

The new E-
Money Directive
in Ireland

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THE NEW E-MONEY DIRECTIVE IN IRELAND

Introduction

On 16 September 2009, the European Council and of the Council of Ministers adopted Directive 2009/110/EC (the “new E-Money Directive”). The new E-Money Directive repeals Directive 2000/46/EC (the “existing E-Money Directive”), which introduced a prudential regulatory regime for providers that issue e-money, known as electronic money institutions (“ELMIs”), with effect from 30 April 2011.

The adoption of the new E-Money Directive follows the European Commission's review of the existing E-Money Directive and the market that it was intended to facilitate. The Commission concluded that e-money has yet to deliver the benefits that were anticipated¹.

The new E-Money Directive seeks to facilitate greater market access to newcomers and Member States will have 18 months from publication to implement the new E-Money Directive into national law.

Implications of the new E-Money Directive for Ireland

Ireland intends to pro-actively implement the new E-Money Directive into Irish law ahead of the March 2011 deadline. The Irish Electronic Money and Payments Association (“EMPA”) has also expressed an intention to create an e-money centre of expertise within the Financial Regulator and the Department of Finance, similar to that which already exists for the mutual funds industry.

In light of the favourable business and regulatory environment in Ireland for financial services, Ireland is well placed to attract EMLIs seeking a progressive location to establish within the EU.

US, Asian and non-EU companies actively seeking out Member States with innovation friendly regimes should consider Ireland as the domicile of choice, offering companies

¹ Commission Staff Working Department. Brussels 9.10.2008 “*Impact Assessment accompanying the Draft Proposal for a Directive of the European Parliament and of the Council amending Directive 2000/46/EC on the taking up, pursuit of and prudential supervision of the business of electronic money institutions*”

established and regulated in Ireland the opportunity to avail of the passporting arrangements under the new E-Money Directive.

Aims of the New E-Money Directive

The objectives of the new E-Money Directive are;

- ▣ to enable innovation within the market to create tangible benefits for consumers, businesses and the wider internal market, by, for example, modernising the definition of 'e-money', taking account of current and future uses of e-money;
- ▣ to establish a single passport for ELMIs so that ELMIs authorised in one EU Member State can issue e-money throughout the EU;
- ▣ to remove the prohibition on ELMIs conducting mixed business and to provide enhanced market access to new players so that real and effective competition between all market providers can be fostered by, for example, addressing current onerous prudential requirements; and
- ▣ to align the new E-Money Directive to ensure consistency with the Payment Services Directive (2007/64/EC) ("PSD"), as far as may be appropriate, thereby securing a level playing field between authorised non-bank ELMIs and authorised payment institutions (non-bank payment service providers authorised under the PSD regime), while also creating an overall harmonised framework for the payments market in Europe.

The Commission's view is that the new E-Money Directive offers a second chance to the e-money market in the EU to expand, forecasting that its expected volume could reach up to Euro 10 billion by 2012.²

Whilst credit institutions will be required to comply with many of the provisions of the Directive, they may issue e-money under their existing authorisation (i.e. without the need to obtain specific authorisation under the Directive).

Summary of the Key Changes

The key changes to be introduced by the new E-Money Directive include:

² Europa Press Release dated 24 April 2009: IP/09/637

- ▣ a simpler, technology neutral definition of e-money;
- ▣ the establishment of a new prudential regime which will lower the initial capital requirements set out in the original E-Money Directive for issuing e-money to €350,000 (from €1 million);
- ▣ the introduction of a new, float-based formula for determining ongoing capital requirements for e-money issuers, which can be selected by competent authorities as an alternative to the three formulas established under the PSD;
- ▣ the removal of the restriction on mixed business, allowing e-money issuers to conduct business other than just issuing e-money and related activities;
- ▣ the ability for competent authorities to exempt e-money issuers from authorisation criteria if certain conditions are met, including where outstanding e-money falls below a €5 million threshold;
- ▣ the clarification of redeemability requirements, maintaining the right for consumers to redeem funds in full at any time but allowing e-money issuers to charge a fee for redemption in limited circumstances provided the fee is commensurate with the actual cost of redemption;
- ▣ an increase in threshold values when compared with the original E-Money Directive beneath which e-money issuers need not comply with full due diligence requirements for anti-money laundering and anti-terrorist financing purposes, with thresholds to be set at a maximum storage value of €250 (for non-rechargeable devices) and at a maximum of €2,500 transacted over a calendar year (for rechargeable devices).

What is E-Money?

Electronic money is the electronic alternative to cash which enables users to store funds on a device (card or phone) or through the internet and to make payment transactions. Examples include electronic purses, such as Proton in Belgium and Chipknip in the Netherlands, and web-based services such as PayPal.

The new E-Money Directive defines 'electronic money' as "electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued

on receipt of funds for the purpose of making payment transactions³ and which is accepted by a natural or legal person other than the electronic money issuer”.

The new definition seeks to provide additional certainty as regards the products which fall within the scope of the regime. One of the differences in Member State under the original E-Money Directive was the approach towards account-based e-money products (i.e., e-money held remotely from the owner, whether stored on a computer or on a smart card, and directly spent by the owner). The new definition aims to bring such account-based e-money products clearly within scope.

Examples of e-money include:

- ▣ *card based e-money*, such as stored value smart cards (such as Mondex and VISA Cash). These are forms of multi-purpose cards or open systems in which a card can be used to buy goods or services from several providers or transfer e-money from one cardholder to another cardholder;
- ▣ *server-based e-money*, such as pre-funded personalised online payments schemes such as PayPal; and
- ▣ *others*; electronic travellers cheques, prepaid debit cards, electronic vouchers; and possibly, in some circumstances, pre-paid services of mobile network operators.

