



Electronic Money Association

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Mr Eric Ducoulombier
DG FISMA
European Commission
Rue de Spa
Brussels 1000

8 February 2023

Dear Eric

Re: The Electronic Money instrument and its role in payment in the EU

The EMA is the European trade body representing electronic money issuers and alternative payment service providers in the EU. Our members include leading payments and e-commerce businesses worldwide, providing online payments, card-based products, electronic vouchers, mobile payment instruments as well as cryptoasset service providers. A list of current EMA members is available on our website: <https://e-ma.org/our-members>.

Yours sincerely,

A handwritten signature in black ink, reading 'Thaer Sabri', with a long horizontal flourish extending to the right.

Dr Thaer Sabri
Chief Executive Officer
Electronic Money Association

The electronic money instrument

1. The role of electronic money in payments in the EU

The electronic money industry has evolved since its foundation in the electronic money directive in 2000 (Directive 2000/46/EC) (“EMD”). Estimates of active accounts in the EU are in the region of 400-500 million¹.

Products meet a range of business needs, many of which are specific in their business case; ranging from travel cards, expense cards/accounts, vouchers, tokens, budgeting apps, city cards, e-commerce shopping products, financial inclusion products and bank-lite accounts.

These are distributed through different channels, directly by the issuer, through corporate partners, partner platforms representing user communities, through supermarkets and retail outlets, as well as specialised business outlets etc.

As described above, products are offered in a variety of form factors, and additionally issuers can be stand-alone three party issuers, or can be part of multiparty payment schemes. Some others offer a hybrid structure that combines the attributes of both models.

The business and contractual relationships that underpin the industry reflect the unique attributes of e-money and the legal relationships are in turn driven by many of these attributes.

2. The attributes of e-money

E-money is an electronic surrogate for notes and coins², its issuance does not involve deposit taking, and users utilise it for making and accepting payments, receiving it in fulfilment of debt obligations.

- E-money resides on electronic or magnetic storage systems/devices, usually of the issuer.
- It provides for a claim against the issuer for its exchange for bank money – the process of redemption. It is an electronic equivalent of a promissory note,

¹ Data collected by the EMA in 2021 from its members provided a total number of accounts held by responding issuers of approximately 314,000,000 and we estimated an EU value in the region of 400-500m accounts.

² See Recital 13 to the second Electronic Money Directive 2009/110/EC (“EMD2”), and Recitals 3 and 7 of the first Electronic Money Directive 2000/46/EC (“EMD”).

like a bank note. It is a promise to pay, by the issuer, upon presentment, of the recorded value.

- A promissory note is an instrument in its own right, which can be transacted in and of itself. It can be transferred to others, and in so doing the rights associated with it, are also transferred.
- In comparison, a deposit is a loan to the bank, and the depositor has a claim against for repayment of the amount loaned. There are no instruments issued, and the claim must be enforced as a personal action by the depositor for repayment.

The electronic money financial instrument can be purchased and sold as property, while also acting as a means of payment. The purchase and sale is however distinct from the use of the e-money in payment transactions.

When used as a means of payment, it is transferred as a category of funds within a payment transaction, and is accepted by payees in fulfilment of debt obligations.

Q. Why do we need e-money when we have bank money?

A. E-money is an innovation, an electronic equivalent of physical promissory notes, and has its own role in financial transactions. Bank issued notes (bank drafts) for example are commonly used as a means of payment , they can be accepted by third parties in fulfilment of debt obligations, with the recipient then seeking payment from the bank that issued the note. Cash is also such a note, but issued by the central bank. These exist side by side with other means of payment, including bank deposits.

E-money was created as a surrogate for cash and has a similar purpose. Its attributes mean that distribution of e-money can take place for example, without the distributor needing to be a payment services agent, as they simply buy and sell the e-money, without performing any payment services themselves. This is essential to the delivery of e-money products to users, and was, and continues to be a key factor in the adoption and success of e-money.

