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QUESTIONNAIRE ON THE ELECTRONIC MONEY DIRECTIVE (2000/46/EC)

Public consultation document of the Commission services (DG Internal Market)

Introduction

Article 11 of the E-Money Directive charges the Commission to present a report to the European Parliament and Council on the application of the Directive, in particular on:

- The measures to protect the bearers of electronic money, including the possible need to introduce a guarantee scheme,
- Capital requirements
- Waivers, and
- The possible need to prohibit interest being paid on funds received in exchange for electronic money

The purpose of this questionnaire is to consult stakeholders about how they view impact of the Directive and possible ways forward. This questionnaire is one element of a broad-ranging review of the Directive in which it is planned to involve all stakeholders, gather evidence of the current situation, which will ultimately put the Commission in a position to bring forward recommendations as to the appropriate course of action.

The E-Money market has evolved since the original Directive was adopted, and it will doubtless continue to evolve in the future in ways which are difficult to accurately predict at this stage. The Commission services' impression at the start of this review process – but which is of course subject to confirmation - is that the original ambitions of the Directive (improve the single market for financial services, create legal certainty, encourage new market entrants, contribute to the development of E-Commerce) have not been achieved, or at most only partly – and indeed that far from improving the single market for E-Money institutions and encouraging new entrants, the Directive may have in fact had the unintended effect of constraining the development of the market. Preliminary evidence indicates that few E-Money licences have been granted, and that in Member States where E-Money institutions have been authorised, supervisory authorities have often waived certain provisions of the Directive through application of Article 8.

In its recent Green Paper¹ on financial services policy, the Commission reiterated its commitment to better regulation, focussing on the continuous ex post evaluation to monitor the application of EU rules and their impact on the financial sector. In particular, ex post evaluation should consider:

- whether the Directive is still up-to-date and whether it achieves what it was meant to achieve
- the Directive's impact on financial and related markets, credit institutions and consumers

The Commission services intend to undertake a thorough review of the E-Money Directive, and will not hesitate to make bold recommendations should its starting premise that the Directive's achievements are sub-optimal be confirmed by the evidence and supported by the views expressed.

The Commission services invite responses by a final deadline of **14th October 2005** to the following mailbox: markt-E-Money@cec.eu.int

¹ Green Paper on Financial Services Policy (2005 - 2010), COM (2005) 177

QUESTIONNAIRE ON THE ELECTRONIC MONEY DIRECTIVE (2000/46/EC)

I. Review of the primary goals of the E-Money Directive

1. Recital 12 of the E-Money Directive refers to the need to preserve a level playing field between electronic money institutions (ELMIs) and other credit institutions issuing electronic money and, thus, to ensure fair competition among a wider range of institutions to the benefit of bearers.

Questions:

- a) *Has a level playing-field between ELMIs and other credit institutions issuing E-Money been achieved?*
- b) *Has a level playing-field between ELMIs and other pre-paid payment service providers issuing E-Money been achieved?*
- c) *Has the Directive encouraged competition? If so, is competition between institutions issuing E-Money “fair”?*
- d) *Has the Directive encouraged new market entrants?*

2. The Explanatory Memorandum of the original E-Money proposal argued that there was no clear legal framework for electronic money issuance and that if the regulatory issues were not addressed this business would be carried out on an unregulated basis. It was claimed that the directive would “create legal certainty, encourage new market entrants, encourage competition, and contribute generally to the development of electronic commerce”.

Questions:

- a) *Have the harmonised provisions of the E-Money Directive eliminated legal uncertainty in the field of E-Money?*
- b) *Does the directive establish the conditions necessary to ensure that any kind of E-Money issuance takes place within a clear legal framework?*
- c) *Does the Directive establish market confidence in, and public awareness of, E-Money?*

3. The Explanatory Memorandum of the original proposal argued for a regulatory framework for the business of ELMIs which aimed to ensure the stability and soundness of issuers, thereby ultimately safeguarding customers’ interests. It argued that the financial integrity and the operations of electronic money issuers needed to be secured, on the one hand in order to ensure the stability and soundness of issuers of electronic money, on the other hand in order to ensure that the failure of any one individual issuer would not result in loss of confidence in this new and developing means of payment.

