions accrue when parties have used electronic agreement, secured electronic record and secured digital signatures.

- (b) Risk and Controls Guidelines:

The RBI has set out a framework of risk mitigation measures for banks to put in place, in order to address various risks associated with use of computers and telecommunication systems. Such risk mitigation measures inter alia include having unique user-ids and passwords for data, allowing only authorised data owners to access the data, constant review of computer systems and telecommunications, etc in order to prevent frauds or data theft.

- (c) Draft Guidelines:

The Draft Guidelines states that issuers shall 'put in place adequate information and data security infrastructure, and systems for prevention and detection of frauds'.

Mobile payment by e-money

- 10) *Does your legislation recognise the concept of e-money, as defined in the introduction of the survey, or similar? What are the legal limitations of e-money payments (eg, amount of money transferred in one transaction, per day) and requirements for entities issuing e-money (eg, licence by an administrative body, notification to such body, minimal value of share capital). Please describe briefly other elements of legal framework for using e-money.*

Per se there are no legislations recognising

the concept of e-money in India. The RBI Report on E-Money has inter alia set out certain recommendations for regulating e-money in India:

- (a) Banks should be the preferred issuers of multipurpose e-money.
- (b) Non-banking entities should not issue e-money. However, if non-banking entities are allowed to issue multipurpose e-money, then they should comply with the prudential requirements set out below:
 - (i) Prudential supervision: issuers of electronic money must be subject to prudential supervision;
 - (ii) Solid and transparent legal arrangements: the rights and obligations on the part of the respective participants (customers, merchants, issuers and operators) in an electronic money scheme must be clearly defined and disclosed. Such rights and obligations must be enforceable under all relevant jurisdictions;
 - (iii) Technical security: electronic money schemes must maintain adequate technical, organisational and procedural safeguards to prevent contain and detect threats to the security of the scheme, particularly the threat of counterfeits;
 - (iv) Protection against criminal abuse: protection against criminal abuse, such as money laundering, must be taken into account when designing and implementing electronic money schemes;
 - (v) Monetary statistics reporting: electronic money schemes must supply the central bank with whatever information that may be required for the purposes of monetary policy;
 - (vi) Redeemability: issuers of electronic money must be legally obliged to redeem electronic money against central bank money at par at the request of the holder of electronic money; and
 - (vii) Reserve requirements: the possibility must exist for central banks to impose reserve requirements on all issuers of electronic money.

As regards limitations of e-money transactions, the Draft Guidelines (which in our view also apply to e-money) lay down different transactions amounts that are applicable for different types of prepaid instrument.

11) *Does your legislation provide that a mobile phone may be recognised as an e-money payment instrument?*

No, there is no legislation in India which recognises the mobile phone as an e-money payment instrument.

12) *If there is no possibility of using a mobile phone as an*

e-money payment instrument or there are some legal difficulties in application of m-payments solutions within e-money, please indicate the main legal obstacles.

Multi-purpose e-payment products which are in the nature of pre-funded/pre-paid form can be deemed to be in the nature of demand liabilities. Hence only banks can issue such products. It is therefore doubtful whether telecom operators can issue such products on their own.

Open question

13) *Please provide any other comments on the possibility of using a mobile phone as a payment instrument or e-money payment instrument. Feel free to point out any legal issues arising from such use of mobile phones which have not been included in this survey.*

The Act seeks to provide legal recognition for transaction to be carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as electronic commerce. In our view, the Act will also apply to transactions involving mobile phones as payment instruments.

As per Section 6 of the Act, where any law provides for the receipt or payment of money in a particular manner, then notwithstanding anything contained in any other law in force, such requirement is deemed to be satisfied, if such receipt or payment is affected by means of an electronic form as prescribed by the appropriate government. The appropriate government may prescribe rules for the manner or method of payment and format in which such electronic records are to be created or issued. The Act also includes an amendment to the RBI Act which empowers the RBI to regulate electronic funds transfer among banks and financial institutions.

Notes

- 1 Dated 11 July 2002.
- 2 Circular dated 4th February 1998.
- 3 This is a code which may be adopted by banks. It sets out the minimum standards of banking practices to be followed by banks, while dealing with individual customers.
- 4 Master Circular dated 3 November 2008.
- 5 Circular dated 8 October 2008.
- 6 Dated 14 January 2009.
- 7 'Services' means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.
- 8 Circular dated 1 July 2008
- 9 Master circular dated 1 July 2008
- 10 Draft guidelines placed on the RBI website on 30 January 2009.
- 11 The definition of 'computer' or 'computer system' under the Act is wide enough to cover mobile phones.

Indonesia

Theodoor Bakker

ABNR Counsellors at law, Jakarta
tbakker@abnrlaw.com

Zacky Husein

ABNR Counsellors at law, Jakarta
zhusein@abnrlaw.com

Elsie F Hakim

ABNR Counsellors at law, Jakarta
ehakim@abnrlaw.com

Regulatory issues and payment solutions

1. *Please provide a short description of legal acts in your jurisdiction that regulate the following issues related to m-payments (please describe briefly the main ideas of specific acts):*

a) *banking activities;*

Law No 7 of 1992 as amended by Law No 10 of 1998 regarding Banking, dated 10 November 1998 (Banking Law) is the main legal act regulating banking activities in Indonesia. The Banking Law regulates both conventional and Sharia-based banking. The Banking Law also provides requirements for establishing banks and required licenses, obligations under the license and against the customers, and permitted and prohibited activities of banks. It also establishes penalties in connection with violations of the Banking Law which include warning, fines, disqualifications and revocation of the bank's license to operate as a financial institution.

In addition to the Banking Law, Law No 23 of 1999 as amended by Law No 3 of 2004 and Law No 6 of 2009 regarding Bank Indonesia, dated 13 January 2009 (Law 23/1999) regulates Bank Indonesia (BI), as the central bank of the Republic of Indonesia and the self-regulatory body of banks and their banking activities in Indonesia. Law 23/1999 provides the purposes, powers, functions and primary goals of BI. BI has the primary goal of achieving and maintaining a stable value of the Rupiah. Furthermore, BI has the following tasks: (i) to prescribe and to implement monetary policies, (ii) to regulate and safeguard the efficiency of the payment system, and (iii) to regulate and supervise banks. In line with its mandate to maintain the payment system, issues regarding m-payments would most likely be regulated under a BI Regulation.

a) *payment instruments;*

Bank Indonesia Regulation No 7/52/PBI/2005 as amended by Bank Indonesia Regulation No 10/8/PBI/2008 regarding Operation of Card-Based

Payment Instrument Activities, dated 28 December 2005 (Regulation 7/52) regulates card-based payment instruments as part of BI's task to regulate and safeguard the efficiency of the payment system. Regulation 7/52 authorises BI to grant an approval and a license to the payment system service operator, to require the operator of the payment system service to submit reports on its activities, and to determine the use of payment instruments.

b) *e-money;*

The Rupiah, which is the currency of Indonesia, is the only legal tender in the territory of the Republic of Indonesia. Any activity using money or having a purpose of payment must, if it is conducted in the territory of the Republic of Indonesia and otherwise prescribed by Bank Indonesia Regulation, use the Rupiah currency. There is currently no specific regulation governing e-money in Indonesia. If one is to be enacted, BI should be the originator and Law 23/1999 provides the umbrella legislation for such regulation regarding e-money.

c) *data protection;*

With regard to data retention generated or held by electronic communications service providers, Law No 36 of 1999 regarding Telecommunications, dated 8 September 1999 (Law 36/1999) and Government Regulation No 52 of 2000 regarding Telecommunications Provision, dated 11 July 2000 (GR 52/2000) states that telecommunications services provider is obligated to record in details the use of telecommunications services by telecommunications users. Furthermore, the latter regulation required anyone who works within the telecommunications operation environment to safeguard and protect the facilities and infrastructures of telecommunications and the information channelled through the telecommunications network. With regard to m-payment, it is likely that m-payment user will be using the technology from a telecommunications operator which must abide by Law 36/1999.

d) *bank secrecy;*

The Banking Law provides that a bank is not allowed to disclose information concerning its depositor and their accounts to third parties. Bank secrecy is further regulated by Bank Indonesia Regulation No 2/19/PBI/2000 regarding Requirements and Procedures for Giving an Instruction or Written Permit to Divulge a Bank Secret, dated 7 September 2000 (Regulation 2/19), which states that bank secrecy shall be everything relating to information on depositor and their accounts. In this context, banks are required to maintain the secrecy of information on depositors and their deposits. However, the restrictions under Regulation 2/19 are excluded in connection with (i) taxation; (ii) settlement of bank's receivables which has been transferred to the state receivables agency and auction agency/committee for state receivables; (iii) criminal proceedings; (iv) civil proceedings between the bank and its customer, (v) exchanging information between banks, (vi) a request, consent or authorization from the depositor, which should be made in writing, and (vii) an application by the legal heir of a deceased depositor.

e) *telecommunication activities;*

Telecommunication activities in Indonesia are generally regulated under Law 36/1999. Telecommunication, under Law 36/1999, is defined as: 'every transmission, delivery and/or reception of any information in the form of signs, signals, writings, pictures, voice and sound through cable system, optics, radio, or other electromagnetic systems'. The m-payment technology would likely falls in the category of other electromagnetic systems. Further, during an interview with the officials of the Department of Telecommunication & Information, we were informed that currently in Indonesia, the NFC technology is still uncommon and that the m-payment solution in Indonesia is, at the moment still in a stated of research and development (mostly by telecommunication operators) in terms of technology and the regulations it is still under discussion and being drafted (mainly by BI and relevant department/governmental agency) in terms of legality.

f) *any other act that may apply to m-payments.*

The general rules of contractual arrangement as stipulated in the Indonesian Civil Code (*Kitab Undang-undang Hukum Perdata* or KUHPer) may apply to the contracts entered into for m-payment. Provisions of Law No 8 of 1999 concerning Consumer's Protection, dated 20 April 1999

(Consumer Protection Law) is generally applicable to m-payment users since the Consumer Protection Law serves to promote the dignity of consumers, to enhance awareness, knowledge, care, capability and independence of consumers to protect themselves and nurture a responsible attitude of business agents.

Lastly, Law No 11 of 2008 concerning Electronic Information and Transaction, dated 21 April 2008 (Law 11/2008) might also have some application. The law provides legal certainty for both, information technology users and providers. The contents of electronic information in electronic form, according to Law 11/2008, is lawful to the extent information contained therein is accessible, displayable, assured as to its integrity and accountable. Law 11/2008 also recognises the term of an 'electronic contract', which is defined as an agreement between parties entered into by means of electronic systems, and the term 'electronic signature', which is defined as a signature that contains electronic information that is attached to, associated or linked with other electronic information that is used for means of verification and authentication.

2. *Does your legislation provide for the possibility of issuing and using the following payment instruments:*a) *debit cards;*

Yes, under the legal framework of the Banking Law and Regulation 7/52 on the Operation of Card-Based Payment Instrument Activities.

b) *credit cards;*

The issuance and usage of credit cards is also regulated under the Banking Law. The provisions of Regulation 7/52 also provide specific provisions on the issuance and usage of credit cards.

c) *prepaid cards?*

The issuance and usage of prepaid cards is also set forth on the abovementioned Banking Law and Regulation 7/52.

3. *Please describe the possibility of using a mobile phone as a payment instrument in your jurisdiction.*

Indonesian law does not have any specific regulation which stipulates the usage of mobile phones as a payment instrument. It is our understanding that currently mobile phones only serve as a mean to facilitate payment; mobile phones will be used as a media to send the payment instruction to the authorised Bank, such as the instruction for payment of telephone/electricity

bill or payment of credit card through the short message services (SMS) or also commonly known as mobile banking.

During an interview with BI, we have been informed that the existing regulation does not cover the usage of mobile phone as a payment instrument. The current regulation only covers card-based payment instruments as stipulated in Regulation 7/52. The card-based payment instruments that are regulated under Regulation 7/52 are: (i) credit cards; (ii) automated teller machine (ATM) cards; (iii) debit cards and (iv) prepaid cards.

4. *If there is no possibility of using a mobile phone as a payment instrument, or if there are some legal difficulties in application of m-payments solutions, please indicate the main legal obstacles.*

Notwithstanding the forementioned and much to our surprise, BI has verbally informed us that since Regulation 7/52 authorises them to grant approvals and to issue licenses, BI has the discretion to determine whether or not mobile phones can be considered as a payment instrument under the provisions of Regulation 7/52. They will particularly be looking at some of the common features of mobile payment with prepaid cards as the basis for applying Regulation 7/52 to mobile payment as a payment instrument. Therefore, it is conceivable for a bank or a non-bank entity to use mobile phones as a payment instrument, provided the said bank or non-bank institution has secured prior approval from BI and BI has issued the required licenses.

5. *Does your legislation limit categories of entities that may issue payment instruments? If so, could a telecommunication operator issue a mobile phone as payment instrument in your jurisdiction?*

Since the current regulation only refers to card-based payment instrument, we will refer to the same regulation to see whether there is any limitation on the categories of entities that may issue payment instruments. Pursuant to Regulation 7/52, a bank or other non-bank entity can be an issuer of all card-based payment instrument, whether in the form of credit cards, automated teller machine (ATM) cards, debit cards and/or prepaid cards, provided that the said bank or other non-bank entity has secured the approval of BI. Regulation 7/52 defines 'other non-bank entity' as: 'a legal entity established under the laws of the Republic of Indonesia or business entity which main office is domiciled outside Indonesia but conducting activity related to the card based

payment instrument in Indonesia'. Under this definition, a domestic telecommunication operator can be included as one of the 'other non-bank entity', and arguably should be allowed to issue a mobile phone as payment instrument. BI has also verbally confirmed that a telecommunication operator is allowed to act as an issuer of such payment instrument provided that it should only for the issuance of mobile phones as a payment instrument in the 'prepaid card' concept and has obtained the approval from BI.

While for the usage of mobile phones as a payment instrument in the credit card or debit card concept, BI is of the view that such activities can only be conducted by either a bank or a non-bank entity that meet the following requirements:

- (a) For credit card, it shall be conducted by a non-bank entity that has obtained approval from the Department of Finance to act as the issuer of credit card; and
- (b) For debit card, it shall be conducted by a non-bank entity which is authorised to conduct the activities to raise funds from the public in the form of deposit based on the law which regulates the said non-bank entity activities (eg, post office, pension fund, or insurance company).

Based on the foregoing, BI has confirmed that it is unlikely for a telecommunication operator to be allowed to act as an issuer of mobile phone as a payment instrument within the scope of credit card or debit card.

Mobile payments

6. *Please describe briefly elements that need to be included in a consumer contract for using a mobile phone as a payment instrument. Please describe briefly rules of liability for issuer and holder of the instrument.*

There is no specific regulation pertaining to consumer contract for the usage of mobile phone as a payment instrument. Based on verbal confirmation from BI, and consistent with their current interpretation regarding similarity between of m-payment and prepaid cards, the usage of mobile phone as a payment instrument will have the same treatment as the usage of prepaid card. Currently, no contract between the issuer and the consumer is necessary for the issuance of prepaid cards. However, the issuer of a card-based payment instrument is obligated to submit its annual report to BI in regard to the implementation of its activities as the issuer of prepaid cards. Such report must include information regarding the procedure of detection system and fraud management. Further, pursuant to Circular Letter of Bank

Indonesia No 7/60/DASP regarding Customer Protection and Prudential Principles, and Improvement of Security for the Operation of Card-Based Payment Instrument Activities dated 30 December 2005 (Letter 7/60), the issuer of a card-based payment instrument must provide written information to its customer on the following:

- a. the procedure and guidelines to use the card, the facilities attached to the cards, and the risks that may arise from using the cards;
- b. the rights and obligations of the customer, which at least comprise the following:
 - important information that needs to be noted by the customer when using the said card, eg, not to give information to another party concerning the cardholder's Personal Identification Number (PIN);
 - the rights and obligations of the customer in the occurrence of cases that may bring loss to the customer, whether it is caused by card fraud, system failure, or other reasons;
 - fees that will be charged for the usage of such card;
 - procedures and consequences if the said customer wishes to discontinue the usage of such card; and
- c. complaint procedures pertaining to the usage of the said card and the estimated time for the settlement of such complaints.

7. *Is it possible, under your jurisdiction, for a telecommunication operator to provide the mobile phone holder with a loan? In such a scenario, payment is made with use of mobile phone and, subsequently, the client is charged for the transaction together with an invoice for telecommunication services.*

Yes, that is possible. However, please note that such activity will be similar to providing credit facility in the scope of credit card. Therefore, in order to be able to provide such a loan, the said telecommunication operator must obtain prior approval from BI to issue the credit card. This information has been verbally confirmed with the Department of Telecommunication and Information, and the Department of Finance, in which case both departments have not issued any regulations which prohibit a telecommunication operator from providing such credit facility to its customer.

8. *Assuming that it is technically possible to have a mobile phone integrated with multiple accounts in more than one bank (just as a consumer may have several PIN debit/credit cards, a mobile phone holder may use one mobile phone and choose between the bank accounts used for*

specific payments), do you think that such a structure would be possible in your jurisdiction?

Based on verbal confirmation from BI, we understand that the above structure can be applied in Indonesia. However, it will depend on the capability of the software that will support the above structure.

Data protection

9. *Does your legislation provide for any requirements as to security of data transfer when mobile phones are used for making payments? If yes, please briefly describe such requirements.*

At present, there is no regulation which regulates data transfer when mobile phones are used for making payments.

We should note that Bank Indonesia has issued Bank Indonesia Regulation No 9/15/PBI/2007 concerning the Implementation of Risk Management in the Utilisation of Information Technology by Commercial Banks, dated 30 November 2007 (Regulation 9/15). Regulation 9/15 is the applicable data protection regulation, however, this regulation is only applicable to commercial banks. Please note that based on verbal confirmation of BI, the m-payments system is not considered as a banking activity and therefore Regulation 9/15 is not applicable for m-payment. Notwithstanding, if the m-payments activity also cover remittance activity (see discussion in section 13 below), then the remittance process of such m-payments will fall under the provisions of Regulation 9/15.

Mobile payment by e-money

10. *Does your legislation recognise the concept of e-money, as defined in the introduction of the survey, or similar? What are the legal limitations of e-money payments (eg, amount of money transferred in one transaction, per day) and requirements for entities issuing e-money (eg, licence by an administrative body, notification to such body, minimal value of share capital). Please describe briefly other elements of legal framework for using e-money.*

Currently, there is no specific regulation on e-money. The concept of e-money is only partially recognised by Regulation 7/52 through its stipulations on prepaid card. Therefore, we are not able to provide the comparison between the concept of e-money in the introduction of the survey with the concept of e-money in Indonesia.

11. *Does your legislation provide that a mobile phone may be recognised as an e-money payment instrument?*

As mentioned in answer 3 above, there is no regulation which recognises mobile phone as a payment instrument. With regard to e-money, we understand that a specific regulation is currently being drafted. From our consultation with BI, we understand that the draft, as currently drafted, does not recognise mobile phone as a payment instrument. Obviously, we can only be sure once the new regulation is issued.

For your information, the draft regulation on e-money will likely distinguish e-money into the following categories:

1. Card based e-money:

The concept of a card based e-money is that a certain value or prepaid amount of fund is stored in an electronic device in the consumer's possession, which is typically stored in a microprocessor chip embedded in a plastic card or in other medium other than plastic card.

2. Server based e-money:

The server based e-money is e-money which is stored in a personal computer using special software. In this category of e-money, the e-money is managed by the issuer server and there will be no physical evidence of the said e-money. For example: the customer will only need to purchase a card that contains a number of codes that will be used for authorisation in the internet. Upon the said authorisation, the customer will have a virtual account of e-money with the same nominal value as the value of the authorisation card. The said e-money can be used for purchases at the participating merchant in the internet.

12. *If there is no possibility of using a mobile phone as an e-money payment instrument or there are some legal difficulties in application of m-payments solutions within e-money, please indicate the main legal obstacles.*

We believe, just as using a mobile phone as payment instrument, there is the possibility of utilising a mobile phone as an e-money payment instrument. We discussed this issue with BI and were advised that the application of mobile phones as an e-money payment instrument is possible upon obtaining prior approval from BI. Due to the fact that there is currently no specific regulation on the subject matter, the application to obtain the said approval will be granted on case-by-case basis. In conclusion, the lack of legal basis for mobile phone as an e-money payment instrument is the main legal obstacle.

Open question

13. *Please provide any other comments on the possibility of using a mobile phone as a payment instrument or e-money payment instrument. Feel free to point out any legal issues arising from such use of mobile phones which have not been included in this survey.*

In addition to the approval and license to utilise a mobile phone as an e-money payment instrument, please note that another license might be required by the issuer to act as a remittance agent. This additional license will be required if the said e-money can be used not only for sale and purchasing activity but also for transfer of e-money. In such situations, the issuer of e-money will be obligated to obtain a license as a remittance agent as stipulated in Bank Indonesia Regulation No 8/28/PBI/2006 regarding Remittance Services, dated 5 December 2006 (Regulation 8/2006).

Malta

Dr David Borg-Carbott

Ganado & Associates Advocates, Valletta

dbcarbott@jmganado.com

Regulatory issues and payment solutions

1. *Please provide a short description of legal acts in your jurisdiction that regulate the following issues related to m-payments (please describe briefly the main ideas of specific acts):*

a) banking activities;

The business of banking (ie, the taking of deposits and the giving of loans) is regulated under the Banking Act (Chapter 371 of the laws of Malta) (the Banking Act). The Banking Act implements the requirements of EU Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions and EU Directive 2006/49/EC on the capital adequacy of investment firms and credit institutions. The Banking Act subjects the business of banking to stringent rules on establishment, authorisation, capital requirements and ongoing supervision of credit institutions.

Institutions which provide quasi-banking activities (eg, lending, financing, money transmission services, issuing and administering means of payment) without the element of accepting deposits from the public are regulated under the Financial Institutions Act (Chapter 376 of the Laws of Malta) (the Financial Institutions Act).