Similarly, as a payment instrument, e-money can be given specific attributes that serve particular purposes, transfers can for example be made immutable, or free from defects in title such as may be desirable for low value payments; or alternatively subject to being reversed under certain conditions, combatting fraud. Other arrangements have included separation of ownership rights from spending rights to enable restrictions to be imposed in corporate use environments. In such

circumstances e-money may be made available to staff for expense management but the right of redemption is retained by the company.

Q. Does e-money have a particular form factor? Is it based on a handheld device, a token or can it be held centrally in an account?

A. The definition of e-money in EMD2 is intentionally technology neutral –(see Recital 7 of EMD2), the provisions requires storage to be in an electronic or magnetic format but is silent on the implementation. This allows a diverse set of arrangements to be possible, and this was for example acknowledged by the ECB when addressing security guidance in its paper: “**Electronic Money System Security Objectives**, according to the common criteria methodology, May 2003”. The ECB set out at section 1.1.2 examples of e-money systems, citing a 'card based system' and alternatively a 'server based system'. The latter category described an account based e-money system. The forthcoming “Regulation on Markets in Crypto Assets” recognises e-money within a distributed ledger environment, and refers to it as “e-money tokens”, also to be regulated under EMD2. In conclusion therefore e-money can be based on handheld devices, on centralised servers, on distributed ledger technology and could also be token or voucher based. There are no specific form factors, and this enables innovation to take place.

Q. What rights do customers have to safeguarded funds?

Safeguarding is an obligation that is part of the prudential/conduct of business regime for e-money and which is set out in EMD/EMD2. It is intended to ensure that the funds received upon issuance of e-money continue to be available to users who may wish to redeem e-money at a later time. The safeguarding provisions restrict how an e-money issuer can dispose of such funds, ensuring they are held in secure low-risk assets.

Customers holding e-money however do not also own safeguarded assets, they have instead a right against the e-money issuer for redemption, a contractual right, and not a right to certain property. After all they own the e-money which they purchased, and safeguarded funds are the price paid for the e-money, and this is now the property of the EMI. This is also true when a credit institution issues e-money, there are no safeguarding obligations in legislation, and users have no rights over any asset held by the bank; they do however have the same right of redemption against the bank.

Safeguarding ensures that electronic money institutions are in a position to honour all redemption requests as they are made by users.

3. E-money and payment services

Questions have been raised as to the status of an e-money account and how it is distinguished from a payment account. We have previously addressed the distinction between commercial bank money and electronic money at section 2 above, and this distinction is consistent with the PSD2 definition of ‘funds’ at Article 4(25) which provides that funds are:

“banknotes and coins, scriptural money or electronic money as defined in point (2) of Article 2 of Directive 2009/110/EC”.

In other words funds comprise cash, commercial bank money and electronic money; clearly distinguishing deposits/bank money from electronic money.

Payment accounts are in turn defined in a neutral manner, being inclusive of whatever payment product the account relates to. The definition at Article 4(12) of PSD2 state that an account is:

“... an account held in the name of one or more payment service users which is used for the execution of payment transactions”;

Payment transactions are in turn defined at Article 4(5) of PSD2 as relating to:

” ...transferring or withdrawing funds...”

It follows therefore that payment accounts are accounts that can relate to commercial bank money or alternatively can relate to electronic money. The characterisation of an account as a payment account indicates the use that it will be put to, but does not inform on the type of fund that it records. Indeed, it is anticipated in a future iteration of the PSD, the definition of the term ‘funds’ may be extended to include a ‘digital euro’ or other central bank issued digital currencies (“CBDC”), and possibly also electronic money tokens or asset referenced tokens, where they are used for the execution of payment transactions.

Q. Does the CJEU case 191/17 of Bundeskammer fur Arbeiter (“Case”) suggest that a payment account held by a payment institution should be able to hold funds on an ongoing basis?