Questions:

- a) *Has the regulatory prudential framework achieved its objective of ensuring stability and soundness of issuers?*

b) Has the regulatory prudential framework increased business and consumer confidence in E-Money products?

4. The Explanatory Memorandum further argued that within the wider context of the rapidly evolving electronic commerce, it was desirable to provide a regulatory framework that assisted electronic money in delivering its full potential benefits and avoided hampering technological innovation in particular.

Question:

a) Has the regulatory framework of the E-Money Directive assisted the development of E-Money in the context of electronic commerce and avoided hampering technological development?

b) Has the Directive encouraged technological innovation?

5. The Explanatory Memorandum argued that the E-Money Directive would facilitate access by ELMIs from one EEA Member State, into another EEA Member State (remotely or via a branch), contributing to the free movement of capital and to the freedom of cross-border services.

Questions:

a) Has the E-Money Directive facilitated access by ELMIs from one Member State to another?

b) To what extent has the E-Money Directive facilitated integration of E-Money Market across the EEA?

6. The Explanatory Memorandum argued that it was vital that development of E-Money be allowed to take place unimpaired by strict technological rules which would hamper innovation and restrict competition.

Questions:

a) Has the regulatory framework of the E-Money Directive enabled the development of E-Money unimpaired by strict technological rules?

b) To what extent has the regulation of E-Money succeeded in its original aim of remaining technologically neutral?

7. **Goals of the E-Money Directive**

Questions:

a) Do you agree that the original goals of the E-Money are those which the Commission has identified above?

b) Is there a risk that the goals as set out above conflict with one another (e.g. the need to ensure stability and soundness vs. encouraging new market entrants and assisting the development of E-Money)?

c) Is there a need to re-assess the original goals and to perhaps establish new goals? If so, what should these be?

d) Should e.g. establishing consistency with the New Legal Framework for Payments be considered as a new goal?

II. Review of the Directive in accordance with Article 11 of Directive 2000/46/EC

Article 11 of the E-Money Directive originally mandated the Commission to present a report to the European Parliament and the Council on the application of this Directive, in particular on:

- the measures to protect the bearers of electronic money, including the possible need to introduce a guarantee scheme,
 - capital requirements,
 - waivers, and
 - the possible need to prohibit interest being paid on funds received in exchange for electronic money.
8. As regards the protection of E-Money bearers, the Directive introduces controls on the activities of E-Money institutions, limits investments to sufficiently liquid assets, establishes prudential controls on own funds and the minimum level of initial capital, requires internal control mechanisms and introduces a right for the bearer to redeem E-Money at par value.

Questions:

- a) Has the Directive created an appropriate legal background to protect E-Money bearers?***
- b) Have there been cases of consumer detriment caused by the lack of adequate measures to protect E-Money bearers?***
- c) Is there a need for additional measures aimed at the protection of bearers of electronic money?***
- d) Do you think that E-Money should be covered by a guarantee scheme?***
- e) If so, how should it be funded?***

9. As regards capital requirements, Article 4 establishes rules on initial capital and ongoing own funds requirements: ELMIs must have initial capital of €1 million and own funds of 2% or above of financial liabilities related to outstanding electronic money.

Questions:

- a) Is there a need to review provisions on initial capital and ongoing own funds requirements?***
- b) Are the requirements of the Directive proportionate to risks E-Money institutions are exposed to?***

10. As regards waivers, Article 8 grants Member States the possibility to waive some or all of the provisions of the Directive for ELMIs where the total E-Money business does not normally exceed €5 million and never exceeds €6 million, or where the E-Money is accepted only by the ELMI's subsidiaries, or where the E-Money is accepted only by a limited number of localised undertakings or undertakings which have a close financial or business relationship with the ELMI.

Questions:

- a) What has been your practical experience of the application of waiver rules?*
- b) Do the existing rules correspond to the needs and realities of E-Money business?*
- c) Should the rules on waivers be changed, and if so in which way?*
- d) Could the extensive and consistent application of waivers encourage E-Money issuance at national level?*
- e) Should the threshold of financial liabilities (€ 6 million) related to outstanding E-Money be amended or removed?*
- f) Is the amount of maximum storage at the disposal of bearers for the purpose of making payments (€ 150) still relevant in the case of a waiver?*
- g) Is there a need to allow the competent authorities of Member States to waive the application of provisions of the Directive in other specific cases not provided for in the Directive?*
- h) Should the waiver be granted automatically or should every waiver be decided by the competent authority case by case?*

11. During negotiations prior to the adoption of the E-Money Directive, certain Member States sought to insert a provision prohibiting ELMIs from paying interest on funds received in exchange for electronic money, in order to prevent the lighter regulated ELMIs from competing with banks for deposits.