The competent authority under both the Banking Act and the Financial Institutions Act is the Malta Financial Services Authority (the MFSA)

b) payment instruments;

Payment services (their issuers are regulated as above) are regulated by the Central Bank of Malta (the CBM) in terms of the Central Bank of Malta Act (Chapter 204 of the Laws of Malta) (the CBM Act). In this regard, the Central Bank of Malta has issued a directive (Directive No 4 on Electronic Payment Services – the CBM EPS Directive) specifically regulating this area and setting out rules on contractual terms, the relations between the issuer and the holder and on liability of the issuer and the holder. Paper based payment

instruments (eg, cheques, bills of exchange) are regulated by the Commercial Code (Chapter 13 of the Laws of Malta) (the Commercial Code).

Malta is presently in the process of implementing EU Directive 2007/64/EC on payment services in the internal market (the EU Payment Services Directive) which should, it is hoped, take place well in advance of the 1 November 2009 deadline.

c) e-money;

The Banking Act also regulates electronic money institutions setting out general rules on their establishment, authorisation and ongoing supervision. The Banking Act also regulates the redemption of e-money by the issuer and enshrines the right of redemption of same by the holder. The MFSA has in this regard issued the Electronic Money Institutions Directive (EMID/01/2002) setting out in detail the regulatory and supervisory procedures which the authority adopts in respect of electronic money institutions. It should be noted that credit institutions authorised under the Banking Act are automatically authorised to undertake the activity of issuing e-money under the terms of their banking licence without requiring a separate e-money licence.

The CBM EPS Directive also contains certain rules which apply to electronic money institutions and users of e-money, particularly rules on contractual terms and conditions and the obligations and liability of both the electronic money institution and the holder.

d) data protection;

The Data Protection Act (Chapter 440 of the Laws of Malta) (the Data Protection Act) regulates the processing of personal data. The Processing of Personal Data (Electronic Communications Sector) Regulations (Legal Notice 16 of 2003 as amended) which regulate, in addition to the Data Protection Act, the processing of personal data in connection with publicly available electronic communication services (eg, mobile phone

network operators) would also be relevant in the context of m-payment services.

e) *bank secrecy;*

Professional secrecy is regulated by a triumvirate of legislation: (1) Article 257 of the Criminal Code (Chapter 9 of the Laws of Malta) (the Criminal Code) which provides for the offence of disclosure of secrets, (2) the Professional Secrecy Act (Chapter 377 of the Laws of Malta) (the Secrecy Act) which amplifies on the provisions of the Criminal Code on secrecy and the exceptions thereto and (3) the Civil Code (Chapter 16 of the Laws of Malta) (the Civil Code) which subjects recipients of confidential information to fiduciary obligations in relation to such information. Employees and officers of credit and financial institutions (which would, owing to the extended definition of credit institution in the Banking Act also appear to catch electronic institutions) as well as ex-employees or officers are in terms of the Secrecy Act deemed to become depositaries of secrets by reason of their profession or office.

f) *telecommunication activities;*

The Electronic Communications (Regulation) Act (Chapter 399 of the Laws of Malta) (the E-Comms Act) regulates the provision of electronic communication services and networks. The competent authority under the E-Comms Act, the Malta Communications Authority (the MCA) is empowered by such Act to authorise and supervise electronic communication service and network providers as well as to generally supervise and regulate the Maltese electronic communications sector in order to ensure the proper functioning thereof and protection of end-users.

g) *any other act that may apply to m-payments.*

The Civil Code and the Commercial Code contain rules of general applicability such as rules on the formation of and effects of contracts and on commercial obligations. In relation to commercial matters (of which banking transactions are one) the Commercial Code takes precedence failing which usages of trade apply. In the absence of any specific provisions in the Commercial Code or applicable usages of trade, the provisions of the Civil Code are to be applied.

The Electronic Commerce Act (Chapter 426 of the Laws of Malta) (the E-Commerce Act) provides for the validity of contracts concluded by means of electronic communications, the rules in relation to such contracts, information requirements, rules on electronic signatures

and on the provision of electronic signature certification services. The Electronic Commerce (General) Regulations (S.L. 426.02) (the E-Commerce Regulations), issued in terms of the E-Commerce Act, further amplify on the provisions of the E-Commerce Act and complete the implementation of the EU E-Commerce Directive 2000/31/EC on the internal market for information society services.

The Distance Selling (Retail Financial Services) Regulations (SL 330.07) (the Distance Selling Regulations), issued in terms of the Malta Financial Services Authority Act (Chapter 330 of the Laws of Malta), will also be relevant to m-payment structures. The FS Distance Selling Regulations, which implement the requirements of EU Directive 2002/65/EC concerning distance marketing of consumer financial services, regulates inter alia the information requirements and cooling off periods applicable in connection with financial services (which term includes services of a banking, credit or payment nature) contracts concluded at a distance.

To the extent that the m-payment structure also contemplates the giving of loans, the Consumer Credit Regulations (SL 378.10) (the Consumer Credit Regulations), issued pursuant to the Consumer Affairs Act (Chapter 378 of the Laws of Malta) (the Consumer Affairs Act), will also be relevant. The Consumer Credit Regulations, which implement the requirements of EU Directive 87/102/EEC, provide for certain additional consumer protection rules specifically in connection with the giving of credit or loans to consumers. The Consumer Affairs Act is also generally relevant as this will regulate the terms and conditions of m-payment services provided to consumers.

Electronic Money Institutions are also subject to the Prevention of Money Laundering and Funding of Terrorism Regulations (SL 373.01) (the PML Regulations) which, inter alia, set out certain customer due diligence obligations and reporting requirements for subject persons.

2. *Does your legislation provide for the possibility of issuing and using the following payment instruments:*

a) *debit cards;*

Yes, the CBM Act, the CBM EPS Directive and the Banking Act/Financial Institutions Act (depending on the type of issuer) create a legal framework for the issuance of such cards and related services and the regulation of issuers.

(b) *credit cards;*

Yes, the CBM Act, the CBM EPS Directive and the Banking Act/Financial Institutions Act (depending on the type of issuer) create a legal framework for the provision of such card services and the regulation of issuers. In addition, the Consumer Credit Regulations and the Commercial Code (in so far as rules on the operation of current accounts are concerned) are of particular relevance.

c) *pre-paid cards*

Yes, the CBM Act, the CBM EPS Directive and the Banking Act (in so far as the pre-paid card is considered to involve e-money) create a legal framework for the issuance of such cards.

3. *Please describe the possibility of using a mobile phone as a payment instrument in your jurisdiction.*

The CBM EPS Directive appears to be sufficiently wide as to cater for mobile phones being used as an electronic payment instrument. In this regard, a mobile phone equipped for m-payments would appear to fall within the definition of 'remote access payment instrument' under the CBM EPS Directive which reads: 'an instrument enabling a holder to access funds held on his account at an institution, whereby payment is allowed to be made to a payee and usually requiring a personal identification code and, or, any other similar proof of identity. This includes in particular payment cards... and phone- home-banking applications.'

Banks or financial institutions wishing to offer m-payment services may be required to outsource the IT services in connection with such service to third party service providers. In this regard, the Banking Act would require the third party service provider to be granted recognition by the MFSA further, any such outsourcing would need to take into account the principles enshrined in the Bank for International Settlement's paper on *Outsourcing in the Financial Services*.

4. *If there is no possibility of using a mobile phone as a payment instrument, or if there are some legal difficulties in application of m-payments solutions, please indicate the main legal obstacles.*

Not applicable.

5. *Does your legislation limit categories of entities that may issue payment instruments? If so, could a telecommunication operator issue a mobile phone as payment instrument in your jurisdiction?*

Yes, payment instruments may only be issued and administered by Banks and Financial Institutions. It would appear that telecommunication operators

could, with an appropriate waiver from the MFSA in terms of the Banking Act however, offer m-payment solutions based on the concept of e-money (discussed below).

Mobile payments

6. *Please describe briefly elements that need to be included in a consumer contract for using a mobile phone as a payment instrument. Please describe briefly rules of liability for issuer and holder of the instrument.*

A contract for electronic payment services (which would include mobile phones as a payment instrument) may be concluded in writing or electronically. The terms must be set out in easily understandable words, in a readily comprehensible form and must be available in one of the official languages of Malta (English or Maltese).

The terms must include as a minimum: (a) a description of the electronic payment instrument, including the technical requirements with respect to the holder's equipment and the way in which it can be used including any applicable financial limits; (b) a description of the holder's and issuers' respective obligation and liabilities (including a description of the reasonable steps which the holder must take to safeguard the instrument and PIN or other code; (c) where applicable, the normal period within which the holder's account will be debited or credited, including the value date, or where the holder has no account with the issuer, the normal period within which the holder will be invoiced; (d) details of applicable charges; and (e) the period of time during which a transaction may be contested by the holder and a description of the redress and complaints procedures available.

Naturally, this list may need to be supplemented further according to the means being used to conclude the contract, whether the contract envisages the extension of credit facilities and/or any regulatory requirements emanating from the type of licence held by the issuer.

Generally, the holder of a payment instrument is (barring fraud, extreme negligence or breach of his obligations) only liable up to a maximum amount of the first EUR150 of any loss sustained in connection with unauthorised use of his payment instrument. This liability will cease from the date the issuer is notified of such unauthorised use. Further if the electronic instrument was used without physical presentation or electronic identification of the instrument then the holder is, in terms of the CBM EPS Directive, exempted

from all liability in this regard. The issuer, on the other hand, is to bear losses in connection with unauthorised use (subject to the first EUR€150 rule above), failures in execution of instructions (including payment of compensation), any errors or irregularity attributable to the issuer and for malfunctions of the payment instrument (other than those which result from a breach of the terms of use).

7. *Is it possible, under your jurisdiction, for a telecommunication operator to provide the mobile phone holder with a loan? In such a scenario, payment is made with use of mobile phone and, subsequently, the client is charged for the transaction together with an invoice for telecommunication services.*

At present, lending is an activity regulated by the Banking Act (where combined with deposit taking) and the Financial Institutions Act (where not so combined). Thus, in this scenario, a telecommunication operator is, at present, unable to extend loans to customers (other than simple sales on credit) though it may, in theory, do so through an appropriately licensed subsidiary undertaking.

This area is currently in the process of being substantially revised as a result of Malta's planned implementation of the EU Payment Services Directive.

8. *Assuming that it is technically possible to have a mobile phone integrated with multiple accounts in more than one bank (just as a consumer may have several PIN debit/credit cards, a mobile phone holder may use one mobile phone and choose between the bank accounts used for specific payments), do you think that such a structure would be possible in your jurisdiction?*

Yes, at present this would appear to be theoretically possible. The CBM EPS Directive specifically includes 'phone-banking applications' as possible remote access payment instruments, accordingly if the mobile phone is capable of managing multiple NFC 'profiles' and each bank provides its own NFC application this would appear to be capable of fitting within the terms of the Directive. Furthermore, since the definition of 'remote access payment instrument' adopted by the CBM EPS Directive does not require the account to be necessarily held with the issuer but with 'an institution' (which can be a third party) it would also appear to be theoretically possible for a third party issuer to offer a service which, by means of multiple NFC 'profiles', is able to link up to the user account of choice with different banks.

Data protection

9. *Does your legislation provide for any requirements as to security of data transfer when mobile phones are used for making payments? If yes, please briefly describe such requirements.*

Maltese data protection law does not specifically regulate data transfers when mobile phones are used for making payments accordingly general rules on data protection (which rules are based on EU Directives 95/46/EC and 2002/58/EC) will apply here.

Mobile payment by e-money

10. *Does your legislation recognise the concept of e-money, as defined in the introduction of the survey, or similar? What are the legal limitations of e-money payments (eg, amount of money transferred in one transaction, per day) and requirements for entities issuing e-money (eg, licence by an administrative body, notification to such body, minimal value of share capital). Please describe briefly other elements of legal framework for using e-money.*

Electronic money institutions (defined as persons who issue means of payment in the form of e-money) (e-money institutions) are regulated under the Banking Act. Under the Banking Act, credit institutions (but not financial institutions) are also able to issue electronic money. The Banking Act offers two regimes in relation to e-money institutions: (a) a full regulatory regime which involves strict authorisation and supervisory conditions akin to those applicable to credit institutions; and (b) a restricted regime which subjects e-money institutions to certain limitations (eg a maximum limit of €150) in return for a lighter regulatory regime.

(A) THE FULL E-MONEY INSTITUTION REGIME

E-money institutions that do not wish to operate under the waiver system described in (b) below, will be required to apply for an e-money licence under the Banking Act. E-money institutions must be established as a limited liability company and must (i) have their own funds of not less than €1m; (ii) adhere to the four-eyes principle; (iii) satisfy the MFSA's 'fit and proper' tests for all qualifying shareholders, controllers and other persons directing its business; and (iv) satisfy the MFSA that, where there are close links between the e-money Institution and any other person, such links will not interfere with the MFSA's ability to regulate such institution. E-money institutions are, in addition to the issuance of e-money, also able to offer certain ancillary services but are not allowed to grant any form of credit.

(B) THE RESTRICTED E-MONEY INSTITUTION REGIME

Article 5(5) of the Banking Act empowers the MFSA to waive any or all the provisions of the Banking Act and of the E-Money Directive in cases where the e-money institution: (i) does not exceed EUR€6m by way of outstanding e-money at any one time, (ii) the e-money will only be accepted by group companies of the e-money institution; or (iii) the e-money will only be accepted by a limited number of undertakings clearly identified by location (same premises or limited local area) or by the close financial or business relationship with the e-money institution (eg, participants in a marketing scheme). E-money institutions operating under a waiver of this kind must limit the maximum storage amount of e-money on such a device to EUR€150, report periodically to the MFSA, and may not benefit from the single passport afforded by EU Directives 2000/46/EC and 2006/48/EC.

The PML Regulations exempt e-money institutions which issue e-money devices which, if not rechargeable, are restricted to a maximum amount of EUR€150 or, if rechargeable, are limited to a maximum of EUR€2,500 that may be transacted in any calendar year from customer due diligence requirements. This exemption does not apply in cases where the e-money device is used to redeem EUR€1,000 or more in any one calendar year.

11. Does your legislation provide that a mobile phone may be recognised as an e-money payment instrument?

Yes, the definition of 'electronic money instrument' in the CBM EPS Directive appears to be sufficiently broad to encompass mobile phones used to store e-money. In this regard, the CBM EPS Directive defines 'electronic money instrument' as 'a reloadable payment instrument..., whether a stored-value card or a computer memory, on which is stored electronic money enabling the holder to effect transactions...'. Consequently m-payment solutions based on the concept of e-money would, subject to the comment below regarding the fiscal treatment of such services, appear to be very much viable.

12. If there is no possibility of using a mobile phone as an e-money payment instrument or there are some legal difficulties in application of m-payments solutions within e-money, please indicate the main legal obstacles.
Not applicable.

Open question

13. Please provide any other comments on the possibility of using a mobile phone as a payment instrument or e-money payment instrument. Feel free to point out any legal issues arising from such use of mobile phones which have not been included in this survey.

The major obstacle to date, besides issues relating to the licensing requirement under the Financial Institutions Act (which, as noted above, is presently on the legislator's radar owing to the implementation of the EU Payment Services Directive), would appear to be related to the value added tax treatment of m-payments. At present, the situation under the Value Added Tax Act (Chapter 406 of the Laws of Malta) (in accordance with the EU 6th VAT Directive) is that payments by customers to telecommunications operators for telecom services are chargeable with VAT at the full rate of 18 per cent. This would mean that customers making use of m-payment services through a mobile operator would, besides having to pay VAT when acquiring goods or services using the m-payment service, would also appear to be liable to VAT once again when either charging his account (in the case of e-money solutions) or when subsequently invoiced (in the case of extension of credit solutions). This is a large disincentive which, as noted in the responses to the CBM's Consultation Paper on Retail Payment Services Policy and the Payment Services Directive (CBM, 30 October 2008), is making m-payment services non-viable in Malta.

As noted earlier, Malta is presently in the process of implementing the EU Payment Services Directive and the facilitation of m-payments appear to be very much on the CBM's (as the authority entrusted with overseeing payment systems) agenda.

Poland

Ewa Butkiewicz

Wardynski & Partners, Warsaw
ewa.butkiewicz@wardynski.com.pl

Krzysztof Wojdyło

Wardynski & Partners, Warsaw
krzysztof.wojdylo@wardynski.com.pl

Regulatory issues and payment solutions

1. Please provide a short description of legal acts in your jurisdiction that regulate the following issues related to m-payments (please describe briefly the main ideas of specific acts):

a) *banking activities;*

The Banking Law Act of 29 August 1997 (consolidated text: *Journal of Laws of 1997*, no 72, item 665 with later amendments) (Banking Law) is the main legal act regulating banking activities. It provides rules for establishing and supervising banks, the activities which banks may undertake and allows them to issue payment cards and e-money.

b) *payment instruments;*

The Electronic Payment Instruments Act of 12 September 2002 (*Journal of Laws of 2002*, no 169, item 1385 with later amendments) (Payment Instruments Act) regulates, among others, rules of issuance of payment instruments, rules of settlements made with use of payment instruments as well as liability issues. It provides also for criminal sanctions for breaching rules of issuance of payment instruments.

c) *e-money;*

The Payment Instruments Act contains special chapters dedicated exclusively to issues connected with e-money. It provides for rules of issuance of e-money, rules of liability, as well as rules of supervision over e-money institutions.

d) *data protection;*

Data Protection Act of 29 August 1997 (consolidated text: *Journal of Laws of 2002*, no 101, item 926 with later amendments) (Data Protection Act) regulates rules of collecting and processing personal data, as well as rules of supervision over processing of personal data.

e) *bank secrecy;*

Bank secrecy is regulated by the Banking Law which defines bank secrecy as any information obtained in connection with performance of banking activity. Regulations regarding bank secrecy prevail over the regulations contained in the Data Protection Act.

f) *telecommunication activities;*

Telecommunication Law Act of 16 July 2004 (*Journal of Laws of 2004*, no 171, item 1800 with later amendments) (Telecommunication Law) provides for rules of establishing and conducting telecommunication activity, rules on telecommunication secrecy as well as rules of supervision over the telecommunication market.

g) *any other act that may apply to m-payments.*

General rules stipulated in Civil Code of 23 April 1964 (*Journal of Laws of 1964*, no 16, item 93 with later amendments) (Civil Code) may apply to contracts concluded within m-payment structures. The Civil Code provides for general rules regarding contracts as well as contractual and tortious liability.

Provisions of the Consumer Credit Act of 20 July 2001 (*Journal of Laws of 2001*, no 100, item 1081 with later amendments) (Consumer Credit Act) apply to m-payment solutions that involve granting loans to consumers. This act provides rules for protecting consumers and imposes additional obligations on entrepreneurs granting consumer loans.

To some extent, the Provision of Electronic Services Act of 18 July 2002 (*Journal of Laws of 2002*, no 144, item 1204 with later amendments) (E-commerce Act) may theoretically also apply to m-payment structures. This act imposes some additional obligations on entrepreneurs providing electronic services. Furthermore, it contains a provision regarding liability.

Additionally, provisions of the Act on Protection of Specific Consumer Laws and Liability for Dangerous Products of 2 March 2000 (*Journal of Laws of 2000*, no 22, item 271 with later amendments) (Specific Consumer Laws Act)

may apply to some m-payment structures. This act stipulates rules under which contracts may be concluded remotely. These rules would apply, in particular, when an issuer of a payment instrument gives the holder a right to apply for a loan by telephone.

The majority of the above-listed legislation is based on EU regulations.

2. *Does your legislation provide for the possibility of issuing and using the following payment instruments:*

a) *debit cards;*

Yes, the Banking Law and especially the Payment Instruments Act constitute a legal framework for issuance and usage of debit cards. The cards may be issued by banks and by non-banking entities as well.

b) *credit cards;*

Credit cards may be issued within the legal framework stipulated by the Payment Instruments Act and the Consumer Credit Act.

c) *pre-paid cards?*

It is also possible to issue pre-paid cards.

3. *Please describe the possibility of using a mobile phone as a payment instrument in your jurisdiction.*

Polish law does not provide clear provisions in respect of using mobile phones as payment instruments. Therefore, some controversies may exist whether m-payment solutions (apart from the solutions based on the e-money concept) are currently possible. The main issue is whether the existing regulations, constituting a legal framework for issuance and usage of payment instruments, cover also mobile phones.

Polish law defines three categories of payment instruments: electronic payment instruments, payment cards and e-money instruments.

The broadest category is electronic payment instruments. It covers payment cards, e-money instruments and other instruments that fall within the definition of electronic payment instruments but, at the same time do not fulfil conditions to qualify as payment cards or e-money instruments.

There is no provision of law that would clearly ascribe mobile phones to any of these categories, although there is clearly no doubt that mobile phones can be treated as electronic payment instruments and e-money instruments, as well. At the same time, there are some important controversies as to whether mobile phones may be classified as payment cards. The construction of the payment cards definition suggests that it refers

to plastic cards only, and as such does not allow mobile phones to be classified as payment cards.

The issue of the legal classification of mobile phones is very important, since most of the regulations regarding payment instruments refer only to payment cards and e-money instruments. Since it is difficult to classify mobile phones as payment cards, the question is whether some essential regulations that refer only to payment cards would also apply to mobile phones as payment instruments.

For example, important regulations regarding the liability of the holder and the issuer of payment instruments refer only to payment cards. These regulations determine, among others, who is liable, when and to what extent, for operations performed with a card without the holder's authorisation. Due to their character, these regulations are essential for the functioning of the payment system.

Furthermore, it is not clear whether a bank issuing mobile phones as payment instruments would be required to obtain a special authorisation for outsourcing some of the activities related to issuing mobile phones to third parties. The technical or business nature of some m-payment solutions may require entrusting performance to third parties of some of the activities related to payment instruments. For example, some solutions may provide for the possibility of concluding contracts for payment instruments by agents of the bank (this may significantly broaden channels of distribution of m-payment services). The Banking Law clearly states that banks are not obliged to obtain authorisation for outsourcing activities connected with the conclusion of contracts for payment cards. No reference is made to other categories of payment instruments, which suggests that authorisation would be required in relation to other categories of payment instruments.

