

Regulating the card issuers

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Over recent years, the introduction of pre-paid payment cards has generated significant publicity throughout Europe: eg, Mondex in the UK, Dan-nt in Denmark and Avant in Finland. Pre-paid cards are able to load and store monetary value using a micro-chip. Schemes issuing such card scan operate in a number of different ways, such as being anonymous or fully accountable.

The recent introduction of pre-paid cards has meant they are not generally provided for in legislation or regulations. Two reports have recently been published which address this important area of law: "Report on the legal and regulatory aspects of the issue and use of pre-paid cards", published by the European Commission, and "Digital Cash - the legal implications", published by the Centre for Commercial Law Studies. This note reviews some of the issues addressed in these reports.

Do pre-paid card issuers require central bank authorisation? Under the Banking Act 1987, the Bank of England has supervisory authority over those institutions which accept deposits. The first question that needs to be addressed, therefore, is whether the manner in which pre-paid cards operate constitutes the taking of deposits. Where a pre-paid card, loads and stores electronic value, it would seem clear that such an activity would constitute deposit-taking, and authorisation would be required. The European Monetary Institute published a report on the topic in 1994, and their conclusions were that central bank authorisation would be required, although such authorisation may not be the same as that applied to a fully-fledged credit institution.

The definition of "deposit" under the Banking Act 1987 makes it clear, however, that authorisation is not likely to be required if the issue of electronic value can be classified as either (a) a sale of goods or services and/or (b) non-redeemable. For example, telephone cards are purchased by the public for the provision of telecommunication services. No deposit occurs and the electronic value may not be redeemed for cash by the purchaser.

From a consumer's perspective, there are obvious advantages to a card issuer being required to be authorised. Not least, is the fact that national 'deposit protection schemes' should apply to such schemes, which provide significant protection for the consumer: in the UK, the Deposit Protection Fund operates under the Banking Act 1987.

Is such electronic value legal tender? The legal consequence of making payment using legal tender is the fact that the creditor is obliged to accept such a payment in settlement of a debt. Under English law, legal tender is defined by legislation: Currency and Bank Notes Act 1954 and Coinage Act 1971. Therefore, electronic value stored on a pre-paid card would require statutory recognition in order to be considered legal tender. However, this should not be viewed as a significant obstacle to the introduction of pre-paid cards, since many

other types of payment are not legal tender (eg. credit cards, cheques), but creditors can waive their right to be paid in legal tender (eg. by contract).

Is a payment made by pre-paid card an absolute or conditional payment? If it is intended to replicate the functions of traditional cash, payment by pre-paid card would obviously constitute absolute payment. The issue of how a particular scheme operates will depend on the nature of the agreements that exist between the creditor, debtor and the third-party.

In the longer term, the development of certain forms of pre-paid card may be expected to cause significant concern to other regulatory authorities, if not the central banks. Taxation, for example, relies on the existence of an audit trail of transactions to ensure that individuals pay tax. In schemes, such as Mondex, where no historical record is maintained by any third-party of each transfer of funds and, indeed, the cards only keep such data for a limited number of transactions, the revenue authorities will be rightly concerned that such anonymity can only threaten their traditional powers of investigation. On the other hand, the Data Protection Registrar may welcome the introduction of a technology which will not raise new threats to the use of an individual's personal data.

"Digital Cash - the legal implications", is available from the Centre for Commercial Law Studies, Queen Mary & Westfield College: tel -0171-975-5125; fax - 0181-980-1079; email - itlaw@qmw.ac.uk."

Cybernews Volume 2, numéro 3 (automne 1996)