Questions:

- a) Are there any examples of ELMIs having offered to pay interest on E-Money or demanding the right to pay interest?*
- b) Is there a need to prohibit interest being paid on funds received in exchange for electronic money?*

III. Review of Other Provisions of the Directive

Article 1: Scope of the Directive, definitions of 'electronic money institution' and 'electronic money' and restriction of activities

12. In article 1.3(a), "electronic money institution" is defined as "an undertaking or any other legal person, other than a credit institution as defined in Article 1, point 1, first subparagraph (a) of Directive 2000/12/EC which issues means of payment in the form of electronic money". At the time of its adoption, the E-Money Directive was concerned with electronic money per se, and had not been conceived to cover prepaid phone cards which might also give rise to the issuance of E-Money. The extent to

which mobile operators should be covered by the Directive has been the subject of a specific Commission review in 2004. In its Guidance note on the application of the E-Money Directive to mobile operators, the Commission services noted that there had so far been no evidence of harm done to consumers or to the stability and good functioning of payment systems as a result of the issuance of E-Money by mobile operators. Rather, the debate had centred on the obligations of mobile operators as issuers of E-Money and the need to create a level playing field with existing E-Money institutions.

Questions:

- a) Should the definition of E-Money institution be broadened/narrowed to cover/exclude institutions issuing a prepaid means of payment for their core service but which may also issue E-Money as a non-core part of their business (e.g. mobile operators and other 'hybrid institutions')?**
- b) Should a special EU regime be introduced for institutions issuing E-Money as a non-core part of their business (e.g. mobile operators and other 'hybrid' prepaid instrument providers)?**

13. In article 1.3(b), E-Money is defined as a “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;
- (iii) accepted as means of payment by undertakings other than the issuer.”

According to Recital 3, electronic money can be considered as an electronic surrogate for coins and banknotes. In its Guidance note on the application of the E-Money Directive to mobile operators, the Commission services supported the view that E-Money was created when the monetary value stored on a pre-paid card was accepted as payment by a third party merchant in line with Article 1.3(b)(iii) of the Directive. However the Commission services also argued that in practice there were few instances where mobile operators were acting simply as payment agents for customers vis-à-vis third party merchants, and that the Directive would only apply in a correspondingly limited number of cases. A payment relationship was only established when:

- There was a direct transfer of e-value
- The (mobile) operator was acting as a facilitator (or intermediary) in the payment mechanism in such a way that customer and merchant would also have a direct debtor-creditor relationship.

Questions:

- a) Is the definition of E-Money appropriate and adapted to any kind of E-Money issuance?**
- b) For the sake of clarity and to avoid any legal uncertainty, does the definition of E-Money need to be clarified? Has the definition of E-Money given rise to different interpretations, either across different business models or as a result of different Member States' interpretations?**
- c) Does the definition of E-Money correspond to the way the market has developed or is likely to develop?**

- d) Is there a need to review the definition of E-Money?*
- e) Do the three criteria in the definition of E-Money (stored on electronic device, issued on receipt of funds not less than monetary value issued, accepted by undertakings other than the issuer) constitute the determining elements as to what really constitutes “electronic money”?*
- f) Would it be appropriate to introduce a reference to "any prepaid float/funds allocated to payment"?*
- g) Which payment instruments in your experience/country fall under the definition of E-Money? Should the definition of E-Money cover pre-paid products of mobile operators?*

14. In Article 1.5, the activities of ELMIs are restricted to closely related services such as issuance of E-Money and administering other means of payment, but excluding the granting of any form of credit and to storing data on the electronic device on behalf of undertakings or public institutions. Furthermore ELMIs are forbidden from having any holdings in undertakings other than when these undertakings perform operational or other ancillary functions relating to E-Money issued or distributed. Recital 2 explains that the rationale for these restrictions is the need to ensure a level playing field between ELMI's, which benefit from a lighter prudential supervisory regime, and other credit institutions which are subject to the full regulatory regime.