The above examples show the diversity of approaches to different categories of payment instruments. Existing legislation seems to regulate payment cards and e-money instruments in detail, while payment instruments other than payment cards and e-money instruments are regulated very generally. Such diversity of approach is unreasonable, since the functioning of other types of payment instruments is based on the same or similar mechanisms as function for payment cards. This diversity results, most probably, from the fact that when the current regulations were adopted, there were no other payment solutions, other than payment cards and e-money instruments on the market. Now, when other solutions, such as, in particular, m-payment solutions are available,

amendments to existing legislation seem necessary.

4. *If there is no possibility of using a mobile phone as a payment instrument, or if there are some legal difficulties in application of m-payments solutions, please indicate the main legal obstacles.*

Difficulties in applying m-payment solutions could be avoided by amending regulations to clarify whether certain essential regulations, which now refer exclusively to payment cards, can apply also to other types of electronic payment instruments. There are no grounds for keeping the existing diversified approach to different categories of payment instruments, since there are no reasons why they cannot function within a common legal framework.

It is worth noting that the EU Payment Services Directive, which needs to be implemented in Poland by 1 November 2009, creates an opportunity for resolving the legal difficulties with m-payment solutions. According to the definition contained in the directive, a payment instrument shall mean 'any personalised device(s) and/or set of procedures agreed between the payment service user and the payment service provider and used by the payment service user in order to initiate a payment order'. Such a broad definition, combined with the directive's intention to create a common framework for all payment instruments, allows one to assume that its implementation would solve the current difficulties with m-payment solutions in Poland.

5. *Does your legislation limit categories of entities that may issue payment instruments? If so, could a telecommunication operator issue a mobile phone as payment instrument in your jurisdiction?*

The situation is clear in relation to payment cards and e-money instruments. There is no limit on the categories of entities that may issue payment cards (in relation to e-money instruments please see Answer 10). Therefore, a telecommunication operator, as well as other entities (for example supermarkets) may also issue payment cards. At the same time, there are no regulations regarding entities that may issue payment instruments other than payment cards and e-money instruments. This is another example of the difficulties that arise due to the fact that most regulations refer only to payment cards and e-money instruments.

Since there is no express limitation on the categories of entities that may issue payment instruments other than payment cards, it may be argued that a telecommunication operator may issue payment instruments other than payment cards.

Mobile payments

6. *Please describe briefly elements that need to be included in a consumer contract for using a mobile phone as a payment instrument. Please describe briefly rules of liability for issuer and holder of the instrument.*

A contract for using a payment instrument (including a mobile phone) must be concluded in writing. The contract shall determine, among others: the operations that may be performed with the use of the instrument, the term for the issuer to complete operations, fees and commissions, and rules of settlement of operations carried out in foreign currencies.

According to the most general rule, a holder of a payment instrument is not liable for operations performed with use of his payment instrument, if this operation was not authorised by him. At the same time, the holder of the payment instrument is liable for operations performed by persons to whom the payment instrument was made available by the holder or by a person to whom the holder disclosed his ID code. More detailed rules of liability (such as conditions for limitation or exclusion of liability) refer exclusively to issuers and holders of payment cards and therefore it is not clear whether they would also apply to issuers and holders of mobile phones used as payment instruments.

7. *Is it possible, under your jurisdiction, for a telecommunication operator to provide the mobile phone holder with a loan? In such a scenario, payment is made with use of mobile phone and, subsequently, the client is charged for the transaction together with an invoice for telecommunication services.*

Yes, a telecommunication operator may provide loans to its clients. Such loans would fall within the consumer loans regime regulated by the Consumer Credit Act. Of course, in practice, the provision of such loans is dependent on the operator's financial capability. The operator's articles of association would also need to foresee the possibility of providing such loans.

8. *Assuming that it is technically possible to have a mobile phone integrated with multiple accounts in more than one bank (just as a consumer may have several PIN debit/credit cards, a mobile phone holder may use one mobile phone and choose between the bank accounts used for specific payments), do you think that such a structure would be possible in your jurisdiction?*

In our opinion, such a structure would be theoretically possible, but under the condition that an application installed on the mobile phone, rather than the mobile phone itself, would be

treated as the payment card. This would require some amendments to existing regulations that would allow treating a software application as a payment instrument. In this scenario each bank providing a client with an application would conclude a separate contract for the application as a payment instrument.

Data protection

9. *Does your legislation provide for any requirements as to security of data transfer when mobile phones are used for making payments? If yes, please briefly describe such requirements.*

There are no special regulations for data transfers in connection with using mobile phones as payment instruments. Thus, general rules regarding processing of data, banking secrecy and telecommunication secrecy would apply. In general, these rules require the use of relevant technical and organisational solutions that guarantee security for the processed data. They also stipulate conditions that need to be met in order to disclose any data.

Mobile payment by e-money

10. *Does your legislation recognise the concept of e-money, as defined in the introduction of the survey, or similar? What are the legal limitations of e-money payments (eg, amount of money transferred in one transaction, per day) and requirements for entities issuing e-money (eg, licence by an administrative body, notification to such body, minimal value of share capital). Please describe briefly other elements of legal framework for using e-money.*

Polish legislation recognises the concept of e-money. E-money payment instruments, namely instruments on which e-money is stored, may be issued only by banks and non-banking institutions that have the status of e-money institutions. Establishment of an e-money institution requires an authorisation issued by the financial supervisory authorities. An e-money institution may be established as a joint stock company with a minimum share capital of EUR€1,000,000. The scope of activities of an e-money institution is limited exclusively to the issuance of e-money and other connected activities. An e-money instrument has to have a mechanism that limits the value of e-money stored on it to the PLN equivalent of EUR€150.

11. *Does your legislation provide that a mobile phone may be recognised as an e-money payment instrument?*

Yes, the definition of e-money instruments is very broad and it may also cover mobile phones.

Furthermore, depending on the structure of the e-money based payment system, a mobile phone may be treated as an instrument that gives access to e-money stored on another instrument (eg, a computer). In other words, under current Polish legislation, mobile phones may be used in m-payment solutions based on e-money.

12. *If there is no possibility of using a mobile phone as an e-money payment instrument or there are some legal difficulties in application of m-payments solutions within e-money, please indicate the main legal obstacles.*

The application of m-payment solutions within e-money structures is possible and does not raise too many controversies; therefore no significant legal obstacles exist.

Open question

13. *Please provide any other comments on the possibility of using a mobile phone as a payment instrument or e-money payment instrument. Feel free to point out any legal issues arising from such use of mobile phones which have not been included in this survey.*

Current regulations allow the use of mobile phones as payment instruments within the e-money concept. There are some m-payment solutions based on the e-money concept on the Polish market, but due to limitations contained in regulations (please see answer 10), these solutions provide only for the possibility of making micro-payments. Larger payments are possible only with the use of payment instruments that are not based on the e-money concept.

The above answers show that there are some essential difficulties with m-payment solutions, which are not based on the e-money concept. Regulations that currently regulate the functioning of payment instruments other than e-money instruments refer, in practise, only to payment cards. Therefore, although the law allows the existence of payment instruments, other than payment cards and e-money instruments, it almost does not regulate its functioning. Due to this gap in the law, there may be difficulties in creating m-payment solutions in Poland, without respective amendments to existing regulations. At the same time, the need to implement the EU Payment Services Directive in Poland in 2009 creates an excellent opportunity to make necessary amendments to existing legislation. Such amendments would allow the application of m-payment solutions not just to micro-payments, which would cause a real revolution in the payment services market.

Portugal

Tiago Lemos

Plen – Sociedade de Advogados, RL, Lisbon

tiago.lemos@plen.pt

Regulatory issues and payment solutions

1. *Please provide a short description of legal acts in your jurisdiction that regulate the following issues related to m-payments (please describe briefly the main ideas of specific acts):*

a) *banking activities;*

The General Regime of Credit Institutions and Financial Companies approved by Decree-Law 298/92 of 31 December 1992 (as amended) (the Banking Law) is the main legal statute regulating banking activities. It provides rules for establishing and supervising banks and financial companies, the activities which banks and financial companies may undertake and allows them to issue payment cards and e-money.

b) *payment instruments;*

Decree Law 42/2002 of 2 March 2002 (the E-money Law) relates to the operation of e-money institutions, the exercise of their activity as well as their prudential supervision. This statute also establishes the legal regime applicable to e-money. It also regulates, inter alia, rules of issuance of payment instruments and rules of settlements made with use of payment instruments

The Banking Law also includes several provisions generally applicable to the banking activity (namely to payment instruments), liability issues, criminal and contraventional sanctions for breaching rules of conduct.

c) *e-money;*

The E-money Law contains special chapters dedicated exclusively to issues connected with e-money. It provides for rules of issuance of e-money, rules of liability, as well as rules of supervision over e-money institutions.

In addition the provisions of the Banking Law relating to credit institutions also fully apply to e-money institutions (eg, liability issues, criminal and contraventional sanctions for breaching rules of conduct).

d) *data protection;*

Law 67/98, of 26 October 1998 (as amended) (Data Protection Law) regulates rules of collecting and processing personal data, as well as rules of supervision over processing of personal data.

e) *bank secrecy;*

Bank secrecy is regulated by the Banking Law pursuant to which members of the managing or supervisory bodies of credit institutions, as well as employees, representatives, agents or any other entities which provide services on a permanent or occasional basis, may not disclose or use information regarding facts or elements concerning the activity of an institution or the relationship of the latter with its clients, the knowledge of which may have arisen exclusively from their role, job or from the provision of the services.

f) *telecommunication activities;*

Law 5/2004 of 10 February 2004 (E-Com Law) provides for legal regime applicable to electronic communications networks and services and to the related resources and services. This statute also defines the competences and powers of the Portuguese regulatory authority in these areas.

g) *any other statute that may apply to m-payments.*

General rules on contractual and connected obligations stipulated in the Portuguese Civil Code 25 November 1966 (as amended) (the Civil Code) shall also apply to contracts concluded within m-payment structures. The Civil Code provides for the general rules on contracts and other civil obligations as well as contractual and liability for tort.

Decree Law 220/95 of 31 August 1995 applies to general contractual clauses (known as LCCG), which are defined as contractual clauses drafted without prior individual negotiations, which are to be merely signed or accepted by undetermined addressors or addressees. This statute determines the extent to which certain type of standard provisions may be regarded as null and void.

The provisions of Decree Law 359/91 of 21 September 1991 (as amended) (Consumer Credit Law) apply to any m-payment solutions that involve granting loans to consumers. This statute provides rules for protecting consumers and rules on the contents of consumer credit contracts.

To some extent, Decree Law 7/2004 of 7 January 2004 (E-commerce Law) may theoretically also apply to m-payment structures. This statute imposes some additional obligations on entrepreneurs providing electronic services and contains specific provisions on liability.

The majority of the above-listed legislation is based on EU regulations.

2. *Does your legislation provide for the possibility of issuing and using the following telly payment instruments:*

a) *debit cards;*

Yes, the Banking Law and specially the E-money Law constitute a legal framework for issuance and use of debit cards. The cards may be issued only by credit and financial institutions.

b) *credit cards;*

Credit cards may be issued within the legal framework stipulated by the E-money Law, the Consumer Credit Act and Regulation 11/2001 of the Bank of Portugal (Portuguese Central Bank).

c) *pre-paid cards?*

It is also possible to issue pre-paid cards.

3. *Please describe the possibility of using a mobile phone as a payment instrument in your jurisdiction.*

Portuguese law does not provide provisions specifically relating to the use of mobile phones as payment instruments, but the respective use for the provision of services such as access to balances, payment or prepayment of services, transfers, requests for cheques, stock market transactions, cash advance requests and alerts/news is already currently possible, generally accepted and, in fact, already made available by several credit institutions.

Nonetheless, it does not seem that a mobile phone may be regarded as a specific payment instrument such as payment cards or e-money instruments.

There is no provision of law that would clearly regard mobile phones as a specific category of payment instrument, although there is clearly no doubt that mobile phones can be used as a platform for payments of several types.

We do not think that the issue of the legal classification of mobile phones is crucial in this

respect, since most of the regulations regarding rules of conduct, secrecy, liability of the service provider, consumer and data protection apply all types of banking services and only banks and financial institutions, subject to strict supervision are allowed to provide such services.

4. *If there is no possibility of using a mobile phone as a payment instrument, or if there are some legal difficulties in application of m-payments solutions, please indicate the main legal obstacles.*

In our view, other than due to any possible technical reasons, mobile phones may be validly used as a platform for the provision of banking services.

5. *Does your legislation limit categories of entities that may issue payment instruments? If so, could a telecommunication operator issue a mobile phone as payment instrument in your jurisdiction?*

Only credit institutions and financial companies may issue and manage credit payment instruments. Under Portuguese law a telecommunication operator could not issue a mobile phone as payment instrument. However, credit institutions and financial companies may render their banking and financial services through the use of a mobile phone.

Mobile payments

6. *Please describe briefly elements that need to be included in a consumer contract for using a mobile phone as a payment instrument. Please describe briefly rules of liability for issuer and holder of the instrument.*

A contract for using a payment instrument (including through mobile phone) must be concluded in writing. The contract shall determine, inter alia: the operations that may be performed with the use of the instrument; the term for the issuer to complete operations; fees and commissions; and rules of settlement of operations carried out in foreign currencies.

According to general rules, a holder of a payment instrument is not liable for operations performed with use of his payment instrument, if this operation was not authorised by him. At the same time, the holder of the payment instrument is liable for operations performed by persons to whom the payment instrument was made available by the holder or by a person to whom the holder disclosed his ID code.

7. *Is it possible, under your jurisdiction, for a telecommunication operator to provide the mobile phone holder with a loan? In such a scenario, payment is made with use of mobile phone and, subsequently, the client is charged for the transaction together with an invoice for telecommunication services.*

No, as a matter of rule, telecommunication operator may not provide loans to its clients. Under the Banking Law only credit institutions and financial companies may carry out credit activities on a professional basis.

8. *Assuming that it is technically possible to have a mobile phone integrated with multiple accounts in more than one bank (just as a consumer may have several PIN debit/credit cards, a mobile phone holder may use one mobile phone and choose between the bank accounts used for specific payments), do you think that such a structure would be possible in your jurisdiction?*

In our opinion, such a structure would be possible, and in fact is already in place and made available by a number of banks.

Data protection

9. *Does your legislation provide for any requirements as to security of data transfer when mobile phones are used for making payments? If yes, please briefly describe such requirements.*

There are no special regulations for data transfers in connection with using mobile phones as payment instruments. Thus, general rules regarding processing of data, banking secrecy and telecommunication secrecy would apply. In general, these rules require the use of relevant technical and organisational solutions that guarantee security for the processed data. They also stipulate conditions that need to be met in order to disclose any data.

Mobile payment by e-money

10. *Does your legislation recognise the concept of e-money, as defined in the introduction of the survey, or similar? What are the legal limitations of e-money payments (eg, amount of money transferred in one transaction, per day) and requirements for entities issuing e-money (eg, licence by an administrative body, notification to such body, minimal value of share capital). Please describe briefly other elements of legal framework for using e-money.*

Portuguese law recognises the concept of e-money. E-money payment instruments, namely instruments on which e-money is stored, may be issued only

by banks and e-money institutions (a type of financial company). Establishment of an e-money institution requires an authorisation issued by the Bank of Portugal. An e-money institution may be established as a joint stock company with a minimum share capital of EUR€1,000,000. The scope of activities of an e-money institution is limited exclusively to the issuance of e-money and other connected activities (for instance, e-money institutions may carry out FX transactions necessary to the performance of their activity).

11. *Does your legislation provide that a mobile phone may be recognised as an e-money payment instrument?*

Yes, e-money is very broadly defined as a monetary value represented through a credit over an issuer (i) stored in an electronic platform; (ii) issued against receipt of funds; and (iii) accepted by a payment instrument by other entities other than the issuer. Hence, this definition could also cover mobile phones. Furthermore, depending on the structure of the e-money based payment system, a mobile phone may be treated as an instrument that gives access to e-money stored in another instrument (eg, a computer). In other words, under current Portuguese law, mobile phones may be used in m-payment solutions based on e-money.

12. *If there is no possibility of using a mobile phone as an e-money payment instrument or there are some legal difficulties in application of m-payments solutions within e-money, please indicate the main legal obstacles.*

The application of m-payment solutions within e-money structures is possible and does not raise too many controversies; therefore no significant legal obstacles exist.

Open question

13. *Please provide any other comments on the possibility of using a mobile phone as a payment instrument or e-money payment instrument. Feel free to point out any legal issues arising from such use of mobile phones which have not been included in this survey.*

Sociedade Interbancária de Serviços, SA (known as SIBS) is a Portuguese joint stock corporation incorporated in 1983 between all banks operating in Portugal. SIBS created an inter-banking service network with the purpose to granting autonomy to certain ordinary banking transactions (all banks currently operating in Portugal are shareholders of SIBS).

This inter-banking service network allows an absolutely universal service since it enables any

cardholder access to a wide variety of services in any place, regardless of which bank the latter is a client. SIBS manages the whole system of debit cards (ATM) and is responsible for the network, cash machines installed in shops and ATM's in which cash withdrawals, service reservations, payment of tickets for shows and transportation, payments to the state and payment of various services can be made. The creation of SIBS as a universal and uniform service provider was possible due to the fact that subsequently to the Portuguese revolution of 25 April 1974 all banks were nationalised and the implementation of this universal inter-banking facility

could be made rather peacefully between every participating bank (then fully owned by the state). SIBS, together with all mobile operators present in the Portuguese market, already provide the 'Telemultibanco' (mobile ATM) system since 1996. Taking advantage of this experience, SIBS is currently engaged in developing m-commerce by promoting a universal solution (inter-connectible between the banking system and operators) and a uniform utilisation by mobile service clients, regardless of their service provider and their bank.

Republic of Ireland

Peter O'Neill

Mason Hayes+Curran, Dublin
poneill@MHC.ie

Patrick Ambrose

Mason Hayes+Curran, Dublin
pambrose@MHC.ie

Regulatory issues and payment solutions

1. Please provide a short description of legal acts in your jurisdiction that regulate the following issues related to m-payments (please describe briefly the main ideas of specific acts):

a) banking activities;

Banks in Ireland are subject to a statutory system of regulation contained primarily in the Central Bank Acts 1942–1998 as amended respectively by the Central Bank and Financial Services Authority of Ireland Act, 2003 and the Central Bank and Financial Services Authority of Ireland Act, 2004.

b) payment instruments;

Basic principles of contract, agency and tort law facilitate the use and issuing of payment instruments in Ireland.

The Payment Services Directive (2007/64/EC) is also relevant, but has not yet been transposed into Irish law. This directive (once transposed) will regulate payment services and payment service providers.

c) e-money;

Directive 2000/46/EC (the 'E-Money Directive'), was transposed into Irish law by the European Communities (Electronic Money) Regulations 2002 (SI 221 of 2002) (the 'E-Money Regulations').

d) data protection;

Irish data protection law is contained in the Data Protection Act, 1988 and the Data Protection (Amendment) Act, 2003 (together the 'DPA'). The European Communities (Electronic Communications Networks and Services) (Data Protection and Privacy) Regulations 2003 (SI 535 of 2003) are relevant to data protection issues in the electronic communications sector and transposed Directive 2002/58/EC on privacy in electronic communications into Irish law.

e) bank secrecy;

A banker's duty of confidentiality to its customer was confirmed in the seminal case of *Tournier v National Provincial and Union Bank of England*¹ where it was held that the duty is based on an implied term in the contract between a bank and its customer.

This duty of confidentiality is not absolute and is subject to exceptions, particularly where provided by statute. For example, section 57 of the Criminal

Justice Act, 1994 requires banks to report suspicious transactions to the Irish police, and failure to make such reports can be a criminal offence by the bank.

f) Telecommunications activity

Telecommunications activities are regulated in Ireland by the Communications Regulation Act, 2002 and the following Irish statutory instruments:

1. SI 307 of 2003, which transposed Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services;
2. SI 306 of 2003 which transposed Directive 2002/20/EC on the authorisation of electronic communications networks and services;
3. SI 305 of 2003 which transposed Directive 2002/19/EC on access and interconnection;
4. SI 308 of 2003 which transposed Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services; and
5. SI 535 of 2003 which transposed Directive 2002/58/EC on privacy and electronic communications.

We do not believe that the use of Near Field Communication would in itself bring the m-payment solution within the regulatory framework for electronic communications networks and services. However, it should be emphasised that the mobile phone operator would need to have appropriate authorisations in place from the Commission for Communications Regulation (ComReg) to operate its mobile phone business.

g) Any other legislation

The Criminal Justice Act 1994 contains various anti-money laundering provisions which could be relevant in the context of the proposed M-payment solution, particularly if the m-payment solution falls within the definition of e-money. Electronic Money Institutions ('EMIs') are required to take measures to effectively counteract money laundering in accordance with the Criminal Justice Act, 1994.

The Consumer Protection Code issued by the Irish Financial Regulator (the Regulator) would apply to providers of M-payment solutions who are also EMIs.

2. *Does your legislation provide for the possibility of issuing and using the following payment instruments:*

- a) *debit cards;*
- b) *credit cards;*
- c) *pre-paid cards?*

Debit, credit and pre-paid cards are facilitated by basic principles of Irish contract, agency and tort law.

3. *Please describe the possibility of using a mobile phone as a payment instrument in your jurisdiction.*

A mobile phone could be used as a payment instrument in Ireland, but any such use would need to comply with applicable law, including, without limitation, banking and consumer law.

4. *If there is no possibility of using a mobile phone as a payment instrument, or if there are some legal difficulties in application of m-payments solutions, please indicate the main legal obstacles.*

As our view is that any attempt to use a mobile phone as a payment instrument would most likely be done within the e-money regulatory framework, the main legal difficulties in applying such a M-payment solution would be those discussed in Answer 12.