The new E-Money Directive also clarifies that the Directive no longer applies to:

- ▣ “limited networks” services based on e-money instruments that can be used to acquire goods or services only in the premises used by the issuer or under commercial agreement with the issuer, either within a limited network of service providers or for a limited range of goods or services; and
- ▣ services based on telecommunications, digital or information technology (IT) devices (i.e. digital payments) where the goods or services bought are delivered to and used through an IT device, provided that the operator is not only an intermediary.

These exemptions align with the exemption the PSD.

³ A “payment transaction” is defined in the original E-Money Directive as an act, initiated by the payer or by the payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and the payee.

Prudential requirements

The new E-Money Directive seeks to implement a proportionate prudential regime, with application of the PSD qualitative prudential requirements. In this regard, ELMIs will be required to submit, inter alia, the following documents to the competent authorities as part of the authorisation process:

- ▣ the programme of operations;
- ▣ submission of a business plan;
- ▣ evidence of initial capital; and
- ▣ details of governance arrangements.

In addition to the new qualitative prudential requirements, certain changes to quantitative regime are established. Under the original E-Money Directive, the prudential regime for e-money institutions was closely linked to the prudential regime for credit institutions under Directive 2006/48. That regime is felt to be excessive for e-money issuers in many respects. The new E-Money Directive lowers the initial capital requirements for issuing e-money to €350,000 (from €1 million).

It also introduces a new, float-based formula for determining ongoing capital requirements for ELMIs (Method D) which can be selected by competent authorities as an alternative to the three formulas established under the PSD (Methods A, B and C). Under Method D, the ELMI's own funds shall not fall below 2% of the average outstanding electronic money in circulation.

Agents

It is recognised that ELMIs distribute electronic money by, for example, selling or reselling electronic money products to the public, providing a means of distributing electronic money to customers, or of redeeming electronic money on the request of customers or of topping up customers' electronic money products, through natural or legal persons on their behalf, according to the requirements of their respective business models.

The new E-Money Directive recognises that while ELMIs should not be permitted to issue electronic money through agents, they should nonetheless be permitted to provide the payment services listed in the annex to the PSD through agents, where the conditions of that Directive are met.

Waivers

The original E-Money Directive permitted EU Member States to waive the application of certain provisions of the Directive as regards institutions issuing only a limited amount of electronic money. The European Commission found that the implementation of the waiver under the original E-Money Directive by the different EU Member States varied considerably among EU Member States both in terms of the criteria and the process for granting a waiver, as well as the provisions which could be waived. It found that six Member States had not implemented the waiver at all and that a large number of those that had implemented the waiver had tightened some of the criteria, or had imposed additional conditions⁴.

The new E-Money Directive permits EU Member States to waive the application of certain of the prudential rules (principally capital, prudential requirements and safekeeping requirements) in respect of institutions issuing only a limited amount of electronic money and in that regard it seeks to mirror that found in the PSD. The following conditions to the waiver apply:

- ▣ the firm generates less than €5 million an average of outstanding e-money (based on float) from all business activities;
- ▣ the legal or natural persons operating or managing the firms met the necessary requirements, for example, natural persons operating the business have not been convicted of offences relating to money laundering or terrorist financing or other financial crimes; and
- ▣ the firm has its head office in a Member State.

Firms that meet the waiver criteria will not be able to passport their services into another Member State.

Member States may also provide for the optional granting of the waiver to be subject to an additional requirement of a maximum storage amount on the payment instrument or payment account of the consumer where e-money is stored.

⁴ "Evaluation of the E-Money Directive (200/46/EC) Final Report for The DG Internal Market" on 17 February 2006 submitted by the Evaluation Partnership Limited

Safeguarding requirements and redeemability

The new E-Money Directive imposes an obligation on all ELMIs (hybrid and non-hybrid) to ringfence client funds (i.e. funds received in exchange for e-money that has been issued) to ensure adequate consumer protection in the event of an ELMI's insolvency. Member States must require an ELMI to safeguard funds received in exchange for electronic money that has been issued. In any event, such funds shall be safeguarded by no later than five business days after the issuance of electronic money.

The new E-Money Directive also clarifies the redeemability requirements, maintaining the right for consumers to redeem funds in full at any time but allowing e-money issuers to charge a fee for redemption in limited circumstances provided the fee is commensurate with the actual cost of redemption. The contract between the electronic money issuer and the electronic money holder shall clearly and prominently state the conditions of redemption, including any fees relating thereto, and the electronic money holder shall be informed of those conditions before being bound by any contract or offer.

Anti-money laundering

The proposal to modernise the e-money regime, the Commission sought to align the threshold values beneath which e-money issuers need not comply with the full due diligence requirements for anti-money laundering (AML) purposes (and below which ELMIs may derogate from certain AML information and liability requirements) with the thresholds set out in the PSD.

Passporting

Whilst the original E-Money Directive provided for certain EU cross-border passporting rights for ELMIs, the new E-Money Directive improves the passporting regime and in particular, extends the passporting rights to enable an EMLI to operate through a branch or agent in another EU Member State, in addition to freedom to provide services cross-border.

The new E-Money Directive passporting regime has been aligned with the passporting regime of the PSD.

Transitional arrangements

The new E-Money Directive provides that ELMIs that have been authorised and are operating prior to 30 April 2011 in accordance with the original E-Money Directive may continue to do so until 30 October 2011 at which stage they must have obtained authorisation under the new E-money Directive or must cease their activities. ELMIs that have been operating under a waiver under the original E-Money Directive have until 30 April 2012 to obtain authorisation under the new E-money Directive.

Summary

Ireland intends to pro-actively implement the new E-Money Directive into Irish law ahead of the March 2011 deadline seeking to offer an attractive place of establishment within the EU as the base for pan-European payment operations.

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