The Case was brought to clarify whether a savings account that could only make onward payments to a current account belonging to the same customer would qualify as a ‘payment account’ for the purposes of applying PSD2 related obligations. The court recognised the broad and inclusive definition of a payment account in PSD2 and found a narrower interpretation in the Payment Accounts Directive 2014/92/EU (“PAD”), which was intended to define payment accounts that were subject to account switching obligations under that Directive. The court ruled that the narrower definition in the PAD could be read into the savings account question, and found that given the restriction on paying third parties that was a feature of the savings account, the savings account did not amount to a payment account.

The qualifications introduced by the PAD, in order to isolate payment accounts that could be subject to account switching requirements are set out at Article 1(6) of the PAD and comprise:

“...payment accounts through which consumers are able at least to:

- (a) place funds in a payment account;*
- (b) withdraw cash from a payment account;*
- (c) execute and receive payment transactions, including credit transfers, to and from a third party.”*

These functionalities were intended to circumscribe a subset of payment accounts that fall within the scope of account switching obligations under the PAD. The present Case then adopted these to delineate the scope of accounts that could be excluded from more general payment account obligations under PSD2.

The CJEU did not however seek to suggest that all payment accounts should have these attributes, as clearly, there are many payment products that do not for example provide for the withdrawal of cash from an account and yet are accepted as payment accounts subject to the obligations set out in PSD2. Instead they stressed only paragraph (c) above, requiring payment accounts to be capable of executing and receiving payment transactions from a third party as the key attribute of a payment account.

The Case suggests that all payment accounts should be capable of executing and receiving payments from third parties. It is entirely silent however on whether such funds should be allowed to sit on the account indefinitely, and whether such funds may give rise to electronic money as defined in EMD2 or other regulated activity. The latter are subject to interpretation of relevant legislation, as well as that of the PSD2, but do not appear to be informed by the above Case.

Conclusions

- Electronic money is a distinct payment product from commercial bank money, it possesses legal attributes that enable its distribution via unregulated retail outlets, they facilitate innovation in formulating product propositions, and in solving business problems.
- E-money is technologically neutral, it can be adapted to server based centralized models, distributed networks, local device storage or combinations of all three. It may be associated with a card, a mobile handset, a voucher or a digital token. Its form factor is as diverse as the innovative solutions that issuers develop.
- Users of e-money hold legal title to the e-money, and the e-money instrument provides for a right of redemption against the issuer, a proprietary right that can be enforced in law. Safeguarded funds in turn are the price paid for e-money by users, and although are the property of e-money issuers themselves, are restricted in their investment to secure low risk assets, to guard the right of redemption of the user.

- Payment accounts are accounts that can hold deposits, or can hold e-money or in the future a digital euro or other CBDCs. The CJEU Case of Bundeskammer für Arbeiter does not comment on the nature of funds held in a payment account.

Next Steps

The EMA is reluctant to see EMD2 and PSD2 combined in a future Directive or Regulation, for the reasons set out above. We do however wish to see a more consistent approach to authorisation and regulatory permissions that allows regulated institutions to offer both payment services and to issue electronic money without having to seek an entirely different license. In other words a firm offering payment services could apply to vary its permissions to add electronic money issuance to its portfolio of payment products, while adopting the additional regulatory obligations that will ensue, but doing so within the scope of their existing license.

The concept of e-money is embedded in the European payments sector, in its commercial arrangements, in its contractual structures, and plays a key role in numerous product propositions and business solutions. The financial and business impact of making any changes to the concept of e-money are entirely disproportionate to any benefit that can be conceived.

Furthermore, the concept extends to distributed ledger products set out in MiCA and will underpin a future digital euro proposition.

We ask the European Commission to take account of this paper and of our previous submissions, and to keep us apprised of any proposals that may be contemplated and which have the potential of disrupting the electronic money and payments industry.



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