5. *Does your legislation limit categories of entities that may issue payment instruments? If so, could a telecommunication operator issue a mobile phone as payment instrument in your jurisdiction?*

The category of entity that may issue a payment instrument under Irish legislation depends on the payment instrument in question. For example, credit cards are generally only issued by credit institutions, whereas payment instruments relating to electronic funds transfer at point of sale, such as debit cards, can only be issued by a bank to its customers.

This means that a telecommunications operator might need to obtain specific authorisations from the Regulator to issue a mobile phone as a payment instrument that is the equivalent of a credit or debit card. We are not aware of any Irish telecommunications operator that has attempted to do this.

Mobile Payments

6. *Please describe briefly elements that need to be included in a consumer contract for using a mobile phone as a payment instrument. Please describe briefly rules of liability for issuer and holder of the instrument.*

Unless the consumer contract for using a mobile phone as a payment instrument is completed online or by means of distance communication when, for example, the existence of a statutory cooling off period within which the consumer can cancel the contract should be mentioned, Irish law does not generally specify what terms need to be included in such a contract. However, issuers need to ensure that the terms of any consumer contract do not infringe provisions of Irish Consumer Law, in particular the following:

1. The European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995 (the UTCC). The UTCC applies to standard consumer contracts and provide that a term of a consumer contract will be regarded as unfair if, contrary to a good faith requirement, the term causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. Unfair contract terms will not be binding on the consumer. The UTCC also provides that terms which have the effect of excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier will be deemed unfair.
2. The Sale of Goods Act, 1893 (as amended by the Sale of Goods and Supply of Services Act, 1980) (SOGSSA) imposes obligations on the sellers of goods and services. In particular, the SOGSSA obliges sellers to make various warranties in respect of the sale of goods and services, including warranties as to fitness for purpose and merchantability. The exclusion of any such warranties in an Irish law consumer contract would not be enforceable.
3. More generally, the recently enacted Consumer Protection Act, 2007 is a wide ranging piece of legislation and prohibits misleading commercial practices, unfair commercial practices and aggressive commercial practices. Any marketing and selling of mobile phones as payment instruments would need to comply with this legislation.
4. While there are no specific rules governing the liability of a holder and issuer of a payment instrument, general rules of liability and remoteness of loss will apply. It will only be possible therefore to recover contractual loss that either flows directly from the breach of contract or could be reasonably foreseen by both parties, at the time they made the contract, as being the probable result of that breach.²

7. *Is it possible, under your jurisdiction, for a telecommunication operator to provide the mobile phone holder with a loan? In such a scenario, payment is made with use of mobile phone and, subsequently, the client is charged for the transaction together with an invoice for telecommunication services.*

Were a telecommunications service provider to provide a loan to a customer, this would most likely bring the telecommunications service provider within the regulatory environment for provision of credit set out in the Consumer Credit Act,

1995 (the CCA). The CCA applies to all credit agreements made with a consumer and lays down detailed regulatory requirements which must be adhered to. Failure to comply with the CCA can result in the relevant credit agreement, and any associated security, being void.

In addition, the Bill of Sale (Ireland) Act 1879 and its amending Act of 1883 have important ramifications for the structure of consumer credit favoured by lenders as they provide that any security created by an individual over chattels, such as goods, is void unless the requirements of this legislation is complied with.

It should be noted that the carrying on of business of lending to non-consumers is potentially an activity which requires a banking licence, and if such activity is contemplated an application for a banking licence may need to be made to the Irish Financial Regulator (the Regulator).

Furthermore, section 7(2) of the Central Bank Act 1971 provides that a person is deemed to hold himself out as a bank if he carries on business or using any of the words 'bank', 'banker', or 'banking' or any variant, derivative of those words or any word which is analogous to those words.

If it is intended that the telecommunications company will not itself make the loan available but will act as an intermediary between the customer and the bank, then the law of agency will also be applicable.

8. *Assuming that it is technically possible to have a mobile phone integrated with multiple accounts in more than one bank (just as a consumer may have several PIN debit/credit cards, a mobile phone holder may use one mobile phone and choose between the bank accounts used for specific payments), do you think that such a structure would be possible in your jurisdiction?*

This structure would be possible, but will be circumscribed by the law of agency as the telecommunications company will in effect act as an intermediary between the customer and the bank. The mechanics of the bank-customer contract will be comprised in the customer's mandate to each individual bank where an account is held.

Data Protection

9. *Does your legislation provide for any requirements as to security of data transfer when mobile phones are used for making payments? If yes, please briefly describe such requirements.*

Provided that the transaction involves the processing of some personal data, the DPA will be relevant to the security of any such personal data processed or transferred.

Section 2(1) (d) of the DPA provides that data controllers shall take appropriate security measures against the unauthorised access to, or unauthorised alteration, disclosure or destruction of, personal data processed by it, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.

Insofar as the provider of the mobile phone as payment instrument will be a data controller in respect of any customer personal data processed in the context of making payments, it will be obliged to comply with Section 2(1) (d) and to keep such personal data secure.

Section 2C of the DPA gives more detail as to what comprises appropriate security measures and provides that data controllers may have regard to the state of technological development and the cost of implementation in deciding on what security measures to put in place. However, data controllers must ensure that the security measures provide a level of security appropriate to the nature of the data concerned and the harm that might result from unauthorised or unlawful processing, accidental or unlawful destruction and accidental loss of, or damage to, that data. This is effectively a proportionality test and obliges data controllers to take appropriate and proportionate steps to protect personal data processed by them. The provider of a mobile phone used for making payments would need to ensure that any data processed by it when facilitating the making of payments by its customers is done in a suitably secure manner. It would be important, for example, to ensure that the Near Field Communication Technology is secured against interception technology and it is not possible for third parties to access any personal data transferred in the context of any particular transaction.

Mobile payment by e-money

10. *Does your legislation recognise the concept of e-money, as defined in the introduction of the survey, or similar? What are the legal limitations of e-money payments (eg, amount of money transferred in one transaction, per day) and requirements for entities issuing e-money (eg, licence by an administrative body, notification to such body, minimal value of share capital). Please describe briefly other elements of legal framework for using e-money.*

The E-Money Regulations transposed the e-money Directive into Irish law. The definition of electronic money in the E-money Regulations is identical to the definition in the E-money Directive.

The maximum storage capacity of each electronic device must not exceed EUR€5,000.

Only certain bodies can issue e-money – certain credit institutions and Electronic Money Institutions (EMIs). EMIs must be authorised by the Regulator.

Bearer of E-money may request EMIs or issuing credit institutions to redeem the nominal value of the E-money in cash or by transferring the relevant amount to a bank account.

EMIs will not be authorised by the Regulator unless the Regulator is satisfied that the EMI has an initial capital of at least €1,000,000. Certain capital maintenance obligations are also imposed upon EMIs – to maintain capital equal to two per cent of e-money issued or €1,000,000 (whichever is higher).

EMIs are restricted to investing in cash or near cash items only.

EMIs are also restricted in terms of the business activities that they can carry out. EMI may carry on the following business activities only.

1. Issuing of e-money in accordance with the E-Money Regulations.
2. The provision of closely related financial and non-financial services including:
 - (i) services of an administrative, operational and ancillary nature that are solely related to the issuing of e-money, and
 - (ii) the issuing and administering of other means of payment, other than insofar as it will relate to the granting of any form of credit.
3. Storage of data on electronic money devices on behalf of other undertakings or public institutions.
4. Activities closely related to the activities referred to above that are carried out for the purposes of any activity so referred to.

There are limited circumstances in which the Regulator will issue a certificate that some provisions of the E-money Regulations do not apply to small issuers of e-money. These waiver provisions follow the waiver provisions of the E-money Directive and relate to:

1. The issuing of electronic devices with a maximum storage capacity of €150 provided that the Regulator can be satisfied that the financial liabilities of the EMI do not usually exceed €5,000,000, but never exceed €6,000,000;
2. The issuing of electronic devices with a maximum storage capacity of €150 where (i) the EMI's total liabilities with respect to the issuing of E-money do not exceed €10,000,000 and (ii) the issued e-money is only accepted by:
 - (i) subsidiaries of the EMI which perform operational or other ancillary functions related to E-money issued or distributed by the EMI; or
 - (ii) other members of the same group as the EMI (other than its subsidiaries)
3. The issuing of electronic devices with a maximum storage capacity of €150 where (i) the EMI's total liabilities with respect to the issuing of E-money do not exceed €10,000,000 and (ii) the issued e-money is only accepted by one hundred undertakings where each undertaking carries on business at the same premises or limited local area as the EMI or has a close financial or business relationship with the EMI, such as a common marketing or distribution scheme.

EMIs must also provide the Regulator with a six monthly statement of compliance with capital requirements and with the rules on investment of funds.

11. *Does your legislation provide that a mobile phone may be recognised as an e-money payment instrument?*

The E-money Regulations do not specifically provide that a mobile phone may be recognised as an e-money payment instrument. However, insofar as a mobile phone represents an electronic device on which monetary value as represented by a claim against an issuer of it can be stored, a mobile phone could be an e-money payment instrument for the purposes of the E-money Regulations.

12. *If there is no possibility of using a mobile phone as an e-money payment instrument or there are some legal difficulties in application of m-payments solutions within e-money, please indicate the main legal obstacles.*

The regulatory environment for EMIs may impose some legal obstacles to the development of M-payment solutions as e-money.

1. The restrictions on the business activities of EMI (discussed above) might make it difficult for a mobile phone operator to obtain an authorisation as an EMI. It would seem necessary for the mobile phone operator to set up a separate company that would be devoted solely to e-money activities in order to obtain such an authorisation.
2. On a related issue, the E-money Regulations provide that an EMI may only have an interest in another undertaking where the main objects for which that undertaking was formed are to carry on operational functions which are ancillary or supplementary to the main objects for which the EMI was formed. This would appear to mean that an EMI would not be able to have a shareholding in a company which, for example, provides non e-money related activities such as telecommunications or mobile phone services.
3. Rules on investments are somewhat restrictive as EMIs can only invest assets in cash or near cash items.
4. EMIs are also restricted from issuing credit, which could have a bearing if it is envisaged that the m-payment solution will involve some provision of credit or a loan facility.
5. It should also be noted that following the European Commission's Guidance Note on the application of the E-money Directive to mobile operators (the 'Guidance'), only pre-paid services would appear to be caught by the E-money Directive, which could limit the potential market for mobile phone operators interested in m-payment solutions as e-money.
6. Similarly, the requirement in the guidance that e-money will only exist where a direct debtor/creditor relationship exists between the customer and merchant with the mobile operator only acting as facilitator in the payment mechanism might be a difficult criterion to satisfy. (An alternative of course would be for there to be a direct transfer of e-value, which could be facilitated by the use of Near Field Communication Technology).
7. The fact that e-money must be redeemable for cash may also give rise to administrative and cost difficulties for mobile phone operators.

Open question

13. Please provide any other comments on the possibility of using a mobile phone as a payment instrument or e-money payment instrument. Feel free to point out any legal issues arising from such use of mobile phones which have not been included in this survey.

Our view is that the core legal obstacles to the introduction of m-payment solutions lie in the applicability of the E-money Regulations to such solutions. The E-money regulatory framework for hybrid entities such as mobile phone operators needs to be both clarified and made more attractive before m-payment solutions will become a viable alternative to credit and debit cards.

South Africa

Andre Visser

Adams and Adams, Pretoria

av@adamsadams.co.za

Regulatory issues and payment solutions

1. Please provide a short description of legal acts in your jurisdiction that regulate the following issues related to m-payments (please describe briefly the main ideas of specific acts):
 - a) *banking activities;*
The Banks Act, 1990 (Banks Act) is the primary statute regulating banking activities and provides for the establishing and supervision of banks. It also regulates the taking of deposits from the public.
 - b) *payment instruments;*
The National Payment Systems Act, 1998 (NPS Act) is the main statute in this regard. It provides for the management, administration, operation, regulation and supervision of payment, clearing and settlement systems.
 - c) *e-money;*
There is currently no statute concerned specifically with e-money. However, the South African Reserve Bank (SARB) has issued a position paper in this regard which sets out SARB's position on e-money (Position Paper). The Position Paper specifies the criteria against which SARB will consider proposals involving e-money and also specifies who will be permitted to issue e-money.
 - d) *data protection;*
As with e-money, there is currently no dedicated legislation dealing specifically with data protection.

However, the Protection of Personal Information Bill (the Bill) will, when passed into law, regulate the handling, processing and protection of personal information. It is not yet clear when it will become law.

There are, however, a combination of statutes in place regulating the protection of personal information in various specific contexts, including the banking context.

- e) *bank secrecy;*

Bank secrecy is regulated by a number of statutes, some prohibiting, and others facilitating, the disclosure of information.

Firstly, the South African Reserve Bank Act, 1989 prohibits directors, officers and employees of banks and officers in the Department of Finance, subject to certain specific exceptions, from disclosing any information relating to the affairs of the bank, a shareholder or a client of the bank, or any other information acquired by such person in the course of his/her participation in the activities of the bank. The Criminal Procedure Act, 1977, provides that no bank shall be compelled, at any criminal proceedings, unless the court orders otherwise, to produce any accounting record. The Civil Proceedings Evidence Act, 1965, contains similar provisions in respect of civil proceedings. Further, the Prevention of Organised Crime Act, 1998 makes it an offence by any person who knows or ought reasonably to have known that

any property (including money) forms part of the proceeds of unlawful activities to perform any act which is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of such property, or which is likely to assist a criminal to avoid prosecution or to remove or diminish such unlawful proceeds.

The Financial Intelligence Centre Act, 2002 also provides for certain reporting duties. The Promotion of Access to Information Act, 2000 provides for access to information held by another person to the extent that such information is required for the exercise or protection of any rights.

f) *telecommunication activities;*

The Electronic Communications Act, 2005 is the main act in respect of telecommunications services. It regulates the provision of electronic communications, broadcasting and telecommunications services. It also provides for the licensing of the providers of these services.

The Independent Communications Authority of South Africa Act, 2000 provides for the establishment of the Independent Communications Authority of South Africa, which authority, among other things, is responsible for the licensing of telecommunications service providers.

g) *any other act that may apply to m-payments.*

The Electronic Communications and Transaction Act, 2002 may find application in the context of payments made using a mobile phone. This Act provides for, among other things, the legal recognition of electronically concluded transactions. Where credit transactions are involved, regard should also be had to the provisions of the National Credit Act, 2005 (NCA).

The Financial Advisory and Intermediary Services Act, 2002 may also be applicable. This Act regulates the rendering of financial advisory and intermediary services. Providing a service in terms of which value is transferred using a mobile phone may possibly be regarded as an intermediary service for the purposes of the Act.

2. *Does your legislation provide for the possibility of issuing and using the following payment instruments:*

a) *debit cards;*

Yes. The NPS Act provides for the establishment of the Payment Association of South Africa (PASA) and this body is responsible for, among other things, authorising the issuing of debit cards.

b) *credit cards;*

Yes. The NPS Act makes provision for the issuing and usage of credit cards on a similar basis to debit cards. The provisions of the NCA must also be noted in this regard. Although the NCA does not regulate the issuing of the physical card, it does regulate the provision of access to credit.

c) *pre-paid cards?*

Various pre-paid cards can be issued under South African law; examples of these include pre-paid phone and electricity cards.

3. *Please describe the possibility of using a mobile phone as a payment instrument in your jurisdiction.*

South African law does not accord specific legal recognition to mobile phones as a payment instrument. (While mobile phone banking is legally recognised in South Africa, the use of a mobile phone in that context is obviously different from what is envisaged in an m-payment context.)

However, it should be possible, within the current legal framework, to introduce a payment system which utilises a mobile phone as a payment instrument. Such a payment system would, however, require the prior approval of the relevant authorities before implementation. This can be achieved in one of two ways:

- a) One option is to regard the money transferred in such a context as e-money. In such a scenario, the provisions of the Position Paper would be applicable and SARB would be the relevant approving authority.
- b) The alternative approach is to make an application to PASA in terms of the provisions of the NPS Act to be authorised to operate such a payment system.

In our view, the South African authorities are likely to take the position that a payment system using a mobile phone is more accurately positioned within the framework of e-money, in which the introduction of products making use of mobile phones as payment instruments will be subject to the approval of SARB.

4. *If there is no possibility of using a mobile phone as a payment instrument, or if there are some legal difficulties in application of m-payments solutions, please indicate the main legal obstacles.*

The only legal difficulty that exists in this regard is the lack of legal certainty as to exactly which laws are applicable to m-payments. This is due to the fact that it is not clear whether m-payments should be regarded as a species of e-money or whether they should fall under the provisions of the NPS Act.

5. *Does your legislation limit categories of entities that may issue payment instruments? If so, could a telecommunication operator issue a mobile phone as payment instrument in your jurisdiction?*

There is no limitation on the categories of entities that may issue payment instruments. However, only those entities that have been authorised to do so in terms of the provision of the NPS Act may issue payment instruments. One of the requirements for authorisation to act as a system operator (which includes entities that provide services in respect of payment instruments) is that such entity must be a company incorporated in accordance with the provisions of the Companies Act, 1973.

Mobile payments

6. *Please describe briefly elements that need to be included in a consumer contract for using a mobile phone as a payment instrument. Please describe briefly rules of liability for issuer and holder of the instrument.*

The answer to this question will depend on whether m-payments are recognised by the authorities as a form of e-money or as falling under the provisions of the NPS Act (see answer 3 above).

Should m-payments be regarded as falling under the category of e-money, then the Position Paper would be applicable, which simply provides that the rights and obligations of the respective participants in an electronic money scheme must be clearly defined and disclosed.

If, however, the position is that m-payments fall under the provisions of the NPS Act, the person providing the payment services should enter into a written service level agreement with each person to whom the services are provided. This agreement:

- obliges the parties to comply with all the appropriate requirements and rules for providing a service as contemplated in the NPS Act and any other applicable law, and contains provisions in respect of:
 - proper crisis and problem management, including escalation procedures;
 - performance in terms of service levels;
 - a disaster recovery plan which ensures continuity of all functions performed by it on behalf of the persons to whom the services are provided;
 - the liability of the system operator;
 - the agreement being governed by and construed according to South African law and that the parties shall submit to the jurisdiction of South African courts;
 - the provision of information and in

particular that the system operator will, subject to the terms and conditions of the service agreement:

- retain all records obtained by itself during the course of providing the service, for a period as required by the NPS Act and any appropriate legislation;
- provide required information, owned by each person to whom such service is provided;
- treat the information of each person to whom such service is provided as confidential and keep such information confidential from other persons subject to a lawful request for the disclosure of the same; and
- supply information requested regarding the person being serviced in terms of the written mandate of such person and/or the provisions of the NPS Act to the Bank or PASA where applicable.

7. *Is it possible, under your jurisdiction, for a telecommunication operator to provide the mobile phone holder with a loan? In such a scenario, payment is made with use of mobile phone and, subsequently, the client is charged for the transaction together with an invoice for telecommunication services.*

Yes, it is theoretically possible for telecommunications operators to provide mobile phone holders with a loan, provided that the telecommunications operator is operating within the provisions of the National Credit Act and is authorised in terms of the Position Paper or the NPS Act, whichever is applicable, to do so.

The telecommunications operator should also ensure that it is acting within the provisions of the NCA and its own telecommunications services licence.

8. *Assuming that it is technically possible to have a mobile phone integrated with multiple accounts in more than one bank (just as a consumer may have several PIN debit/credit cards, a mobile phone holder may use one mobile phone and choose between the bank accounts used for specific payments), do you think that such a structure would be possible in your jurisdiction?*

Yes, this structure should be possible, regardless of whether m-payments are a species of e-money or otherwise. Again, the implementation of such a system would require the prior approval of the authorities. From a risk perspective, any authorisation of such a system by the South African authorities would probably be subject to certain strict conditions.

Data protection

9. *Does your legislation provide for any requirements as to security of data transfer when mobile phones are used for making payments? If yes, please briefly describe such requirements.*

Because our law does not as yet recognise mobile phones as a payment instrument in an m-payment context, there are no specific requirements as to security of data transfer when mobile phones are used for making payments in this context.

Payments made in a mobile phone banking context are subject to certain specific security requirements.

Mobile payment by e-money

10. *Does your legislation recognise the concept of e-money, as defined in the introduction of the survey, or similar? What are the legal limitations of e-money payments (eg, amount of money transferred in one transaction, per day) and requirements for entities issuing e-money (eg, licence by an administrative body, notification to such body, minimal value of share capital). Please describe briefly other elements of legal framework for using e-money.*

South African law recognises the concept of e-money by virtue of the Position Paper. The Position Paper defines electronic money as 'monetary value represented by a claim on the issuer which is stored on an electronic device and widely accepted as a means of payment by persons other than the issuer'.

The introduction of electronic money products is subject to the approval of SARB and, upon approval, will be subject to rules and regulations imposed by SARB from time to time. Furthermore, the Position Paper provides that only a registered bank can be authorised to issue e-money; however, it further provides that SARB will revise this position as and when required by developments. The Position Paper also states that SARB will, among other things:

- support the development of a banking industry vision for electronic substitutes for physical banknotes and coin;
- support the development of national standards to enable inter-operability of electronic money

- products and devices; and
- participate in initiatives aimed at providing secure payment instruments for the general public, including the unbanked and rural communities of South Africa and Southern Africa the region.

11. *Does your legislation provide that a mobile phone may be recognised as an e-money payment instrument?*

South African legislation does not specifically recognise mobile phones as e-money payment instruments. However, the Position Paper defines 'instrument', for the purposes of the definition of e-money, as 'a continuance or an invention serving a particular purpose, especially a machine used to perform one or more relatively simple tasks. A thing made or adapted for a particular purpose.' In our view, this definition is sufficiently wide to include a mobile phone.

12. *If there is no possibility of using a mobile phone as an e-money payment instrument or there are some legal difficulties in application of m-payments solutions within e-money, please indicate the main legal obstacles.*

The only difficulty in this regard is the lack of certainty as to whether a mobile phone qualifies as an e-money payment instrument or otherwise.