Questions:

- a) Is the limitation of E-Money institutions' activities too restrictive?*
- b) Does the limitation of activities discourage new entrants, restrict competition or hinder innovation?*
- c) Does the limitation of activities contribute to preserving a level playing field between ELMIs and other credit institutions or alternatively disadvantage ELMIs in comparison with other credit institutions that issue E-Money??*
- d) Does the restriction on the granting of any form of credit have an impact on the payment possibilities offered through E-Money instruments? For example, does the delay in some payment transactions constitute “credit” in your experience/Member State?*

Article 2: Application of banking directives

15. Article 2 applies a number of provisions in Directive 2000/12/EC to ELMIs. This is supplemented by Directive 2000/28/EC relating to the taking up and pursuit of the business of credit institutions, which modifies the definition of “credit institution” to include ELMIs, thus ensuring that in particular those provisions in Directive 2000/12/EC referring to the freedom of establishment and freedom to provide services - can also apply to ELMIs.

Questions:

- a) Has the application of the passporting provisions of Directive 2000/12/EC given rise to any specific problems?*
- b) To what extent has the single passport been used by licensed ELMIs?*

c) Is it still valid to define an ELMI as a credit institution under Directive 2000/12/EC (as amended) despite the fact that ELMIs are legally barred from granting credit and from paying interest on funds received in exchange for E-Money issued?

16. According to Article 2 (3) of the E-Money Directive, the receipt of funds (or in other words, the issuance of electronic money) does not constitute a deposit or other repayable funds according to Article 3 of Directive 2000/12/EC, if the funds received are immediately exchanged for electronic money. A bearer of electronic money may, during the period of validity, ask the issuer to redeem the electronic money at par value in coins and bank notes or by a transfer to an account (Article 3(1) of the Directive). However Recital 9 clarifies that redeemability does not imply, in itself, that the funds received in exchange for electronic money should be regarded as deposits or other repayable funds for the purpose of Directive 2000/12/EC, redeemability being necessary for electronic money in order to ensure bearer confidence. Moreover the explanatory memorandum of the original proposal explains that, unlike a depositor, a user does not advance funds to an issuer in order to ensure their safe keeping and handling.

Questions:

- a) Is it still valid to distinguish between the different nature of the issuance of electronic money and a deposit-taking activity in the interests of bearer confidence?*
- b) If funds received are “immediately” exchanged for E-Money, at which point in time does the conversion into E-Money actually take place?*
- c) Should the notion of deposit-taking in Article 3 of Directive 2000/12/EC be clarified?*

Article 3: Redeemability requirements

17. Article 3 of the E-Money Directive introduces a right for the bearer of electronic money to ask the issuer to redeem the electronic value at par value in coins and bank notes or by a transfer to an account. It also allows for the contract to stipulate a minimum threshold for redemption which should not exceed €10. The European Central Bank argued² at the time that the redeemability requirement was necessary in order to preserve the unit of account function of money, to maintain price stability by avoiding the unconstrained issuance of electronic money, and to safeguard both the controllability of liquidity conditions and the short-term interest rates set by the ESCB.

² Opinion of the European Central Bank, 18 January 1999, official Journal of the European Communities, 6.7.1999, C189/7

Questions:

- a) *Does redeemability at par value pose any special problems for E-Money issuers?*
- b) *How could this rule be adapted to institutions issuing E-Money as a non-core part of their business (for example, mobile operators) for which the E-Money float on prepaid cards or accounts is only known “ex post” when customers have purchased goods and services from a third party ?*
- c) *Is a minimum threshold of EUR 10 for redemption at par value still relevant?*

Article 4: Initial capital and ongoing own funds requirements

This Article is reviewed under section II.

