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**COMMISSION STAFF WORKING DOCUMENT**

**on the Review of the E-Money Directive (2000/46/EC)**

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## COMMISSION STAFF WORKING DOCUMENT

### on the Review of the E-Money Directive (2000/46/EC)

#### 1 INTRODUCTION

Directive 2000/46/EC on the taking up, pursuit of and prudential supervision of the business of electronic money institutions (EMD) seeks to open the market for the issuance of E-money to non banks through the creation of "Electronic Money institutions" (ELMIs) regulated under a lighter prudential regime than that required of credit institutions. Broadly speaking, the concept of "Electronic Money"<sup>1</sup> represents a monetary value which is stored on an electronic device and which is accepted as a means of payment by undertakings other than the issuer. The Directive represented a response to the emergence of new pre-paid electronic payment products, and was intended to create a clear legal framework designed to strengthen the Internal Market and stimulate competition whilst at the same time ensuring an adequate level of prudential supervision.

The E-Money market has however evolved in ways which were not foreseen at the time of the Directive's adoption. Initial expectations about the extent to which the E-Money Market would grow have proved optimistic, few E-Money licences have been granted and there have been a number of problems in connection with how the Directive should be interpreted. In particular, there was considerable uncertainty about how the Directive should be applied to mobile network operators (MNOs), and in 2004–5 the Commission services sought to clarify this issue through a public consultation and the publication of a short guidance note.

Article 11 of the EMD requires the Commission to 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.

This report will however in addition to addressing these issues, also address a broader set of issues which have come to light as a result of the evaluation process; it will also cover the possible implications of ongoing negotiations on the Payment Services Directive (PSD), bearing in mind that from a better regulation perspective it would seem appropriate to

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<sup>1</sup> The precise reference in Article 1(3) is 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.

integrate the EMD into the PSD once it is finalised.<sup>2</sup> However, how this could be done will depend on the outcome of the PSD negotiations.

## 2 DESCRIPTION OF THE REVIEW PROCESS

The evaluation process has involved a number of different elements which are summed up in the following table:

Action	Description	Timing
Consultation on mobile network operators	Public consultation leading to the issuance of guidance on how the Directive should be applied to mobile network operators.	Consultation launched May 2004  Guidance published January 2005
Three Consultation Meetings on the broader review	First meeting with Member States prior to launch of public consultation  Second meeting with Member States and industry stakeholders to discuss early results  Third meeting with Member States to discuss key issues and policy options	24 June 2005  4 November 2005  23 January 2006
Technical advice from CEBS (Committee of European Banking Supervisors)	Concerning the application of Article 8 (waivers) as well as the application of the Directive to MNOs as well as other hybrids.	Delivered on 1 July 2005
Public consultation of stakeholders	Commission questionnaire launched July 2005 – fed into the external consultants' evaluation study and the Commission's own report	Launched 14 July 2005  Closed 14 October 2005  Published on website 2 February 2006
Evaluation study by external consultants	<u>Objectives to:</u>  Provide independent and objective evidence of the state of the EU E-Money market  Evaluate the impact of national rules	Launched September 2005  Final results end February 2006

<sup>2</sup> This would eliminate possible overlaps and contradictions between the two directives.

	implementing the Directive	
	Test whether the Directive's objectives have been met	

### 3 KEY FINDINGS FROM THE REVIEW PROCESS

The principle sources of evidence-gathering have been the public consultation and the external consultants' evaluation study, which can be found as an annex to the present report. The Commission prepared a questionnaire for its public consultation which was both broad ranging as well as designed to respond directly to the terms set out in Article 11. The first part of this section assesses the findings of the review in relation to Article 11. The following parts concern the review in its broader context.

#### 3.1 Review of the Directive in Accordance with Article 11 of Directive 2000/46/EC

##### *Measures to protect E-Money bearers including the possible need to introduce a guarantee scheme*

Although a strong majority of respondents to the Commission services' public consultation believed the Directive had indeed created an appropriate legal framework to protect E-money bearers, there was a strong body of opinion suggesting that the rules were disproportionate to the risks. Although some cases of failure were mentioned, these did not appear to have impacted consumers – indeed no cases of consumer detriment were signalled. The Commission services would therefore conclude that there is little support to introduce additional measures to protect bearers of electronic money, especially as in any case certain additional protections will be introduced by virtue of the new PSD<sup>3</sup>. As regards the possible need to introduce guarantee schemes, there appeared to be little support for this idea alongside the existing provisions of the Directive.