Open question

13. *Please provide any other comments on the possibility of using a mobile phone as a payment instrument or e-money payment instrument. Feel free to point out any legal issues arising from such use of mobile phones which have not been included in this survey.*

Using a mobile phone as a payment instrument should be possible on the basis of current South African law. The question as to which laws and regulations would be applicable in this regard will depend on whether the South African authorities regard this form of payment as a species of e-money or otherwise. This position is likely to be clarified once an application is made to the authorities to use a mobile phone as a payment instrument, as envisaged by the concept of m-payment.

Spain

Joan Roca

ROCA JUNYENT, SL, Barcelona
j.roca@rocajunyent.com

Xavier Foz

ROCA JUNYENT, SL, Barcelona
x.foz@rocajunyent.com

Regulatory issues and payment solutions

1. Please provide a short description of legal acts in your jurisdiction that regulate the following issues related to m-payments (please describe briefly the main ideas of specific acts):

a) *banking activities;*

The general legal framework regarding banking activities is composed of the following legislation:

- Act of 31 December 1946, of Bank Ordinance;
- Act 26/1988, of 29 July on Discipline and Intervention of Credit Entities; and
- Royal Decree 1245/1995, of 14 July on the formation of banks, cross-border activity and other issues relating to the legal regime of Credit Institutions.

b) *payment instruments;*

There are no specific legal regulations on m-payment instruments other than those relating to e-money described below.

c) *e-money;*

Royal Decree 322/2008, of 29 February 2008 on the Legal Regime of Legal Regulation of Electronic Money Entities, establishes the scope and requirements of e-money activities and develops Act 44/2002, of 22 November 2002 on Financial System Reform Measures adopted in order to make the Spanish financial system uniform with the European Community legal framework.

d) *data protection;*

Organic Act 15/1999, of 13 December 1999 of Personal Data Protection (LOPD), establishes the general regime adopted in order to protect individuals from personal data interference, which is further developed in Royal Decree 1720/2007, of 19 December 2007 approving the regulation of such Act.

e) *bank secrecy;*

Act 26/1988, of 29 July 1988 on Discipline and Intervention of Credit Entities. This Act deals with banking customers' transparency and protection.

f) *telecommunication activities;*

Act 32/2003, of 3 November 2003 entitled General of Telecommunications. This Act regulates telecommunications, which comprise network exploitation and the rendering of electronic communications services and associated resources.

The regulation of such Act is contained in Royal Decree 424/2005, of 15 April 2005, which also sets forth the public service rights and obligations in connection with telecommunications.

g) *any other act that may apply to m-payments:*

- Act 7/1998, of 13 April 1998, of General Conditions of Contracting, which regulates the general conditions of contracting and deals with the consumer defence before abusive clauses.
- Royal Legislative Decree 1/2007, of 16 November 2007, approving the consolidated text of the General Act for the Defence of Consumers and Users and other complementary laws. Its purpose is to enhance the protection of consumers and users.
- Act 47/2002, of 19 December 2002, reforming Act 7/1996, of 15 January of Ordinance of the Retail Trade for the transposition of the EU Directive 97/7/EC, regarding distance contracts.
- Act 34/2002 of 11 July 2002, of Services of the Information Society and Electronic Commerce. Such Act was adopted to promote electronic commerce and to establish the legal regime of electronic contracts.
- Act 59/2003, of 19 December 2003, of Electronic Signature, which promotes and regulates the conditions of use of electronic signatures.
- Act 56/2007, of 28 December 2007, of Measures of Promotion of the Information Society, which intends to promote the use of electronic utilities in all the stages of a contracting process.

2. *Does your legislation provide for the possibility of issuing and using the following payment instruments:*

a) *debit cards;*

Issuance and usage of debit cards are not specifically regulated in Spanish legislation. Debit cards are considered as a means of disposal of the funds deposited in a bank account and as such are the subject of a banking contract. Credit entities and financial establishments of credit may issue debit cards.

b) *credit cards;*

Issuance and usage of credit cards are not specifically regulated in Spanish legislation. Credit cards are considered as a means of disposal of a credit facility and as such are the subject of a banking contract. Credit entities and financial establishments of credit may issue credit cards.

c) *pre-paid cards?*

Issuance and usage of pre-paid cards are not specifically regulated in Spanish legislation, but they are broadly used in the Spanish market.

3. *Please describe the possibility of using a mobile phone as a payment instrument in your jurisdiction.*

There is no legal impediment to making payments through the mobile phone. The existing experiences of m-payments in Spain use the mobile phone as an access product, which acts as an electronic intermediary device that puts two bank accounts in contact to carry out the payment.

In this regard, the mobile phone serves to activate different means of payment, whether debit or credit cards or the account linked to the mobile phone.

Another possibility would be to use the mobile phone as a device to store e-money, in which case the provisions of Royal Decree 322/2008, of 29 February 2008, on the Legal Regime of Legal Regulation of Electronic Money Entities would have to be fulfilled.

4. *If there is no possibility of using a mobile phone as a payment instrument, or if there are some legal difficulties in application of m-payments solutions, please indicate the main legal obstacles.*

There are no restrictions to the possibility of using the mobile phone as a payment instrument, nor legal difficulties beyond the fact that there is no specific legislation on this matter.

5. *Does your legislation limit categories of entities that may issue payment instruments? If so, could a telecommunication operator issue a mobile phone as payment instrument in your jurisdiction?*

Payment instruments other than bills of exchange, cheques or promissory notes are usually linked to a bank account (namely debit and credit cards) and this is the reason why their issuance is reserved to financial entities including banks, savings banks and financial establishments of credit, save for retail cards which may only be used in certain shops.

As a means to dispose of the funds deposited in a bank account, the telecommunication operator would need to associate with banks in order to offer the service of using the mobile phone as a payment instrument.

As regards e-money, telecommunication operators wishing to offer e-money services through mobile phones would need to qualify as Electronic Money Entities under Royal Decree 322/2008, of 29 February, on the Legal Regime of Legal Regulation of Electronic Money Entities.

Mobile payments

6. *Please describe briefly elements that need to be included in a consumer contract for using a mobile phone as a payment instrument. Please describe briefly rules of liability for issuer and holder of the instrument.*

In order to use a mobile phone as a payment instrument in a contract, certain legal requirements must be satisfied. Such a contract must be concluded in writing, it must provide identification of the holder as well as of his/her mobile device and the costs and commissions applicable. It is also necessary to provide identification of the financial institution of the holder that will make the payment according to the order of the holder and the identification of the retailers or categories of retailers that accept the mobile phone as a payment instrument.

Furthermore, the contract must include details of the safety measures applicable as well as data protection treatment, patent and intellectual rights of the application used for the mobile payment and termination events.

In any case, this contract would need to comply with the provisions of Act 7/1998, of 13 April 1998, of General Conditions of Contracting.

7. *Is it possible, under your jurisdiction, for a telecommunication operator to provide the mobile phone holder with a loan? In such a scenario, payment is made with use of mobile phone and, subsequently, the client is charged for the transaction together with an invoice for telecommunication services.*

Legally speaking, under Spanish law, the fact that payments made by using the mobile phone are charged in the invoice for telecommunication services would not be considered as a 'loan' but a mere advance of funds, likewise the functioning of cards that accumulate payments made during a certain period (normally within a month) and which are settled at the end of such a period.

Credit activities including the granting of loans are reserved to credit entities.

8. *Assuming that it is technically possible to have a mobile phone integrated with multiple accounts in more than one bank (just as a consumer may have several PIN debit/credit cards, a mobile phone holder may use one mobile phone and choose between the bank accounts used for specific payments), do you think that such a structure would be possible in your jurisdiction?*

There is no legal obstacle to the fact that payments made using the mobile phone could be charged to different bank accounts. Currently existing m-payment systems in Spain allow the holder to select up to nine different bank accounts to charge payments made through the mobile phone.

Data protection

9. *Does your legislation provide for any requirements as to security of data transfer when mobile phones are used for making payments? If yes, please briefly describe such requirements.*

Organic Act 15/1999, of 13 December 1999, of Personal Data Protection requires that specific safety measures are applied according to the type of the data treated.

The data of the financial institutions such as banks must have an average level of security. The security level comprises the mechanisms of identification and authentication, which will have to be modified in periods no longer than a year and the unauthorised repeated access to the system will have to be limited.

Mobile payment by e-money

10. *Does your legislation recognize the concept of e-money, as defined in the introduction of the survey, or similar? What are the legal limitations of e-money payments (eg, amount of money transferred in one transaction, per day) and requirements for entities issuing e-money (eg, licence by an administrative body, notification to such body, minimal value of share capital). Please describe briefly other elements of legal framework for using e-money.*

Spanish legislation recognises the concept of e-money (as defined in the introduction of the survey), which was introduced by Act 44/2002, of 22 November, on Financial System Reform Measures that followed the concept of e-money established in EU Directive 2000/46.

The legal regime for e-money is provided for in Royal Decree 322/2008, of 29 February, of Legal Regulation of Electronic Money Entities, which further implemented said EU Directive 2000/46.

Entities issuing e-money (the so-called Electronic Money Entities) are qualified as credit entities under Spanish law and need to be authorised by the Ministry of Economy, with a previous report from the Bank of Spain and the Executive Service of the Commission of Money Laundering Prevention and Monetary Infringements. They also need to be registered with the Special Registry of Electronic Money Entities of the Bank of Spain. Other regulatory requirements include having a minimum share capital of €1million, its shareholders holding a significant stake being considered ideal, its directors having commercial and professional reputations and money-laundering controls having to be implemented.

In addition, electronic money entities need to comply with the investment restrictions established in Article 11 of Royal Decree 322/2008 of 29 February, of Legal Regulation of Electronic Money Entities.

There are no legal limitations of e-money payments. Nonetheless, electronic money entities may be exempt from the obligation to comply with certain legal requirements when the maximum amount stored in the storage or disposal devices does not exceed EUR€150.

11. *Does your legislation provide that a mobile phone may be recognized as an e-money payment instrument?*

Spanish legislation does not specially regulate the use of mobile phones as an e-money payment instrument; however, as long as it may be used as an electronic storage or disposal device, there are no legal provisions preventing using mobile phones as e-money payment instruments.

12. *If there is no possibility of using a mobile phone as an e-money payment instrument or there are some legal difficulties in application of m-payments solutions within e-money, please indicate the main legal obstacles.*

There are no difficulties in application of m-payment solutions within e-money beyond the fact that this matter is not specifically regulated under Spanish law.

Open question

13. *Please provide any other comments on the possibility of using a mobile phone as a payment instrument or e-money payment instrument. Feel free to point out any legal issues arising from such use of mobile phones which have not been included in this survey.*

It would be advisable that both the Spanish and European Community legislation contain specific provisions addressing the use of mobile phones as payment instruments or e-money payment instruments. This would reinforce the trust of users in this payment method and would permit the establishment of a clear framework of rights and obligations for all parties intervening in the process (establishing coordination systems in the sense of 'circles of trust').

Likewise, the security of the devices would need to be enhanced by implementing measures of encryption and of electronic signature. Finally, the role that telecommunication operators may play in the use of such payment instruments would need to be clarified in order to clearly determine to what extent they may be involved in activities traditionally reserved to credit entities.

Switzerland

Stefan Breitenstein

Lenz & Staehelin, Zurich

stefan.breitenstein@lenzstaehelin.com

Philipp Jermann

Lenz & Staehelin, Zurich

philipp.jermann@lenzstaehelin.com

Regulatory issues and payment solutions

1. *Please provide a short description of legal acts in your jurisdiction that regulate the following issues related to m-payments (please describe briefly the main ideas of specific acts):*

a) banking activities;

Banking activities in Switzerland are governed by the Federal Banking Act dated 8 November 1934, as amended (FBA), and the implementing ordinances, and supervised by the Swiss Financial Market Supervisory Authority (FINMA).

b) payment instruments;

Since Switzerland is not a Member State of the European Union (EU), it is not obliged to implement EC directives into national law. However, in view of its dependency on the European market, Switzerland regularly transforms certain EC directives into national law on an autonomous

basis (*autonomer Nachvollzug*). The Swiss legislator has, however, not adopted the recommendations and directives of the European Commission relating to electronic payment instruments and therefore no special law applies under Swiss law to the issuance or administration of payment instruments (irrespective of whether they are eg, access, internet, card or software based products). The Swiss National Bank (SNB) has the authority to supervise payment systems for purpose of protecting the stability of the financial system (Federal Act on the Swiss National Bank dated 3 October 2003, as amended; NBA). Operators of payment systems that transact payments of more than CHF25 billion annually are subject to information duties and audit requirements, SNB may impose on such operators minimum requirements regarding their organisation, capitalisation, operational safety, contractual terms or used payment instruments.

c) *e-money*;

Swiss law does not provide for specific rules regarding the issuance of and trade with e-money. The Federal Act on Currency and Payment Instruments dated 22 December 1999 as amended provides that (only) Swiss Franc coins, bills and sight deposits at the SNB qualify as legal tender. Nevertheless, e-money as well as other forms of virtual currency or payment methods may be issued and traded under Swiss law.

d) *data protection*;

The Federal Data Protection Act dated 19 June 1992, as amended (DPA) governs the processing of personal data. Personal data are all information that relate to an identified or identifiable natural person or legal entity. Data processors must comply with duties regarding the use, transfer and security of personal data. Data collections must be registered if, on a regular basis, sensitive personal data or personality profiles are processed or personal data are disclosed to third parties. With respect to the use of personal data by private persons, the Federal Data Protection and Information Commissioner (FDPIC) has limited competences which include the advising and issuing of recommendations on data protection matters and investigating eg, in case of system errors.

e) *bank secrecy*;

Art 47 of the FBA provides that whoever discloses a secret entrusted to him in his capacity as executive, employee, agent or liquidator of a bank or as executive or employee of an auditing company, or of which he become aware of in this capacity, shall be punished by imprisonment for up to three years or a penalty of up to CHF1,080,000 (or a fine of up to CHF250,000 in case of negligence).

f) *telecommunication activities*;

Under the Federal Telecommunications Act dated 30 April 1997, as amended (TCA), providers of telecommunication services must register themselves at the Federal Office of Communications (OFCOM) and are subject to the telecommunication secrecy obligation which prohibits disclosing, or allowing third parties to disclose, details of telecommunication traffic. Stringent duties apply with respect to value added services (see answer 5 below).

g) *any other act that may apply to m-payments*.

Other acts that are relevant or may be applicable to m-payment service providers include:

- The Federal Code of Obligations dated 30 March 1911, as amended (CO) is the Swiss

private law code applicable to contracts as well as contractual and tort liability. The provisions on mandate agreements (Art 392 ss. CO) and orders (Art 466 ss CO) apply with respect to payment services effectuated by means of m-payment instruments.

- The Federal Consumer Credit Act dated 23 March 2001, as amended (FCC) protects consumers, ie, natural persons that conclude a consumption loan for other purposes than their profession or business. The FCC may be relevant in connection with post-paid m-payment instruments and debit instruments that allow overdraft credits (see 4(iii) below).
- The Federal Ordinance on the Disclosure of Prices dated 11 December 1978, as amended (FODP) set forth rules on mandatory price information regarding value added services (see answer 5 below) and account opening, administration and settlement, national and cross-border payment services as well as payment instruments (credit cards) (see answer 6 below).
- Under the Federal Anti-Money Laundering Act dated 10 October 1997, as amended (AMLA), providers of payment transaction services (in particular persons undertaking to transferring money electronically on behalf of third parties) and issuers or administrators of payment instruments are deemed financial intermediaries within the meaning of the AMLA.
- The Federal Act on Certification Services in the Area of the Electronic Signature, dated 19 December 2003, as amended (CertES) establishes the legal framework for encrypted communication. Although not legally required, encryption may be employed in m-payment systems.

2. *Does your legislation provide for the possibility of issuing and using the following payment instruments:*

(a) *debit cards*

Swiss law does not contain specific regulation on the issuance or administration of debit cards. Debit card institutions are subject to the banking regulation unless an exemption applies (see answer 4(i) below). The rules on the prevention of money laundering apply. The rules on consumer protection apply only to debit accounts which can be overdrawn (see requirements in answer 4 below).

(b) *credit cards*

Swiss law does not contain specific regulation on the issuance or administration of credit

cards. Credit card institutions are not subject to the banking regulation unless the credit card agreements allow for pre-payment (see answer 4(i) below). The rules on the prevention of money laundering are and the rules on consumer protection may be applicable to credit card institutions (see requirements in answer 4 below).

(c) *pre-paid cards.*

Swiss law does not contain specific regulation on (single or multi-purpose) pre-paid cards. The issues of pre-paid cards may be subject to banking supervision and anti-money laundering supervision (unless it is a single purpose pre-paid card). The FCC does not apply.

3. *Please describe the possibility of using a mobile phone as a payment instrument in your jurisdiction.*

The issuance or administration of mobile payment instruments is not a regulated or supervised activity under Swiss law. Switzerland is not obliged to implement the relating EC directives (see answer 1 above) and no legislative or governmental activities have been identified with regard to the introduction of a regulatory framework on electronic or mobile payment instruments. Already in 2002, the Federal Council considered the existing telecommunication, banking, money laundering and data protection laws in general to be sufficient with respect to the regulation of mobile payment systems. In 2008, representatives of the Federal Department of Justice confirmed in the broader context of internet usage the positive experience made with technologically independent and abstract rules, and they concluded that an extensive revision of the current law is not advisable or may even be counterproductive.

For the time being, m-payments instruments are subject to the same legal framework as chip, magnetic stripe or card based payment instruments (see answer 2 above).

4. *If there is no possibility of using a mobile phone as a payment instrument, or if there are some legal difficulties in application of m-payments solutions, please indicate the main legal obstacles.*

M-payment service providers may want to structure and set up their business activities in Switzerland such that they not require a banking license (see answer (i) below) and comply with the requirements regarding the prevention of money laundering (see answer (ii) below) and consumer protection (see answer (iii) below):

- (i) Debit based m-payment solutions and credit based m-payment solutions with pre-payment function may fall under the banking regulation.

In general, the acceptance of deposits from the public on a professional basis requires authorisation from, and is subject to banking supervision by, FINMA. However, FINMA defines certain exemptions in Circular 2008/3. Money processed by means of a payment instrument or in a payment system (payment cards, internet payment facilities, mobile telephone payment systems and alike) does not have the character of a deposit provided that:

- the money is only used for the subsequent acquisition of goods or services;
- for each issuer of payment instruments or operator of payment systems, the maximum credit balance per customer does not exceed CHF3,000 at any time; and
- no interests will be paid on the deposited amounts. Rebates or other monetary value advantages are allowed only on goods and services and may not depend on the credit balance.

If the above requirements are cumulatively met, m-payment service providers may implement debit based m-payment systems and credit based solutions with pre-payment function without falling within the scope of banking supervision.

- (ii) As regards the prevention of money laundering, issuers or administrators of payment instruments are deemed financial intermediaries within the meaning of the AMLA (see answer 1 above). As such, they are required to affiliate themselves with a self-regulatory organisation or obtain a license for their activities from the FINMA (non-compliance may lead to severe criminal sanctions in the form of imprisonment of up to three years or a monetary penalty of up to CHF1,080,000 or, in case of negligence, a fine of up to CHF250,000).

As financial intermediaries, issuers or administrators of payment instruments must identify their contractual partner and the beneficial owner of the assets in relation to which an arrangement is made, and keep records for at least ten years concerning transactions or enquiries which are required by the AMLA. Moreover, the AMLA makes it mandatory for financial intermediaries to immediately report what is considered to be a suspicious transaction to the Money Laundering Reporting Office (and block the concerned assets). Transactions are deemed to be suspicious if there are reasons to assume that eg, the assets involved are either the proceeds of a crime, under the control of a criminal

organisation or used for financing terrorist activities.

- (iii) If m-payment instruments are used only to process payment transactions, the FCC does not apply. However, a contract qualifies as consumer credit agreement if a consumer is given an account with a credit option (ie, a credit account, or debit account which can be overdrawn) and the right to settle an invoiced amount in instalments (which regularly include late payment interest). In such a case, the FCC requirements are applicable and provide for eg, minimum consumer information duties and a limitation of the maximum annual interest rate at 15 per cent. Notwithstanding the above, the FCC is not applicable if credits are granted free of interest and charges or if the credit amount is less than CHF500 or must be fully repaid by the consumer within three months.

5. *Does your legislation limit categories of entities that may issue payment instruments? If so, could a telecommunication operator issue a mobile phone as payment instrument in your jurisdiction?*

Swiss law does not reserve the right to issue payment instruments to certain entities. Telecommunication service providers (TSPs) may issue m-payment instruments. They should, however, be aware of the rather restrictive rules applicable to value added services which TSP must comply with (eg, the customer must give prior explicit consent to value added service charges based on unambiguous information given free of charge, and TSPs may not suspend a connection if premium rate service charges remain unpaid in connection with post-paid solutions).

Mobile payments

6. *Please describe briefly elements that need to be included in a consumer contract for using a mobile phone as a payment instrument. Please describe briefly rules of liability for issuer and holder of the instrument.*

M-payment instruments may be subject to the FCC and the respective provisions of consumer protection (see answer 4 above). The FCC provides that the consumer credit agreements must be in writing and contain minimum information on the credit relationship, such as eg, maximum credit amount, annual interest rate, charges invoiced at contract conclusion, conditions of termination and credit rating test parameters. If an account is overdrawn for more than three months, consumers must be informed of the annual interest rate and the invoiced charges (and any amendments

thereof). Based on the FCC, no specific m-payment related information must be given.

To the extent that the relationship between administrators of payment instruments (cards, mobile phones etc) and their clients qualify as mandate relationship in the meaning of CO, the administrators have statutory duties of care and loyalty and a duty to provide information towards their customers. In practice, standardised information on the main risks associated with the contractual relationship (eg, with the payment services effectuated by mobile phone) is given to customers in the beginning of the contract relationship.

The prices for national and cross-border payment services and payment instruments (credit cards) must be disclosed in line with the FODP. Prices must be stated in CHF, in the amount to be paid by customers and in readily accessible and legible form. In our reading of the law, the rule also applies to payment instruments other than credit cards.