Article 5: Limitations of investments

18. Article 5 establishes certain limitations on the investments ELMIs are allowed to undertake. ELMIs must hold investments of no less than their financial liabilities in outstanding E-Money, and these must be limited to highly liquid asset items (zero risk weighted, Zone A sight deposits, etc). These investments may not exceed 20 times the own funds of the ELMI, and are subject to limitations which are at least as stringent as those for credit institutions. ELMIs are further limited in their use of derivative instruments, which must be solely intended to fully eliminate market risks. Member States must also impose appropriate limitations on the market risks incurred by ELMIs due to the liquid asset items held, and if the value of such items falls below the amount of outstanding electronic money, the competent authorities are obliged to take appropriate measures to ensure the situation is remedied. Recital 2 explains these measures as being necessary in order to preserve a level playing field between ELMIs and other credit institutions issuing electronic money and, thus, to ensure fair competition among a wider range of institutions to the benefit of bearers. The less cumbersome features of the prudential supervisory regime applying to ELMIs are balanced by provisions that are more stringent than those applying to other credit institutions, particularly prudent limitations of their investments aimed at ensuring that their financial liabilities related to outstanding electronic money are backed at all times by sufficiently liquid low risk assets.

Questions:

- a) *Have the provisions of the Directive on limitation of investments achieved their aim of establishing a level playing field between ELMIs and credit institutions?*
- b) *Are the provisions of the Directive too restrictive for ELMIs?*
- c) *If so, have they deterred new market entrants, restricted competition or hindered innovation?*

Article 8: Waiver

This Article is reviewed under section II.

IV. Customer due diligence in the context of Money Laundering and FATF Special Recommendation VII

19. The current scope of the E-Money Directive encompasses activities which may be affected by other recent initiatives. In particular, Article 10 of the newly adopted third anti money laundering Directive³ explicitly exempts electronic money as defined in Article 1 of Directive 2000/46/EC from the application of customer due diligence provisions, where low limits are imposed on the amount issued, but which implies that for larger E-Money amounts, money laundering provisions would apply. Similarly FATF special recommendation VII (SRVII) designed to prevent terrorist financing aims at ensuring that basic information on the payer of transfers of funds (name, address and account number) is immediately available to appropriate law enforcement and /or prosecutorial authorities⁴. Certain forms of E-Money may also fall under the definition of “funds transfer”, which are defined as “*any transaction carried out on behalf of an originator person (both natural and legal) through a financial institution by electronic means with a view to making an amount of money available to a beneficiary at another financial institution. The originator and the beneficiary may be the same person*”. This issue is currently being examined by the FATF.

On the other hand, the E-Money Directive originally considered E-Money as a substitute for notes and coins, and therefore an anonymous means of payment. Many E-Money schemes are trying to emulate the anonymity of cash, which may be difficult due to the "Know your customer" principles and record keeping requirements. If E-Money is caught by such requirements, it has been suggested that issuers might be required to identify the customer, enter into a written contract and keep records for every transaction (including tiny micropayments).

Questions:

- a) Do national customer due diligence provisions, such as "Know Your Customer", record keeping requirements and other established principles in banking law pose specific problems to the issuance of electronic money – despite the exemptions foreseen for E-Money? If so, which?***
- b) Is it possible to sell anonymous pre-paid cards (or other electronic devices) in your country?***

³ http://europa.eu.int/comm/internal_market/company/financial-crime/index_en.htm#moneylaundering

⁴ SRVII is transposed into Community legislation by the proposal for a Regulation on information on the payer accompanying transfers of funds.

V. E-Money Market Developments

20. Preliminary indications would tend to suggest that the E-Money market has not developed in ways which had been envisaged when the E-Money Directive was originally drafted. The market remains relatively small, few E-Money licences have been issued, and where E-Money issuers have engaged in E-Money activity, they have frequently been exempted from certain provisions of the directive by virtue of the waiver provision in Article 8.

Questions:

- a) Would you agree that the E-Money market has either failed to develop to or not yet reached its full potential?***
- b) If so, what are the main reasons for the limited development of the E-Money market?***
- c) Have any particular obstacles constrained the E-Money market growth across the EEA?***
- d) What are the prospects for the future development of E-Money?***
- e) Is the E-Money Directive adapted to the market conditions?***
- f) If not, are there any amendments to the Directive which are needed in order to reflect the E-Money market developments, especially as regards technological innovations?***
- g) Are there any obstacles in the taxation area constraining the E-Money market development?***
- h) What changes, if any, might be needed to the E-Money legal framework in the light of forthcoming Directive on Payment Services (New Legal Framework)?***

VI. Other issues

Would you like to comment on any other issues which have not been raised in this consultation document but which you consider to be important?