##### *Capital requirements*

In order to protect the float and ensure that E-money can be redeemed at par value at any point in time, ELMIs hold on a permanent basis a certain amount of regulatory own funds. This differentiates them from the payment institutions covered by the PSD. The evaluation has however indicated support in favour of reducing provisions on own funds and initial capital for ELMIs, although there was no evidence which would indicate precisely to what level the requirements should be reduced. ELMIs' activities are limited to issuance and other closely related activities, they are prohibited from offering credit, maintain 100% float in addition to a EUR 1 million initial capital and a 2% own funds requirement and are therefore not exposed to a high degree of risk. Indeed, as pre-paid payments are on average low value, any financial risks that might exist are low. A strong case has therefore been made in favour of reducing the overall prudential regime<sup>4</sup>.

<sup>3</sup> In particular information requirements and rights and obligations of users and providers all of which will give additional protection to users.

<sup>4</sup> The prudential regime will need to be further evaluated in light of the outcome of the negotiations on the PSD.

## *Waivers*

Evidence from the public consultation suggests that there is inconsistent application between Member States and that the current situation might lead to competitive distortions within national borders. While there might be scope to ensure application of the waiver rules in a more consistent manner, this would imply a relaxation of the rules in certain Member States who have not availed themselves of the option to apply a waiver regime. Where waivers have been applied, they appear to have enabled new players to enter the market. Any arguments in favour of relaxing existing waiver rules are counter-balanced by regulatory and level playing field concerns. The Commission services are of the view that as an appropriate response to this the clarification of the scope of the Directive and relaxation of certain core requirements might help to avoid widespread recourse to waivers. It will also be necessary to ensure a consistent approach vis-à-vis the waiver regime in the PSD.

### *The possible need to prohibit interest being paid on funds received in exchange for electronic money*

The consultation revealed only one example of a firm paying interest on E-Money. Respondents were divided on whether ELMIs should be prohibited from paying interest, although the Commission services are of the view that there would not appear to be strong arguments to justify the introduction of a prohibition on payment of interest.

## **3.2 Assessment of the state E-Money market in the EU**

The following three sections summarise the findings of the consultants "The Evaluation Partnership" who were commissioned by the Commission services to carry out an evaluation<sup>5</sup> of the EMD. Further, more detailed analysis is contained in the complete evaluation which is annexed to the present report.

The evaluation provides evidence that the e-money market has developed more slowly than expected, and is far from reaching its full potential. There are currently four ELMIs in the UK, and one each in Germany, the Netherlands, and Norway and only three of them are using the passport. However, this number can be expected to change significantly over the next year: approximately 5–8 new applications are either in process or expected shortly. 72 companies in 7 Member States (Czech Republic, Denmark, Germany, Latvia, the Netherlands, Sweden, and the UK) are currently registered as operating under a waiver. The highest number (33) is found in the UK; it includes several online payment schemes with different features, and at least one local transport smartcard scheme. The next highest number (24) is found in the Czech Republic; 22 of these are public transport providers whose travel cards are accepted by other transport providers.

Based on the data available, it is estimated that the total amount of e-money in circulation issued by banks as of late 2005 is approximately EUR 450 million. The estimated amount of e-money in circulation that is issued by ELMIs and institutions operating under a waiver is approximately EUR 215–225 million.

As regards the various types of E-Money product, take-up for card-based e-money has remained low in most EU Member States. Card-based e-purses in many countries have been

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<sup>5</sup> Evaluation of the E-Money Directive (2000/46/EC) – The Evaluation Partnership Limited, February 2006.

discontinued, and for most of those that remain, usage is very limited. Only in the Benelux countries have the local e-purse schemes reached a critical mass, and even in countries where take-up has been relatively high, e-money cards are still used almost exclusively at unmanned stations (public telephones, car parks, vending machines) and have not gained widespread acceptance among merchants and consumers for other everyday transactions. There are no indications to suggest that the vision of e-purses gradually replacing banknotes and coins as the preferred means of payments for everyday purchases will become a reality, at least not in the near future.

The recent emergence of contactless cards may provide a new impulse to card-based e-money. Such cards are currently issued almost exclusively by public transport providers, and can at present only be used to pay for transport services. However, this may change relatively soon, and there seem to also be significant potential benefits in the use of contactless e-money cards for many types of organisations, including conventional financial service providers, retailers, telecoms, utilities, sports stadiums and local councils.

In the realm of server-based e-money, certain market segments have developed significantly in recent years, targeting specific niche markets and target audiences. The most well-known and widely-used of these are pre-funded personalised online payment schemes. By far the largest of these is PayPal, which provides a low value and instant payment service primarily to customers of its parent company E-Bay, but there are also a number of other, smaller firms that are experiencing solid growth. Some sources also suggest that certain online payment products may in the near future extend their reach into the physical world.