Based on statutory law, payment administrators are liable for damages arising out of the undue performance of their services (eg, the processing of a payment order without due authentication) unless they can prove that no fault is attributable to them. They may contractually exclude or limit their liability with certain exceptions (eg, for acts conducted in wilful misconduct or gross negligence; banks and other licensed businesses may not limit or exclude their liability for acts conducted in light negligence).

7. *Is it possible, under your jurisdiction, for a telecommunication operator to provide the mobile phone holder with a loan? In such a scenario, payment is made with use of mobile phone and, subsequently, the client is charged for the transaction together with an invoice for telecommunication services.*

Under Swiss law, a TSP may grant loans to the mobile phone holders in the manner described above. The requirements of consumer credit protection may apply (see answer 4(iii) above).

8. *Assuming that it is technically possible to have a mobile phone integrated with multiple accounts in more than one bank (just as a consumer may have several PIN debit/credit cards, a mobile phone holder may use one mobile phone and choose between the bank accounts used for specific payments), do you think that such a structure would be possible in your jurisdiction?*

The structure described above is permissible under Swiss law. Swiss law provides for technologically independent and abstract rules which apply uniformly to the issuance and administration of the various kinds of m-payment solutions, ie, irrespective

of whether the mobile phone itself or an application installed on the mobile phone is considered to be the payment instrument.

Data protection

9. *Does your legislation provide for any requirements as to security of data transfer when mobile phones are used for making payments? If yes, please briefly describe such requirements.*

When mobile phones are used as payment instruments, the general rules on the protection of personal data and the telecommunication secrecy apply. Personal data (ie, mainly names and addresses of the ordering customer and recipient) must be protected by data processors and network providers against unauthorised processing, modification, destruction or loss through adequate technical and organisational measures. No generally applicable data security standard has been adopted by the Swiss legislator. Swiss law allows that more detailed and customised data security standards are developed by private institutions (such as eg, the Payment Card Industry Data Security Standard developed by the credit card industry).

Mobile payment by e-money

10. *Does your legislation recognise the concept of e-money, as defined in the introduction of the survey, or similar? What are the legal limitations of e-money payments (eg, amount of money transferred in one transaction, per day) and requirements for entities issuing e-money (eg, licence by an administrative body, notification to such body, minimal value of share capital). Please describe briefly other elements of legal framework for using e-money.*

The Swiss legal system does not explicitly recognise the concept of e-money. Switzerland is not a Member State of the European Union and decided not to transform the E-Money Directive (Directive 2000/46/EC) into Swiss law on an autonomous

basis. E-money does not qualify as legal tender (other than Swiss Franc coins, bills and sight deposits at the SNB). Anyone may establish a payment system or instrument that makes use of electronically stored monetary value. Such activity is primarily subject to private law. The banking, money-laundering and consumer protection law requirements apply only if the respective requirements are fulfilled (see answer 4 above).

11. *Does your legislation provide that a mobile phone may be recognised as an e-money payment instrument?*

All kinds of e-money payment instruments are permissible under the technologically independent and abstract rules of Swiss law (as set out in answer 10 above). Therefore, mobile phones may also be used as e-money payment instruments.

12. *If there is no possibility of using a mobile phone as an e-money payment instrument or there are some legal difficulties in application of m-payments solutions within e-money, please indicate the main legal obstacles.*

The use of mobile phones as an e-money payment instrument is permitted under Swiss law and does not raise material concern.

Open question

13. *Please provide any other comments on the possibility of using a mobile phone as a payment instrument or e-money payment instrument. Feel free to point out any legal issues arising from such use of mobile phones which have not been included in this survey.*

If m-payment service contracts are to be concluded via mobile phones, it can be difficult for m-payment operators to disclose on the relatively small displays the prices for the payment instrument and services (as required under the FODP, see answer 6 above) and the general terms and conditions. As an alternative, operators could consider solutions where customers register for the service over the internet.

United Kingdom

Gwen Godfrey

DMH Stallard LLP, Crawley
gwen.godfrey@dmhstallard.com

Mohammad Mia

DMH Stallard LLP, Crawley
mohammad.mia@dmhstallard.com

Regulatory issues and payment solutions

1. Please provide a short description of legal acts in your jurisdiction that regulate the following issues related to m-payments (please describe briefly the main ideas of specific acts):

a) Banking activities:

The FSA is the single regulator for the UK financial services industry; it is an independent non-governmental body which has been given statutory powers by the Financial Services and Markets Act 2000 (FSMA).

The FSA is responsible for regulating the UK financial services sector and the promotion of the objectives set out in FSMA. The FSA is responsible for supervising banks, building societies, friendly societies, insurance companies and other financial institutions.

Under FSMA a person is prohibited from carrying on a regulated activity in the UK, or purporting to do so, unless authorised or exempt (the general prohibition).

Certain regulated activities may be deemed to be carried on in the UK where the activity in question is managed or carried on from an office in the UK (section 418, FSMA). Regulated activities include deposit taking and investment activities.

Although the FSA is the primary financial regulator the conduct of retail banking business is mainly regulated under the Banking Codes (Codes), which are monitored and enforced by the Banking Code Standards Board (BCSB):

- The Banking Code sets out the standards of good banking practice for personal customers (retail clients). It is published by three sponsoring bodies: the British Bankers' Association (BBA); the Building Societies Association (BSA); and the UK's payment association, APACS.
- The Business Banking Code sets out the standards of good banking practice to follow when dealing with certain business customers, and is published by the BBA and APACS.

Adoption and compliance with these codes is at present voluntary. However, the FSA has proposed a new framework to regulate the way banks treat retail customers in its Consultation Paper 08/19 – Regulating retail banking conduct of business. The new framework will involve full application of the FSA's Principles for Businesses to the regulated activities of accepting deposits and issuing electronic money to the extent compatible with European law.

Since many firms to which the new framework will apply already comply with the standards required of the Principles, the FSA does not expect that full application of all the Principles will, in practice, require significant changes in behaviour for most deposit takers.

On 25 February 2009, the European Commission issued 30 outline proposals for the pan-European regulation of certain aspects of business banking. These proposals are not further considered in this memorandum.

b) Payment instruments:

Payment instruments are defined under the Draft Payment Services Regulations which are currently before Parliament. They will be made into law on 2 March 2009 and they will implement the Payment Services Directive in the UK on 1 November 2009 (Draft Regulations).

The Draft Regulations define payment instruments as any personalised device or personalised set of procedures agreed between the payment service user and the payment service provider. There is further information available about the Draft Regulations on the FSA website: www.fsa.gov.uk.

c) E-money:

The relevant legislation for e-money is the Financial Services and Markets Act 2000. The Act contains the general prohibition (Section 19), the classes of activity and investment (Section 22), and deals with the carrying on of regulated activities in the UK (Section 418).

Further legislation supplementing this area is provided by Articles 9B to 9K and 74A of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI2001/544) and Financial Services and Markets Act 2000 (Exemption) Order 2001.

The definition of e-money in the supplementing legislation is based on, and should (the FSA states) be interpreted consistently with, the definition of e-money contained in the E-Money Directive.

The FSA in the UK provides guidance on the scope of the regulated activity of issuing e-money in the Perimeter Guidance Manual (PERG 3). The guidance in PERG is intended to represent the FSA's views and does not bind the courts, but may be of persuasive effect.

d) *Data protection*

The collection and use of personal data is governed by the Data Protection Act 1998 which is accompanied by secondary legislation.

The Data Protection Act implemented the EC Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data (95/46/EEC) (the Directive).

e) *Bank secrecy*

The leading case on bank confidentiality was *Tournier v National Provincial & Union Bank of England* (1924) 1 KB 461 in which it was held that, save in four qualified circumstances, there was a legal obligation of secrecy on banks arising out of contract.

There are provisions which reflect this in the Banking Code and the Business Banking Code (see paragraph 1(a)).

There is an implied term of a contract between a banker and his customer that the banker will not divulge to third persons, without the express or implied consent of the customer, either the state of the customer's account or any of his transactions, unless the banker is compelled to do so by a court order, or the circumstances give rise to a public duty of disclosure or the bankers own interests require protecting.

f) *Telecommunication activities*

The Communications Act 2003 came into force in the UK in December 2003. The new communications regulator became the Office of Communications (Ofcom), which assumed all the regulatory functions of the then separate regulatory teams, including the Office of Telecommunications.

The Communications Act is applicable to all forms of communications technology, whether used for broadcasting or telecoms. The focus of the Communications Act is on markets rather than technologies.

The Wireless Telegraphy Act 2006 (WTA) has brought together under a single statute the legislation that is used to manage the radio spectrum for mobile operators.

Any wireless device which is used shall require licensing from Ofcom, unless it falls within any of the exceptions granted by Ofcom.

g) *Any other act that may apply to m-payments*

The Payment Services Directive will be implemented into UK legislation before 1 November 2009 through the Payment Services Regulations (see paragraph 1(b) above for a summary of the Draft Regulations).

The Electronic Commerce Directive which will also apply was implemented into the UK by various regulations:

- the Electronic Commerce Directive (Financial Services and Markets) Regulations 2002 (SI 2002/1775);
- the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No 2) Order 2002 (SI 2002/1776), which amended the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (2001/544);
- the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013);
- the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) (Electronic Commerce Directive) Order 2002 (SI 2002/2157), which amended the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 (SI 2001/1335) and the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (SI 2001/1060);
- the Electronic Commerce Directive Instrument 2002 (FSA 2002/49), which introduced the Electronic Commerce rules (ECO) into the FSA Handbook and made other consequential changes;
- Electronic Commerce Directive (Supplemental and Amendment) Instrument 2002 (FSA 2002/61), which further amended the FSA Handbook.

2. *Does your legislation provide for the possibility of issuing and using the following payment instruments:*

a) *Debit cards:*

According to the FSA (and as detailed above, FSMA 2000), a deposit involves the creation of a debtor-creditor relationship under which the person who accepts the deposit stores value for eventual return, whereas e-money involves the purchase of a means of payment (PERG 3.3.21).

The value on a debit card may be categorised as either e-money or a deposit depending on the circumstances. As such, debit cards may be e-money but the distinguishing factors should be used to identify a deposit and e-money.

PERG 3.3.20, sets out the relevant factors for distinguishing e-money and deposits. The factors include:

- the value kept on an account that can be used by non-electronic means;
- if the product is likely to be used for small payments and not for saving;
- if an account has features beyond payment such as overdraft and direct debit facilities is indicative of it not being e-money.

b) *Credit cards:*

A credit card will not be e-money as the customer does not pay for the spending power in advance (PERG 3.3.6). However, money paid through a credit card may still be e-money, even if the prepayment is through borrowed funds (PERG 3.3.7). Dual functionality of a debit or credit card will not affect the status of the card as e-money.

c) *Pre-paid cards?*

E-money must be prepaid. Providing the pre-paid card is accepted as a means of payment by third parties it will be deemed to be e-money.

As such, a card or similar token, issued by an employer to staff solely for the purpose of buying lunch will not amount to e-money. However, where the card is accepted as a means of payment by third parties, it can also be used to pay for goods and services and will fall within the definition of e-money (PERG 3.3.13).

3. *Please describe the possibility of using a mobile phone as a payment instrument in your jurisdiction?*

Part 2 and 4 of the Draft Payment Services Regulation will establish an authorisation regime for mobile phone operators. Part 2 requires the Financial Services Authority (FSA) to establish a register of payment services providers. The Draft

Regulations also provide for the FSA to supervise and enforce certain provisions.

Part 3 of the Draft Regulations sets out the requirements to be met by authorised payment institutions and provides the mechanism for them to establish a branch or provide services. These requirements include capital requirements and safeguarding users' funds.

There is some uncertainty regarding the application of the definition of e-money to mobile phone operators, especially where prepaid products can be used by customers to pay for third party goods and services. E-money is likely to be involved where a mobile phone operator acts as a payment agent for its customers where they purchase goods and services from a third party. A direct transfer of e-value and the mobile operator acting as an intermediary are key factors. The intermediary element is important, as the customer and third party should have a direct debtor-creditor relationship.

It is unlikely to be classed as e-money where the mobile phone operator arranges for the payment of third parties who accept the operator's products as payment for goods and services.

The FSA will have regard to the Commission's guidance when considering whether a mobile phone operator is carrying on the regulated activity of issuing e-money (PERG 3.3.25).

4. *If there is no possibility of using a mobile phone as a payment instrument, or if there are some legal difficulties in application of m-payments solutions, please indicate the main legal obstacles.*

English law does not state specifically that mobile phones may be used as a payment instrument. The main legal obstacles to determining m-payments are similar to the provisions set out in European legislation and are discussed in relation to whether the e-money directive applies to mobile payments.

The FSA have attempted to deal with these difficulties by stating that it will have regard to the Commission's guidance when considering whether a mobile phone operator is carrying on the regulated activity of issuing e-money.

The Draft Payment Services Regulations should help to create a common framework for the use of mobile phones as payment instruments.

5. *Does your legislation limit categories of entities that may issue payment instruments? If so, could a telecommunication operator issue a mobile phone as payment instrument in your jurisdiction?*

The Draft Payment Services Regulations will establish an authorisation regime for providers of payment services who are neither credit institutions nor e-money institutions such as mobile phone operators. The Regulation states that the FSA may refuse to grant any application for authorisation as a payment institution if the conditions set out in the Draft Regulations are not met.

The only requirement on the applicant is that it must be a 'body corporate' and must be constituted under the law of the United Kingdom, while having a head office or registered office in the United Kingdom. The applicant must also satisfy the FSA that it has complied with certain conditions for authorisation.

Furthermore, if there is any credit involved the Consumer Credit Act 1974 (as amended) may also be relevant. This applies if credit is provided to individuals or partnership of two to three people (subject to certain exemptions). It includes requirements for licensing and the following of certain procedures and the use of compliant documentation. Please see also paragraph 7 below.

Mobile payments

6. *Please describe briefly elements that need to be included in a consumer contract for using a mobile phone as a payment instrument. Please describe briefly rules of liability for issuer and holder of the instrument.*

Various information is required both prior to the conclusion of single payment service contract by the service provider and also after receipt of the payment order. Part 5 of the Draft Payment Services Regulations sets out the information required to be given to service users. Information required includes the way the payment instrument can be used, the liability of the payer, charges levied, any other material information the payer might need and the prior general information that is set out in Schedule 4 of the Draft Regulations.

There are separate provisions for single payment services contracts and framework contracts. The Draft Regulations also contain common provisions including a prohibition on charging for certain information.

The Draft Regulations will make provision for the rights and obligations relating to the provision of payment services. It includes matter relating to consent to payment transactions, unauthorised or

incorrectly executed payment transactions, liability for unauthorised payment transactions, execution and liability of payment services providers.

Liability is identified for the use of incorrect unique identifiers – where the service provider shall not be liable for non-execution or defective execution of the transaction. The service provider must have made reasonable efforts to recover the funds involved and charge the service user for any such recovery (providing it has been included in the framework agreement). Further liability provisions exist for non-execution or defective execution of payment transactions initiated by the payer or the payee and also for charges and interest.

A carve out for liability has been included for a force majeure event.

7. *Is it possible, under your jurisdiction, for a telecommunication operator to provide the mobile phone holder with a loan? In such a scenario, payment is made with use of mobile phone and, subsequently, the client is charged for the transaction together with an invoice for telecommunication services.*

The provision of loan and other credit to consumers in the UK is regulated under the Consumer Credit Act 1974 (CCA). It is the main legislation regulating consumer lending and credit related activities in the UK. However there are a number of other relevant laws and regulations. Amendments have been made to the CCA by the Consumer Credit Act 2006.

8. *Assuming that it is technically possible to have a mobile phone integrated with multiple accounts in more than one bank (just as a consumer may have several PIN debit/credit cards, a mobile phone holder may use one mobile phone and choose between the bank accounts used for specific payments), do you think that such a structure would be possible in your jurisdiction?*

The current m-payments systems available are web-enabled on the relevant mobile device, as a secure element and therefore part of a contactless device or SMS e-money based systems.

If technically possible as stated, multiple accounts are more likely to be web-enabled. Providing that they fulfil the relevant regulatory regimes and consumer protections, a web-enabled feature seems more appropriate than a contactless device.

Data protection

9. *Does your legislation provide for any requirements as to security of data transfer when mobile phones are used for making payments? If yes, please briefly describe such requirements.*

The Data Protection Act referred to in Answer 1 (d) above still applies.

Mobile payment by e-money

10. *Does your legislation recognise the concept of e-money, as defined in the introduction of the survey, or similar? What are the legal limitations of e-money payments (eg, amount of money transferred in one transaction, per day) and requirements for entities issuing e-money (eg, licence by an administrative body, notification to such body, minimal value of share capital). Please describe briefly other elements of legal framework for using e-money.*

The concept of e-money is recognised in the UK as discussed above. The concept of e-money as m-payments is described above.

A briefing note to the Chief Secretary of the Treasury noted that 'the emerging models of m-banking can be placed in four categories, based on the different roles played by the parties involved: the bank, the telecommunications company ('telco'), and, in some cases, a third party product provider. The models vary from one in which a bank adds on a mobile channel to its existing product range, through hybrid models where a telco may bring different branding, product set and/or distribution system to a bank-based product, to a telco-dominated model in which the telco itself is responsible for the deposits taken.'

The m-payments market in the UK is still very much in the developmental stage with Department of Transport having completed its first mobile phone ticketing trial using government mandated smartcards.

The FSA in its Specialist Sourcebook for Electronic Money (ELM Handbook, which can be found in the FSA's full handbook available at www.fsa.gov.uk) has noted that the purse limit is GB£1,000 unless the firm is sufficiently sophisticated and can block the account and recover the funds when required.

11. *Does your legislation provide that a mobile phone may be recognised as an e-money payment instrument?*

Please see above definition of 'payment instrument' in answer 1 (b) above.

12. *If there is no possibility of using a mobile phone as an e-money payment instrument or there are some legal difficulties in application of m-payments solutions within e-money, please indicate the main legal obstacles.*

Please see above.

Open question

13. *Please provide any other comments on the possibility of using a mobile phone as a payment instrument or e-money payment instrument. Feel free to point out any legal issues arising from such use of mobile phones, which have not been included in this survey.*

Please see above.

Please note that our above responses are not intended to amount to legal advice on which reliance should be placed. We therefore disclaim all liability and responsibility arising from any reliance placed on such materials.

United States

Andrew Lorentz

Wilmer Cutler Pickering
Hale and Dorr LLP
andrew.lorentz@wilmerhale.com

Franca Harris Gutierrez

Wilmer Cutler Pickering
Hale and Dorr LLP
franca.gutierrez@wilmerhale.com

Emily Westerberg Russell

Wilmer Cutler Pickering
Hale and Dorr LLP
emily.russell@wilmerhale.com

R Beckwith Burr

Wilmer Cutler Pickering
Hale and Dorr LLP
becky.burr@wilmerhale.com

Lynn Charytan

Wilmer Cutler Pickering
Hale and Dorr LLP
lynn.charytan@wilmerhale.com

Samir Jain

Wilmer Cutler Pickering
Hale and Dorr LLP
samir.jain@wilmerhale.com

David Medine

Wilmer Cutler Pickering
Hale and Dorr LLP
david.medine@wilmerhale.com

Regulatory issues and payment solutions

1. Please provide a short description of legal acts in your jurisdiction that regulate the following issues related to m-payments (please describe briefly the main ideas of specific acts):

- a) banking activities;

OVERVIEW OF US BANKING SYSTEM

The US banking system is complex and permits a wide variety of financial institutions, each subject to differing, but often overlapping, jurisdiction by state and federal regulators. Nearly all of these banks could potentially play major roles in the offering of a mobile payment product or service. In basic outline, the United States operates under a dual banking system, under which financial institutions may be chartered by a US state or the federal government. Generally, the choice of federal or state charter determines: (1) the bank's powers, capital requirements, and lending limits; (2) which agency will supervise the bank; and (3) the types of regulation that may apply to persons controlling the institution. Federally chartered financial institutions are supervised by the Office of the Comptroller of the Currency (OCC) (for national banks) or the Office of Thrift Supervision (OTS) (for federal savings banks). State-chartered banks may be supervised jointly by their state chartering authority and either the Federal Deposit Insurance Corporation (FDIC) or the Federal Reserve System (Federal Reserve). Banks and their affiliates are generally prohibited from directly engaging in, or affiliating with an

entity that engages in, general commercial activities (eg, telecommunications or manufacturing).

Certain types of financial institutions (such as state-chartered industrial banks) have powers similar to banks, but are not considered 'banks' subject to this prohibition.¹ A telecommunications provider could not therefore be affiliated with a traditional bank; however, it could affiliate with a non-bank entity.

The summary below focuses on US federal banking law, and provides examples of certain state laws that may also be applicable.

LEGAL ACTS THAT REGULATE BANKING ACTIVITIES

At the federal level, two of the more important banking statutes are:

- National Bank Act,² which generally provides for the establishment, powers and regulation of national banks; and
- Home Owners' Loan Act³ (HOLA), which generally provides for the establishment, powers and regulation of federal savings banks.

As noted, banks may also be chartered by any of the states.

Federal (such as Section 21 of the Glass-Steagall Act)⁴ and state laws generally prohibit non-banks from accepting deposits or otherwise engaging in the business of banking.

The Federal Deposit Insurance Act⁵ and the applicable rules of the FDIC,⁶ provide deposit insurance to all 'deposits' at FDIC-insured banks up to the insurance limit (currently USD\$250,000). 'Deposit' is generally defined to include the 'unpaid balance of money or its equivalent received

or held by a bank or savings association in the usual course of business and for which it has given or is obligated to give credit.' 'Deposit' includes traditional products, such as savings accounts, trust accounts, and certificates of deposit. Funds owned by a principal and deposited into one or more deposit accounts in the name of an agent, custodian, or nominee may qualify for 'pass-through' insurance (ie, will be insured to the end owner to the same extent as if deposited in the name of the principal(s)), subject to satisfaction of certain rules. Recently, the FDIC clarified the treatment of deposits accessible through stored value cards and other 'non-traditional access devices' (which might include mobile phones

Provided the funds for such a system are placed in an insured depository institution and the titling requirements are met, such funds should qualify for FDIC insurance to the individual holder.⁷

The Bank Service Company Act⁸ among other things provides the federal banking agencies with the authority to regulate and examine third party service providers performing any authorised services on behalf of a bank, or a bank's subsidiary or affiliate, to the same extent as if such services were being performed by the bank itself. An m-payment system that involved the provision of services to a bank would therefore be subject to examination by the federal bank's regulators.

b) payment instruments;

BANKING STATUTES

Under the National Bank Act and OCC regulations, national banks may 'perform, provide, or deliver through electronic means and facilities any activity, function, product or service that it is otherwise authorised to perform provide or deliver,' such as 'offering [of] electronic stored value systems.'⁹ Accordingly, a national bank may be able to engage in m-payment activity with respect to payment instrument products and services that it is authorised to perform or deliver.

