



## Contributing question for EBA's Q&A – DIRECTIVE (UE) 2015/2366 regarding the implementation of the electronic communications exclusion.

### Question

---

Considering the organization of the voiced-based premium rate services market, and considering the interpretations proposed for the electronic communications exclusion (ECE) in the different countries, might the European Banking Authority confirm, that :

1. as far as a payment transaction complies with the conditions imposed by the ECE, **the ECE applies to the whole value chain**, and therefore,
2. **all the providers of electronic communications networks or services involved in payment transactions covered by the ECE do not need to register as payment institutions or agents for these operations.**

### Context

---

The DIRECTIVE (UE) 2015/2366 defines a 'payment transaction' in article 4 as an 'act, initiated by the payer or on his behalf or by the payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and the payee'.

Under DIRECTIVE (UE) 2015/2366 the digital download exemption has been replaced by the electronic communications exclusion (ECE) in its article 3 'Exclusions'.

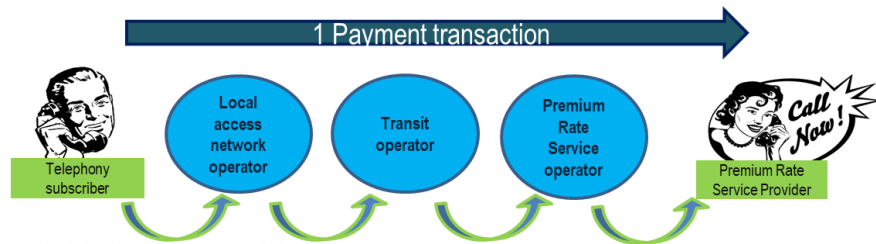
The ECE excludes payment transactions by a provider of electronic communications networks or services where these are provided in addition to electronic communications services provided to a customer.

The ECE is limited to the purchase of digital content and voice based services. It also includes charitable giving and the purchase of tickets but only via electronic devices, charged to the subscriber's bill.

The ECE also introduces value limits for transactions that are within the ECE: 50€ per single payment transaction and 300€ cumulative value for an individual subscriber per month.

The purchase of digital contents and voice based premium rate services involves several "intermediaries" (as premium rate operators or transit operators) implied in the delivery of the services and contents as well as in the invoicing/cashing, in the same way they proceed for other telco services.

**This mesh architecture enables stakeholders to provide content and premium rate services while being assured of reaching every potential customer and of being paid for every delivered content or service, whoever is the customer's local access network operator.**



The question rises of the practical application of DIRECTIVE (UE) 2015/2366 to these intermediaries.

## ACPR's Interpretation

The French Financial Service Regulatory Authority (ACPR) don't consider the payment transaction as an 'end to end' activity but as a succession of payment services between intermediaries, where only the first transaction in the chain provided by the local access network operator benefits of the ECE.

Therefore, intermediaries as premium rate services operators and transit operators<sup>1</sup> shouldn't benefit from the ECE and would have to register as payment institutions or agents of payment institutions.

## Our Interpretation

The recital 15 of the Directive (UE) 2015/2366 states that one of the main purposes for a new version of the ECE was *'to clarify and narrow the scope of eligibility for that exclusion for such service providers by specifying the types of payment transactions to which it applies'*.

In line with the goal set in the above recital, the ECE targets the payment transaction initiated between a provider of electronic communications networks or services and its costumer, in addition to electronic communications services for the purchase of digital services, electronic tickets and charitable donations.

Reading the Article 4 of the Directive (UE) 2015/2366, we understand that a payment transaction is an 'end to end' activity from the payer to the payee.

Since the ECE applies to payment transactions, and as far as a payment transaction complies with the conditions imposed by this same exclusion, **we understand its application to be valid on the end to end chain. And therefore, that the operators providing intermediary payment service required to complete this payment transaction, in addition to electronic communications services, wouldn't have to register as payment institutions or agents of payment institutions.**

In France, where:

- voice-based premium rate services market is already firmly regulated by ARCEP Authority,
- consumer protection is also strongly regulated through national regulations and joint work between the organizations representing this market and the DGCCRF Authority,

the application following ACPR's interpretation would be very disproportionate compared to the alleged benefits it could bring on its organization. Such an implementation could even threaten the sustainability of this market Which would defeat the purpose of this exclusion.

<sup>1</sup> an operator handling calls/SMS between network operators and service providers.



## Interpretations in Europe

---

Given the room left to the interpretation regarding the implementation of the ECE, two countries took a stand, the United Kingdom and Germany, by favouring its application across the value chain involved in the provision of the service and the payment transaction.

Despite different interpretations it is important to note that these two countries came to the same conclusion.

- In Germany, BaFin, the financial supervisor, and BNetzA, the regulatory authority for telecommunications, jointly agreed, in an internal briefing document, informally shared with operators' association VATM.

They decided not to classify as Payment Services the so-called "Online Billing" flavor of Intelligent Network services, i.e. when the value of the call is entirely determined by the local access network operator to which the subscriber is connected (counting the number of calls or of minutes), based on the logic of recital 52 of DIRECTIVE (UE) 2015/2366, which consists in saying that, since three-corner services (consumer, operator to which the subscriber is connected, Intelligent Network service provider) were not classified as payment services, then four-corner services (consumer, local access network operator, Intelligent Network operator, Intelligent Network service provider) should also be not classified as payment services, for competition promotion purposes; **And therefore the ECE applies for all the intermediaries.**

- In United Kingdom, the exclusion historically applied to all operators in the voice-based premium rate services value chain and nothing has changed since DIRECTIVE (UE) 2015/2366

FCA considers that "where a network operator benefits from the exclusion with respect to a particular transaction, the provider of any other payment service resulting from that transaction will also benefit from the exclusion" and specifies in its HandBook that **this exclusion 'cascades' to include intermediaries that facilitate the transfer of money to merchants;**

**The practical application of the ECE in those two countries is consistent with our interpretation.**

As far as the rest of Europe is concerned, no other country has commented, to our knowledge, on the scope of application of the ECE, and probably continue to include all the intermediaries of the chain as when the PSD1 was the current law.

---