Similarly, under HOLA, OTS regulations and guidance, federal savings banks 'may use, or participate with others to use, electronic means or facilities to perform any function or provide any product or service, as part of an authorised activity.'¹⁰ Electronic means or facilities include, among other things, personal computers, the internet, telephones and 'other similar electronic devices.' Consequently, federal savings banks may be able to engage in m-payment activity with respect to certain payment instrument products

and services that it is authorised to provide.

State banking parity statutes generally provide state-chartered institutions with the authority to engage in any activity permissible for national banks. State and federal bank powers in the United States have tended to converge over time as a means of fostering competition.

PAYMENT INSTRUMENT SELLER/MONEY TRANSMITTER STATUTES

Nearly all US states have 'payment instrument seller', 'check seller' or 'money transmitter' laws, many of which generally apply to electronic payment products (except those offered by banks, which are exempt).¹¹ While there is significant variation among states, these laws generally regulate the sale or issuance of payment instruments (except those redeemable only in the goods or services of the issuer), as well as engaging in the business of receiving and transmitting money. Significant precedents have evolved in the application of these laws to internet-based payment systems, but generally speaking the statutes themselves do not address internet or m-payments with any specificity. Such state laws impose a variety of significant regulatory requirements, including licensing, bonding, liquidity or capital requirements and regular examination, depending on the applicable state. Banks, other depository and credit institutions and governmental agencies are generally exempt from these laws. Failure to be licensed as a money transmitter if required in accordance with state law may be punishable under federal criminal law. See 18 USC § 1960.

In many states, gift card laws regulate the ability to impose administrative fees on inactive cards or accounts, and also may impose certain limitations on expiration dates and redemption. These statutes are principally aimed at closed system, merchant-issued gift cards, but the breadth of the statutory language requires a state-by-state assessment to determine whether m-payments would also be covered.

In addition, as discussed in more detail below, most money services businesses (eg, money transmitters but not issuers, sellers or redeemers of stored value) are required to register with the US Treasury Department's Financial Crimes Enforcement Network (FinCEN) every two years under the anti-money laundering laws and regulations of the Bank Secrecy Act.

c) e-money;

In general, US legislation does not provide for separate prudential regulation of 'e-money.' In

lieu of requiring federal licensing of 'e-money institutions', the various states require licensing under their respective money transmitter and payment instrument laws. Various federal and state banking statutes and regulations, as well as state money transmitter and payment instrument laws, mention terms such as 'stored value,' 'electronic stored value' or 'bill payment' as the types of products subject to various requirements. These terms, however, are generally incorporated into the existing statutory framework rather than establishing an independent set of requirements for issuing e-money. (See also answer 10 below).

d) data protection;

PRIVACY

The US Federal Trade Commission's (FTC) privacy regulations under the Gramm-Leach-Bliley Act (GLBA)¹², require 'financial institutions' to provide initial and annual privacy notices to 'consumers' of their services (meaning individuals who establish an ongoing relationship with the financial institution for personal/household use) and 'customers' (individuals who use a financial product or service offered by a financial institution but do not establish an ongoing relationship with that provider). Financial institutions must notify customers (and in some cases, consumers) about their privacy practices. Under GLBA, an entity is a 'financial institution' if it engages in 'financial activities' as described in section 4(k) of the BHC Act, including lending, exchanging, transferring, investing for others, or safeguarding money or securities (eg, services offered by lenders, check cashers, wire transfer services, and sellers of money orders). Financial institutions must permit customers and consumers to 'opt out' of the disclosure of personal information to unrelated third parties for certain reasons, including for marketing. The privacy rules also prohibit the sharing of a user's account number with unaffiliated third parties for marketing purposes. The Health Information Portability and Accountability Act (HIPAA) regulates the use of certain health information (which could include payment information) by covered entities, including healthcare providers, insurers, and certain payment processors.

The Communications Act provisions on the privacy of customer proprietary information (CPNI)¹³ govern the uses telecommunications providers may make of information they obtain from the provision of telecommunications services to their

customers. The rules apply only to traditional telecommunications services and not other, new 'enhanced' services that a telecommunications provider may support. Thus, the rules would – absent a customer's consent – restrict the ability of a carrier to use CPNI obtained from a customer's use of a telecommunications service to, for example, market mobile banking or commerce services, but would not apply to CPNI obtained from use of such enhanced services. However, the Federal Communications Commission (FCC) has a pending proceeding that inquires whether these traditional protections should be expanded to newer services, and the scope of any such possible expansion is unexplored.¹⁴

General Consumer Protection Regulations. The Federal Trade Commission is empowered under its organic statutes (Section 5 of the FTC Act) to protect consumers from unfair and deceptive acts and practices (UDAP) in commerce. In addition, each state has a similar statute prohibiting unfair or deceptive acts or practices. These statutes require m-commerce providers to provide truthful information to consumers about material aspects of any product or service offered, and prohibit even fully disclosed practices that cause consumer injury that cannot reasonably be avoided by consumers and are not outweighed by a countervailing public interest.

DATA SECURITY

Financial institutions are also required to safeguard financial information. Under the Interagency Guidelines applicable to traditional financial institutions, banks must take a number of measures to protect their customers' personal information.¹⁵ Similarly, the FTC's Safeguards Rule,¹⁶ applicable to other entities engaged in financial activities, obliges covered entities to develop a comprehensive, written information security plan consistent with industry standards and reasonably designed in light of the nature of the regulated financial institution and the nature of the personal information to be protected. Financial institutions must also designate a security officer, conduct regular risk assessments, train employees, supervise vendors, and monitor compliance with the information security plan. Financial institutions are also required to notify consumers when their personal information has been accessed or acquired without authorisation. The Fair and Accurate Credit Transactions Act of 2003 (FACTA)¹⁷ amendments to the Fair Credit Reporting Act (FCRA)¹⁸, and the relevant implementing regulations,¹⁹ require persons that

use a 'consumer report' or information derived from a consumer report for a business purpose to properly dispose of any such information or compilation. (Typically such a consumer report would be used in evaluating a potential borrower's creditworthiness).

FACTA and its implementing regulations²⁰ also generally require: (1) each 'financial institution' and 'creditor' that holds any 'covered account' to develop and implement an identity theft prevention programme designed to prevent, detect, and mitigate identity theft in connection with new and existing accounts; (2) issuers of credit and debit cards to develop policies and procedures to assess the validity of an address change request when that request is followed closely by a request for an additional or replacement card; and (3) users of consumer credit reports to develop policies and procedures to respond to notices from credit reporting agencies regarding address discrepancies.

Depending on its structure, an m-payments system might be deemed to create a 'covered account' for purposes of the identity theft rules.

More than 40 states have enacted legislation requiring an entity to notify customers in the event of the unauthorised acquisition of data that compromises the confidentiality of 'personal information' maintained by the entity. Furthermore, many states have privacy and data security laws that require entities that handle personal information that can be used for identity theft to institute reasonable technical, administrative, and physical safeguard to protect against unauthorised access to or use of this information. Some state laws impose specific obligations with respect to disposal of sensitive personal information, though even in the absence of such provisions safe disposal practices would be required under the general safeguards requirements and/or disposal legislation that may apply. For example, Massachusetts has issued new regulations requiring persons who own, license, store, or maintain 'personal information' about a resident of Massachusetts to develop a comprehensive, written information security programme applicable to any records containing 'personal information.'

The Federal Trade Commission has used both its deception and unfairness authority under Section 5 of the FTC Act to bring enforcement actions against entities that failed to take reasonable steps to safeguard sensitive personal information, in some cases even in the absence of any breach, as well as for breaches of the entity's privacy policy.

d) *bank secrecy;*

The Right to Financial Privacy Act²¹ (RFPA) establishes procedures requiring customer notice and an opportunity to object before certain financial institutions may disclose a customer's financial records to federal government authorities. Generally, financial institutions are prohibited from providing federal government authorities access to information contained in customer financial records, except pursuant to written customer authorisation; an administrative subpoena or summons; a search warrant; judicial subpoena; or formal written request. The RFPA only applies to federal government authorities, and does not apply to state authorities or to private persons, although a number of states have similar statutes. As discussed below, 'bank secrecy' in the United States generally refers to the laws and regulations regarding money laundering.

e) *telecommunication activities;*

There are no telecommunications laws directly applicable to the provision of m-payments. The provision of enhanced services such as m-payments, as opposed to traditional telecom services, is not subject to common carrier regulation, and thus not subject to most protections under the Communications Act. The provision of billing services is also generally unregulated, which means that telecommunications providers have broad flexibility to provide billing services for other entities.

To the extent the provision of m-payments involves the use of wireless prepaid accounts, there could be regulatory implications. While the rates for wireless services are unregulated, there have been various lawsuits and Federal Communications Commission (FCC) enquiries into several aspects of wireless terms and rates; it is possible that the use of prepaid accounts in this context could prompt such enquiries.

As noted above, the privacy implications of telecommunications companies providing m-payments services is an open question, and it is possible that the FCC might look into these issues at some point in the future.

f) *any other act that may apply to m-payments.*

The Electronic Fund Transfer Act²² (EFTA), and its implementing Regulation E,²³ establish the rights, liabilities, and responsibilities of parties in electronic funds transfers and protects consumers when they use such systems. Generally, Regulation E establishes (1) disclosure obligations; (2) consumer liability limitations for unauthorised use;

(3) record-keeping requirements; and (4) error resolution procedures (including a requirement to provisionally recredit a holder's account if the error is not resolved within stipulated timeframes). Regulation E applies 'to any electronic fund transfer [EFT] that authorises a financial institution to debit or credit a consumer's account.' For purposes of Regulation E, an 'account' is defined as 'a demand deposit (checking), savings, or other consumer asset account ... held directly or indirectly by a financial institution and established primarily for personal, family, or household purposes.' Regulation E applies generally to banks and other persons holding consumer asset accounts, but certain parts also apply to service providers that issue access devices but do not hold the consumer's account.

The Truth in Lending Act²⁴ (TILA), and its implementing Regulation Z,²⁵ prescribe uniform methods for computing the cost of credit, for disclosing credit terms, and for resolving errors on certain types of consumer credit accounts. See answer 7 below for a discussion of credit in connection with m-payments.

The federal Equal Credit Opportunity Act²⁶ (ECOA), and its implementing Regulation B,²⁷ prohibit lenders from discriminating against credit applicants, establish guidelines for gathering and evaluating credit information, and require written notification when credit is denied. In addition, at the state level, there are anti-discrimination laws that generally set forth substantive anti-discrimination standards similar to ECOA, but occasionally impose additional requirements concerning notices to customers and other documentation. See answer 7 below for a discussion of credit in connection with m-payments. ECOA covers a wider scope of credit-related activity than the Truth-in-Lending Act.

The Bank Secrecy Act,²⁸ as amended by Title III of the USA PATRIOT Act, and its implementing regulations²⁹ (collectively, the BSA) apply to certain 'financial institutions,' such as banks and 'money services businesses' (MSBs) (eg, money transmitters, and issuers, sellers or redeemers of traveler's checks, money orders, or stored value). Under the BSA, MSBs must comply with registration and reporting requirements (eg, suspicious activity reports (SARs)), as well as develop and implement an anti-money laundering (AML) programme. The regulations may exempt issuers, sellers and redeemers of traveler's checks, money orders or stored value, to varying degrees depending on the type instrument, from the reporting, recordkeeping, registration and AML

programme requirements. MSBs currently need not comply with the strict customer identification programme requirements imposed on banks, broker-dealers and certain others, although they may need to put in place some customer identification processes to fulfill their applicable recordkeeping and reporting requirements.

The US Treasury Department's Office of Foreign Assets Control (OFAC) administers and enforces list-based and country-based economic sanctions against targeted foreign countries and regimes, terrorists and terrorist organisations, and others in furtherance of US policy goals (collectively, the OFAC Sanctions). OFAC Sanctions apply to all US citizens and permanent residents located anywhere in the world, entities organised under US law (including foreign branches), US branches of foreign entities, all persons (individuals and entities) located in the United States and, in limited circumstances, foreign subsidiaries of US entities and foreign persons (collectively, subject persons). OFAC Sanctions implicate a wide range of commercial and financial transactions, including the provision of services and dealings in property, involving targeted countries, entities and individuals that are undertaken (both directly and indirectly) by subject persons.

The Unlawful Internet Gambling Enforcement Act of 2006³⁰ (UIGEA), together with its implementing regulations, generally require non-exempt participants in designated payment systems that could be used in connection with unlawful internet gambling to establish policies and procedures reasonably designed to prevent or prohibit restricted transactions, such as by identifying and blocking such transactions. Such 'designated payment systems' include automated clearing house systems, card systems (eg, credit cards, debit cards, as well as stored value products), cheque collection systems, certain money transmitting businesses, and wire transfer systems.

The federal Electronic Signatures in Global and National Commerce Act (E-Sign)³¹ facilitates electronic commerce by providing for the legal equivalence of electronic signatures and records with written signatures and paper records, provided the requirements of the statute are met. For the sake of efficiency, m-payments issuers might be expected to avail themselves of the E-Sign rules to obtain signatures and make necessary disclosures electronically to customers. Compliance with federal consumer disclosure laws using E-Sign requires adherence to specific rules, and otherwise valid 'electronic records' consisting of recordings of oral communications

cannot be used to satisfy consumer disclosure rules. M-payments operators will also need to ensure disclosures are made in a clear and readily understandable manner on the smaller screens and formats available on mobile devices (in comparison to conventional computer screens).³²

Section 3091 of the Housing and Economic Recovery Act of 2008³³ generally requires 'payment settlement entities' to provide a return to the Internal Revenue Service for each calendar year beginning after 31 December 2010 setting forth (1) the name, address and taxpayer identification number of each participating payee to whom one or more payments in settlement of reportable payment transactions (ie, any payment card transaction and any third party network transaction) are made; and (2) the gross amount of the reportable payment transactions with respect to each such payee. Furthermore, where an 'electronic payment facilitator' or other third party makes payments in settlement of reportable payment transactions on behalf of the payment settlement entity, the 'electronic payment facilitator' or other third party is required to make the return in lieu of the payment settlement entity. A 'payment settlement entity' is, in the case of a payment card transaction, the merchant acquiring entity and, in the case of a third party network transaction, the third party settlement organisation (ie, the central organisation which has the contractual obligation to make payments to participating payees of third party network transactions). The term 'electronic payment facilitator' is not defined.

General Consumer Protection Regulations

The Federal Trade Commission is empowered under its organic statutes (Section 5 of the FTC Act) to protect consumers from unfair and deceptive acts and practices (UDAP) in commerce. In addition, each state has a similar statute prohibiting unfair or deceptive acts or practices. These laws would require m-payments providers to provide truthful information to consumers about material aspects of any product or service offered, and prohibit even fully disclosed practices that cause consumer injury that cannot reasonably be avoided by consumers and are not outweighed by a countervailing public interest. These statutes deserve particular attention in connection with m-commerce activities undertaken by minors, as the regulators will consider evaluate the tendency of a particular practice to be deceptive in light of a reasonable consumer 'under the circumstances.'

The payment network rules governing various self-regulatory and private organisations would be implicated if m-payments transactions utilise these networks. These systems include the credit card/

debit card networks, the ATM networks, and the Automated Clearing House (ACH) network. Each network has its own special rules and access points. For example, the ACH network is often implicated when an account held in a financial institution is electronically debited or credited, which can only be done through a participating bank. National Automated Clearing House Association (the NACHA Rules) govern transactions through the ACH network. The NACHA Rules set forth specific processing, formatting, security and authorisation requirements, as well as the structure of relationships for the parties using the network for transmission of electronic payments. NACHA is actively evaluating whether and how the NACHA Rules should address mobile payments and is considering whether a unique transaction code should be used for these payments, as well as what unique authorisation and security issues are implicated. Visa and MasterCard are also well-known to be making efforts to facilitate the adoption of m-payments. Satisfaction of the security, branding and other standards of these payment brands (and others) and the ability to have an issuer's payment instruments accepted at merchants in their networks may be critical steps to the commercial viability of an m-payments issuer.³⁴

2. Does your legislation provide for the possibility of issuing and using the following payment instruments:

a) debit cards;

Yes, debit cards may be issued both by banks and non-banks. Non-banks may not hold deposit accounts customarily accessed using debit cards (in contrast to prepaid cards).

b) credit cards;

Yes, credit cards may be issued by banks and similar financial institutions such as state-chartered industrial banks. As a practical matter, most credit cards are issued by nationally-chartered financial institutions, although certain state-chartered institutions formed in states with favorable usury laws, such as Utah and Delaware, are also major credit card issuers.

c) pre-paid cards?

Yes, open system prepaid cards may be issued both by banks and by non-bank licensed money transmitters and payment instrument sellers. Other than state gift card laws, most regulations do not specifically address prepaid cards. A significant exception to this general rule would be the inclusion of 'payroll card accounts' under certain specially-modified provisions of Regulation E.³⁵

3. *Please describe the possibility of using a mobile phone as a payment instrument in your jurisdiction.*

While the precise classification of a mobile phone used as a payment device may be ambiguous under most US laws, the US scheme can accommodate the offering of a mobile phone as a type of payment instrument.³⁶ In general, the laws applicable to a particular payment instrument depend on the type of instrument or system:

- Closed system – if the value stored on (or accessible through) the mobile phone is only usable to purchase goods or services from the issuer (such as the telecommunications provider), the banking, money transmission, and certain other statutes will generally not apply. Such a system is severely limited in that it does not provide the ability to pay third party providers of goods and services and so seems unlikely to satisfy the need for a broad m-payments service.
- Open system – in an open system, the value accessible through the m-payment system can be used broadly to transfer funds to any person who has agreed to accept m-payment value. Open systems can be established under a banking, payment instrument seller/money transmitter, or hybrid model that combines elements of each. The discussion below assumes the mobile phone would be used as part of such an ‘open’ system.

Assuming an open system, the mobile phone device would need to be integrated into either the banking or the money transmitter regimes (and many payment systems employ a hybrid of both). The design and operating characteristics of the system will help determine the optimal regulatory structure. Typically, the telecommunications provider would enter into some form of partnership or alliance through services agreements with the regulated institution. Alternatively, acquisition or establishment of a licensed money transmitter or other non-bank financial institution could be employed, as a telecommunications provider could not own a conventional bank (but could own a state-chartered industrial bank).

Finally, the mobile phone payment system would need to be assessed under each of the laws discussed elsewhere in this survey to determine what applies to the specific design of the system. Care needs to be taken in structuring the alliance or programme to ensure that the activities triggering financial regulation are undertaken by the regulated institutions.

4. *If there is no possibility of using a mobile phone as a payment instrument, or if there are some legal difficulties in application of m-payments solutions, please indicate the main legal obstacles.*

In general, the most significant legal challenge facing m-payments solutions is the lack of any laws or regulations specific to m-payments, and therefore uncertainty regarding how the panoply of current federal and state laws and regulations discussed in answer 1 would apply. The lack of certainty is most acute as concerns the potential application of state money transmitter laws and the federal Regulation E, given the significant burdens associated with complying with those rules.³⁷

Given the fragmented nature of payment regulation in the United States, various proposals have been made for clarifying and harmonising the various sources of law.³⁸ Notwithstanding such efforts, the regulatory approach to electronic payments in the United States has been very incremental, with the principal US statute regulating electronic fund transfers (the EFTA) now 30 years old. The Federal Reserve proposed to incorporate stored value expressly into the scope of Regulation E in 1996, but withdrew its proposal after releasing a Congressionally-mandated study in 1997 which concluded such regulation might stifle innovation.³⁹ Similar conclusions were reached in the Consumer Electronic Payments Task Force Report issued by the banking agencies the following year regarding the desirability of regulating electronic money in the United States.⁴⁰

Even in the face of such legal uncertainty, payment innovations (such as the use of mobile phones as payment devices) may be implemented in the United States. The lack of a clear classification under various laws creates the opportunity for creative argumentation and system design to address the principal regulatory concerns in retail payment systems (settlement risk, consumer protection, anti-money laundering, etc) without necessarily subjecting new and innovative approaches to undue regulatory burdens.⁴¹ Efforts to clarify the authority applicable to novel payment methods face the challenge of unintended consequences given the complexity of existing regulation. There are also practical difficulties inherent in harmonising federal and state rules as well as major public policy considerations in assessing whether federal preemption of state law is appropriate in various circumstances.

5. *Does your legislation limit categories of entities that may issue payment instruments? If so, could a telecommunication operator issue a mobile phone as payment instrument in your jurisdiction?*

As discussed above (see answer 3), federal and state law generally requires that entities issuing payment instruments in open systems be banks or licensed money transmitters. As banks in the United States are generally prohibited from engaging in commerce, a telecommunications provider could not own or operate a traditional bank, but it could be licensed as a money transmitter/payment instrument seller. As discussed in answer 4, many m-payments services might be expected to employ a hybrid approach which might involve partnering with a regulated financial institution (either one or more banks or a licensed money transmitter). Given the compliance costs associated with maintaining the requisite regulatory licenses money transmission business, it may be more efficient to contract with a licensed entity rather than obtain the necessary licenses.

Mobile payments

6. *Please describe briefly elements that need to be included in a consumer contract for using a mobile phone as a payment instrument. Please describe briefly rules of liability for issuer and holder of the instrument.*

CONTRACT ELEMENTS⁴²

Regulation E requires 'financial institutions' (eg, persons that issue an 'access device' and agree with a consumer to provide EFT service) to provide certain written initial disclosures at the time a consumer contracts for an EFT service or before the first EFT is made. An 'access device' is defined as a 'means of access to a consumer's account... that may be used the consumer to initiate electronic funds transfer,' and could encompass a mobile phone when used as a payment instrument. The initial disclosures required by Regulation E include, among other things: a summary of the consumer's liability for unauthorised EFTs; the telephone number and address of the person or office to be notified of an unauthorised EFT; the financial institution's business days; the types of EFTs the consumer may make and any limitations on the frequency and dollar amount of the transfers; any fees imposed for EFTs; a summary of the consumer's right to receipts, periodic statements and notices regarding certain transfers; a summary of the consumers right to, and procedure for, stop payment of a preauthorised EFT; a summary of the financial

institution's liability for the failure to make or stop certain transfers; the circumstances under which the financial information may provide information concerning the consumer's account to third parties; a notice concerning error resolution; and a notice that a fee may be imposed by an ATM operator. For jointly-offered EFT services, these disclosure obligations may be allocated among the parties in accordance with the information they hold and their relationship to the customer.

Importantly, a service governed by Regulation E must also provide by contract that the operator resolve errors in a timely manner. An 'error' under Regulation E includes an unauthorised transfer. In general, errors are to be resolved within ten days or the operator must provisionally recredit the account for the amount in dispute. If the account is recredited, the operator may take up to 45 days to resolve the error.

Regulation Z also imposes a number of initial disclosure requirements with respect to certain open-end and closed-end credit transactions that would need to be included in any contract for such credit. If a telecommunication operator provides a mobile holder credit, as discussed in answer 7 below, such disclosures would need to be provided depending on the type of credit extended. Additional disclosures may also be required under state legislation governing consumer credit.

Additional disclosures may be required under similar state legislation governing EFTs, or other state consumer protection laws. Furthermore, if the entity issuing the mobile phone payment instrument is licensed under state law as a 'money transmitter,' 'payment instrument seller' or 'check seller,' additional disclosures may be required under the statute applicable to such entities.

LIABILITY

The EFTA and Regulation E generally establish certain liability limits for the consumer and financial institution. With respect to the consumer's liability, Regulation E establishes limits on such liability in the event of (1) the theft or loss of an access device or (2) unauthorised transfers. In instances of the theft or loss of an access device, a consumer's liability will depend on whether the consumer provides timely notice to the financial institution of the theft or loss of the access of device (ie, notice within two days after learning of the theft or loss), and in any event will not exceed USD\$500. In instances of unauthorised transfers discovered in periodic statements provided by the financial institution, a consumer must report

the unauthorised transfer within 60 days of transmittal of the statement to avoid liability for subsequent transfers. If the consumer fails to do so, the consumer's liability will be the amount of unauthorised transfers that occur after the close of the 60 days and before notice to the institution, and that the institution establishes would not have occurred with notice within the 60-day period. In any event, if state law or applicable contract imposes less liability, the consumer's liability shall not exceed the amount imposed under state law or the applicable agreement.

The EFTA generally provides that a financial institution is liable to a consumer for all damages proximately caused by: (1) the failure to make an EFT, in accordance with the terms and conditions of an account, in the correct amount or in a timely manner when properly instructed to do so by the consumer (with certain exceptions, eg, the account had insufficient funds, the funds are subject to legal process); (2) the failure to make an EFT due to insufficient funds when the financial institution failed to credit, in accordance with the terms and conditions of an account, a deposit of funds to the consumer's account which would have provided sufficient funds to make the transfer; and (3) the financial institution's failure to stop payment of a preauthorised transfer from a consumer's account when instructed to do so in accordance with the terms and conditions of the account. However, if the failure to make an EFT or to stop payment was not intentional and resulted from a bona fide error, the financial institution is only liable for actual damages proved.

7. *Is it possible, under your jurisdiction, for a telecommunication operator to provide the mobile phone holder with a loan? In such a scenario, payment is made with use of mobile phone and, subsequently, the client is charged for the transaction together with an invoice for telecommunication services.*

Yes, a telecommunication operator could provide loans to its clients, although it may be subject to state licensing requirements by doing so. Unless the credit extended were incidental, the loans would generally be governed by state laws regulating the business of making small consumer loans, such as small loan statutes, licensed lender statutes, or state codifications of the Uniform Commercial Consumer Code (UCCC). Small loan laws typically apply to loans of specified amounts and interest rates, and vary considerably in the size of the loans that they cover. Licensed lender statutes, on the other hand, tend to regulate more broadly any persons engaged in the business of lending and usually have significant bonding or solvency

requirements. Laws based on the UCCC typically require licensing of those engaged in the business of lending and may also regulate those who take assignments of loans and undertake direct collection of payment on those loans; they apply only to loans made at interest rates above the rates otherwise allowed by state law. Many of these laws require the entity making loans to be licensed by or registered with the state. The laws also impose a variety of other regulatory requirements, which may include reporting and disclosure obligations, depending on the state.

Due to the complexity of complying with multiple state lending laws, lending activities are generally conducted through federally-chartered institutions, which typically benefit from the federal preemption of state laws. In addition, federally chartered institutions are able to export the interest rate of the state where the institution is headquartered to any other state, thus allowing the possibility of an institution to charge a higher interest rate without violating a given state's usury laws. Federally-insured state-chartered financial institutions also benefit from the ability to export their home state's interest rate to loans extended to residents of other states. Depending on the type of credit product contemplated, telecommunication operators may find it challenging to compete nationally due to the advantages of preemption and exportation afforded such financial institutions. Such an operator may therefore prefer to partner with a financial institution in extending credit rather than acting as the creditor itself.

The disclosure and other requirements included in the federal TILA, and its implementing Regulation Z, as well as similar state disclosure laws, would apply to such loans. The loans would also be governed by the federal ECOA, its implementing Regulation B, and state-level anti-discrimination laws.

8. *Assuming that it is technically possible to have a mobile phone integrated with multiple accounts in more than one bank (just as a consumer may have several PIN debit/credit cards, a mobile phone holder may use one mobile phone and choose between the bank accounts used for specific payments), do you think that such a structure would be possible in your jurisdiction?*

Yes, it should be possible to use a single mobile phone to access accounts at multiple banks. In connection with mobile banking offerings, for example, any bank that offers online bill payment could be accessed by such a device through an Internet-capable mobile phone. The mobile phone user would need to separately open an account at each bank and verify his identity to satisfy the applicable anti-money laundering

rules. In addition, banks are required to maintain strict authentication controls governing access to accounts through the internet, and therefore would need to authenticate the user using the proper credentials (such as a PIN) for each visit.⁴³ A mobile phone might also be used in connection with some form of payment aggregation gateway to access multiple bank accounts for the purpose of executing m-payments.

A mobile phone could also use a settlement system such as the ACH network to access more than one bank account. Of course, any such payment process would have to comply with the NACHA Rules (including any requirements involving security and authorisation) and the provider of the process would have to contract with a financial institution or third-party service provider that is authorised to originate entries in the ACH network.

Data protection

9. *Does your legislation provide for any requirements as to security of data transfer when mobile phones are used for making payments? If yes, please briefly describe such requirements.*

As discussed above (see answer 1(d)), the FTC's general consumer protection requirements regarding unfair and/or deceptive acts in commerce, as well as financial privacy and safeguards regulations under the GLBA, would apply to data transfers when mobile phones are used for making payments. In general, these rules require the provision of initial and annual privacy notices; the establishment of procedures to allow users to 'opt-out' of information sharing with third parties; and the development, implementation and maintenance of safeguards to protect customer information. In addition, as discussed above, under FACTA, and its implementing regulations, if the mobile phone operator is a 'financial institution' or 'creditor' that holds any 'covered account,' it would have to develop and implement an identity theft prevention programme designed to prevent, detect, and mitigate identity theft in connection with new and existing accounts. The FCRA/FACTA amendments also require persons that use a consumer report or information derived from a consumer report for a business purpose to properly dispose of any such information or compilation.⁴⁴

A variety of state laws may apply as well, such as those governing data disposal and privacy and data security. Two states, Massachusetts and Nevada, require that certain information be encrypted when transmitted over the public internet.

Furthermore, in the event of a data security breach, general consumer protection statutes, GLBA, and

state data breach notification laws may apply. Such laws generally require notice to customers of the unauthorised acquisition of data that compromises the confidentiality of sensitive personal information maintained by the entity; breaches of an entity's privacy policy may also give rise to liability.

Most of the settlement and payment systems also have rules about security concerning the transmission of payment data. For example, the NACHA Rules require that all transmissions containing banking information be encrypted to a specified standard or transmitted via secure sessions that are equivalent to the specified standard.

Mobile payment by e-money

10. *Does your legislation recognise the concept of e-money, as defined in the introduction of the survey, or similar? What are the legal limitations of e-money payments (eg, amount of money transferred in one transaction, per day) and requirements for entities issuing e-money (eg, licence by an administrative body, notification to such body, minimal value of share capital). Please describe briefly other elements of legal framework for using e-money.*

E-money is not subject to stand alone regulation, but rather is encompassed under the banking or money transmission regimes. As noted above, electronic money equivalents can be issued either by licensed money transmitters or banks. Money transmitters are generally subject to licensing, bonding, and other requirements discussed above, and certain state laws incorporate the concept of 'stored value' into their statutes.

E-money is generally not separately regulated at the federal level, although certain provisions are made for 'stored value.' For example, for purposes of applying the anti-money laundering rules, the BSA includes issuers, sellers or redeemers of stored value within the definition of 'money services business.' 'Stored value' for this purpose is defined as 'funds or monetary value represented in digital electronics format (whether or not specially encrypted) and stored or capable of storage on electronic media in such a way as to be retrievable and transferable electronically.' Depending on how the programme is designed, an m-payments system could be characterised as a 'seller or redeemer of stored value' or as a 'money transmitter' for federal law purposes, which has significant consequences for the degree of regulation to which the system will be subject. (See answer 13).

The BSA exempts from the definition of MSB (and hence from the requirements of the BSA) an issuer, seller, or redeemer of traveler's checks, money orders or stored value that issues sells or redeems such instruments in amounts less than US\$1,000 in

currency or monetary or other instruments to any person on one day in one or more transactions.

As discussed above, banks must be chartered at the state or federal level, and are subject to supervision and regulation by the relevant supervisory authority, including various capital requirements (such as leverage limits and risk-based capital standards).

11. *Does your legislation provide that a mobile phone may be recognised as an e-money payment instrument?*

State money transmitter laws are being expanded over time to incorporate broader definitions of 'payment instrument' for purposes of such laws. Each such statute needs to be analysed on its own terms to determine if a mobile phone would qualify. For example, recent revisions to Florida's statute governing money services businesses amended the definition of 'payment instrument' to include an 'electronic instrument,' therefore making the transmission, issuance, sale, provision or deliverance of such 'electronic instruments' subject to regulation under the statute. The revised statute defines an 'electronic instrument' as a 'card, tangible object, or other form of electronic payment for the transmission or payment of money or the exchange of monetary value, including a stored value card or device that contains a microprocessor chip, magnetic stripe, or other means for storing information; that is prefunded; and for which the value is decremented upon each use.' In turn, 'stored value' is defined as 'funds or monetary value represented in digital electronics format, whether or not specially encrypted, and stored or capable of storage on electronic media in such a way as to be retrievable and transferred electronically.' Depending on the design, it would seem a mobile phone functioning as a payment instrument may fall within this definition.

12. *If there is no possibility of using a mobile phone as an e-money payment instrument or there are some legal difficulties in application of m-payments solutions within e money, please indicate the main legal obstacles.*

As noted above, there is no separate regulatory scheme for e-money. The challenges in applying an m-payments solution within the US payments framework are discussed throughout this survey.

Open question

13. *Please provide any other comments on the possibility of using mobile a phone as a payment instrument or e-money payment instrument. Feel free to point out any legal issues*

arising from such use of mobile phones which have not been included in this survey.

ANTI-MONEY LAUNDERING

By allowing a mobile phone to be used as a payment instrument, a telecommunication operator might be considered to be a money transmitter and/or an issuer, seller or redeemer of money orders or stored value products, thus an MSB subject to the BSA. Under the BSA, MSBs are required to, among other things, comply with registration, reporting and record-keeping requirements, as well as develop and implement a risk-based AML compliance programme. As discussed briefly above, stored value issuers, sellers and redeemers, may be exempted the BSA's requirements to varying degrees, depending on the type of stored value. Similarly, some of the BSA's reporting and recordkeeping requirements may be avoided by requiring transactions to be below a certain dollar threshold.

Although the AML programme for MSBs does not specifically require a customer identification programme, as an AML programme for a bank would, certain of the MSBs recordkeeping and reporting requirements either expressly or implicitly require the MSB to verify customer identification or to otherwise 'know' its customers. Accordingly, some customer identification process may be necessary to fulfill applicable recordkeeping and reporting requirements. Finally, an MSB is required to implement an AML programme that is 'reasonably designed to prevent the [MSB] from being used to facilitate money laundering and the financing of terrorist activities' which suggest that the MSB screen all parties to whom it provides services.

Certain exceptions to these rules may be available if the telecommunications operator acts as an agent for another MSB or a financial institution. For example, entities that act solely as an agent for a money transmitter are not subject to the registration requirements. Similarly, if an entity acts solely as an agent for an MSB, the agent and the MSB may allocate between them responsibility for development of policies, procedures, and internal controls required as part of each MSBs AML programme.

If the telecommunication operator has partnered with a bank to offer the m-payment service (ie, acts as the bank's service provider in the administration of the bank's m-payments programme), the operator's direct legal obligations under the BSA might be simplified, however the obligations imposed on it indirectly by the bank will likely be

more stringent. As noted above, the BSA requires banks to implement a customer identification programme as part of their AML programme. The regulation requires that specific elements of sensitive personal information be obtained from the customer and then verified. As a practical matter, because the telecommunications operator would be directly interfacing with the mobile phone customer, the bank might try to contract with the telecommunication operator to perform portions of its BSA obligations (such as the customer identification programme requirements), on its behalf.

OFAC

To the extent that the telecommunication operator is a US person, it would be subject to and would need to ensure compliance with the OFAC Sanctions. Compliance with the OFAC Sanctions would entail, among other things; (1) screening customers and other counterparties (collectively 'counterparties'), as well as transactions by or on behalf of such counterparties, against the OFAC Sanctions; and (2) blocking or rejecting, and reporting, prohibited transactions as necessary.

STATE ABANDONED PROPERTY LAWS

State abandoned property laws require the 'holder' of intangible property, such as a balance on an m-payment account, to be turned over to the custody of the state after a defined period of inactivity. If a mobile phone is considered a payment instrument, such state laws might apply to any unused value held by the telecommunication operator or any other party in the m-payment system that was deemed the 'holder'. Typically, this would necessitate an accounting system that would allow for the automatic identification of accounts that have been inactive for the requisite period, and then reporting and remittance of the corresponding funds to the relevant states.

UIGEA

As discussed above in answer 1(g), the UIGEA requires certain non-exempt 'participants' in a 'designated payment system' to establish and implement written policies and procedures to identify and block, or otherwise prevent or prohibit, transactions involving unlawful internet gambling. A 'money transmitting business' is a designated payment system only to the extent that it engages in the transmission of funds (but not including check cashing, currency change, or the issuance or redemption of money orders, traveler's checks, and other similar instruments)

and permits customers to initiate transmission of funds transactions remotely from a location other than a physical office of the money transmitting business. In addition, the participants in such a money transmitting business are exempt from the requirement to establish policies and procedures, except for the 'operator' of the money transmitting business (ie, the entity that 'provides centralised clearing and delivery service between participants in the designated payment system and maintains the operational framework for the system'). Accordingly, if by operating a mobile phone as a payment instrument, a telecommunications carrier acts as the 'operator' of a 'money transmitting business', then the telecommunication carrier may be subject to the UIGEA.

Notes

- 1 12 U.S.C. § 1841 et seq. Although there are a number of other statutes relevant to banking, we have focused on those most directly relevant to the offering of a mobile payment product or service. In addition, state and federally-chartered credit unions offer many of the same services as banks.
- 2 12 U.S.C. § 21 et seq.
- 3 12 U.S.C. § 1461 et seq.
- 4 12 U.S.C. § 378(a)(2).
- 5 12 U.S.C. § 1811 et seq.
- 6 12 C.F.R. Part 330.
- 7 Stored Value Cards and Other Nontraditional Access Mechanisms, New Gen. Couns. Op No 8, FDIC Fin. Institution Letter 129-2008 (13 Nov 2008). 'Depository institutions' that are not federally insured are required to make certain disclosures to borrowers, and must receive the borrower's acknowledgment prior to accepting deposits.
- 8 12 U.S.C. § 1861 et seq.
- 9 12 C.F.R. Part 7 § 5002(a).
- 10 12 C.F.R. § 555.200(a).
- 11 For example, see California's laws regarding Transmission of Money Abroad, Cal. Fin. Code § 1800 et seq. and the Payment Instruments Law, Cal. Fin. Code § 33000 et seq; and New York's statute regarding Transmitters of Money, NY Bank Law § 640 et seq.
- 12 15 U.S.C. § 6081 et seq.
- 13 47 U.S.C. § 222.
- 14 Report and Order and Notice of Proposed Rulemaking, Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No 02-33, Consumer Protection in the Broadband Era, WC Docket No. 05-271, et al, 20 FCC Rcd 14853, Para 149 (2005).
- 15 See, eg, 12 CFR Part 364, App B.
- 16 16 CFR Part 314.
- 17 Pub L No 108-159.
- 18 15 USC §§ 1681 et seq.
- 19 16 CFR Part 682.
- 20 16 CFR Part 681.
- 21 12 USC § 3401 et seq.
- 22 15 USC § 1693 et seq.
- 23 12 CFR Part 205.
- 24 12 USC §§ 1601-1665, 1671-1677.
- 25 12 CFR Part 226.
- 26 15 USC §§ 1691-1691f.
- 27 12 CFR Part 202.
- 28 31 USC § 5311 et seq; 12 U.S.C. §§ 1786(q), 1818(s), 1829b, and 1951-1959.
- 29 31 CFR Part 103.
- 30 31 U.S.C. § 5361 et seq.
- 31 15 U.S.C. § 7001 et seq.
- 32 A similar legal regime exists at the state level under the Uniform Electronic Transactions Acts and similar laws.
- 33 Pub. L No 110-289.

- 34 For example, to the extent an m-payments system accessed or stored cardholder information, the applicable provisions of the Payment Card Industry Data Security Standards would need to be satisfied.
- 35 12 CFR Sect 205.18. A 'payroll card account' is 'an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer's wages, salary, or other employee compensation (such as commissions), are made on a recurring basis.' *Ibid* at 205.2.
- 36 We have assumed for this purpose that the term 'payment instrument' is meant in the sense of a method of payment (such as a debit card) and not an 'instrument' under the Uniform Commercial Code (UCC). Under the UCC, Article 3, an 'instrument' means a 'negotiable instrument', which must take a written form. See UCC, Articles 3-103-104.
- 37 Uncertainty as to the availability of FDIC insurance has been frequently cited as a third key area of ambiguity, but it may be that the new FDIC General Counsel Opinion No 8 has largely resolved such questions as to stored value and similar non-traditional access devices. See Note 7 (regarding FDIC pass-through insurance opinion).
- 38 For example, the Department of Treasury Blueprint issued in March 2008 recommended the consolidated regulation of 'systemically important' payment and settlement systems. US Treasury Dept, Blueprint for a Modernised Financial Regulatory Structure (March 2008). In addition to state money transmission and payment instrument seller laws, state laws also principally govern traditional payment instruments such as checks and wire transfers under Articles 3, 4 and 4A of the Uniform Commercial Code (UCC). The Uniform Law Commission, which promulgated the UCC in 1952, has created a Study Committee that is currently examining the potential for updating payment regulations to reflect a number of developments in electronic payments. See www.nccusl.org/Update/DesktopDefault.aspx?tabindex=1&tabid=40
- 39 Board of Governors of the Federal Reserve System, Report to the Congress on the Application of the Electronic Fund Transfer Act to Electronic Stored-Value Products (1997), available at: www.federalreserve.gov/boarddocs/rptcongress/efta_rpt.pdf.
- 40 Report of the Consumer Electronic Payments Task Force (30 April 1998).
- 41 In any event, most payment innovations take place at the level of the customer interface (such as introducing a mobile phone as the payment device), with the back-end processing and settlement relying on existing networks and systems. See *The Electronic Payments Study* sponsored by the Federal Reserve System (March 2008), available at: www.frbsservices.org/files/communications/pdf/research/2007_electronic_payments_study.pdf.
- 42 Regulation E and Regulation Z may apply directly to the issuer of a mobile phone access device, or they may indirectly apply if accounts governed by these regulations are used as the source of value to load the mobile phone device. Notably, Regulation Z provides consumers in covered credit transactions to assert claims and defenses against the issuer as a defense to repayment of the credit, if the consumer has satisfied certain requirements (such as first asserting such defenses against the merchant that sold them the good or service). Although not necessarily a legal requirement, credit card issuers have agreed with regulators in certain circumstances to apply these 'goods and services' protections to transactions using value loaded to an intermediary payment system (such as PayPal) from credit cards.
- 43 Federal Financial Institutions Examination Council ('FFIEC'), *Guidance on Authentication in an Internet Banking Environment* (2005), available at: www.ffiec.gov/pdf/authentication_guidance.pdf.
- 44 To the extent applicable, it would also be necessary to comply with the privacy requirements of the Children's Online Privacy Protection Act, 15 USC § 6501 et seq.

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All finance securities and banking lawyers, whether in private practice or working in-house, and those working generally in the banking and finance industry.

For further information, please contact:

International Bar Association

10th Floor, 1 Stephen Street, London W1T 1AT, United Kingdom

Tel: +44 (0)20 7691 6868 Fax: +44 (0)20 7691 6544

E-mail: confs@int-bar.org Website: www.ibanet.org/conferences/Conf271/



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