A considerable number of other types of e-money product are available, although they have not yet achieved a significant market penetration. Prepaid debit cards and electronic travellers' cheques have been introduced only recently in Europe; there is considerable interest in these products, and significant growth seems likely. Mention also needs to be made of electronic vouchers and the prepaid services of mobile network operators (MNOs) who are also now introducing some hybrid products which combine both pre and post paid services;

Most stakeholders cite the lack of a clear business case and of a compelling consumer proposal able to convince a larger number of customers of the advantages of using e-money as the main reasons for the limited development of the e-money market to date. While it is widely acknowledged that the E-Money Directive (EMD) has provided non-banks with an opportunity to enter the e-money market-place in the first place, certain restrictions and requirements imposed by the Directive, and in some cases, their national implementation and interpretation, are likely to have hindered the development of the market to some extent. In addition, legal uncertainty as to the applicability of the Directive to certain business models has restrained the development of certain products.

### **3.3 Impact of National Rules Implementing the Directive**

The EMD is based on minimum harmonisation and has consequently led to differences in implementation at national level. In general, the consultants' evaluation found that the differences in the national rules implementing the EMD that are most likely to have an impact on the development of the market fall into three areas: (a) the implementation of the waiver; (b) the interpretation of the definition, scope and applicability of the EMD; and (c) the existence or not of a customised set of rules regarding management, administrative and accounting procedures, internal control mechanisms, anti-money laundering rules, etc.

Deviations from the other provisions of the EMD are relatively rare, although some (e.g. increased initial capital requirements) are likely to have a strong potential impact.

As regards point (a) – Member States' implementation of the waiver – the consultants' report indicates that this varies considerably both in terms of the criteria and the process for granting a waiver, and the provisions which can be waived. Six Member States have not implemented the waiver at all. A large number of those that have implemented the waiver have tightened some of the criteria, or have imposed additional conditions. Among the differences that are most likely to have hindered the development of the market are: the non-implementation or tightening of the waiver criterion of Article 8(1)(a); a burdensome or excessively complicated application process; and procedures whereby the regulatory authorities decide on a case-by-case basis which provisions can be waived.

As regards point (b) regarding the definition, scope and applicability of the EMD, the evaluation confirmed that there is an urgent need for clarification of which institutions, schemes and business models fall within the scope of the EMD, and those which do not. The most controversial issue in this context is the question of the EMD's applicability to MNOs. Almost all Member States have de facto exempted these from the application of the EMD for the time being, but the justifications for this vary. A majority of Member States, as well as industry players, emphasised there is a need for further guidance on this issue. The national authorities in certain Member States also hold somewhat diverging views regarding the classification of a number of other products and schemes (pre-funded personalised online payment schemes, electronic service vouchers, and smartcards for public transport).

Finally as regards point (c), the existence or absence of a customised set of rules, in all cases Member States have classified ELMIs as a sub category of credit institution. However, there are differences as to whether certain rules applicable to traditional credit institutions are applied to ELMIs, and how the requirement concerning the sound and prudent operation of ELMIs is interpreted and applied in practice. Most Member States seem to differentiate little or not at all between ELMIs and traditional credit institutions in this respect. For example, ELMIs in at least two countries are required to submit monthly balance sheets. In contrast, the UK has developed a separate set of rules to address the financial and non-financial risks to which ELMIs are exposed. The evidence seems to suggest that a more customised approach is likely to have a positive impact on the development of the market.

Overall, few changes have been made to the core requirements of ELMIs (capital requirements, limitations of investments, redeemability, restriction of activities). The initial capital ELMIs are required to have was raised in three Member States; although there is no evidence to directly support this view, higher initial capital requirements are likely to prevent some potential ELMIs from participating in the e-money marketplace. While the basic provisions of the EMD regarding limitations of investments have been implemented unchanged across the EU, there are differences in the principles applied to determine which types of investments are permitted. Finally, in two Member States the minimum threshold for redemption was lowered significantly; the only ELMI currently affected by this reported that the lower threshold is burdensome and causes additional costs.

### **3.4 Fulfilment of the Directive's Objectives**

The Directive's original objectives were identified as:

- (1) Create legal certainty, thereby encouraging new market entrants, encouraging competition, and contributing generally to the development of electronic commerce.
- (2) Assist electronic money in delivering its full potential and avoid hampering technological innovation.
- (3) Preserve a level playing field between ELMIs and other credit institutions issuing e-money, and, thus, ensure fair competition among a wider range of institutions to the benefit of the bearers.
- (4) Ensure the stability and soundness of issuers, thereby safeguarding customers' interests.
- (5) Facilitate access by ELMIs from one Member State into another Member State, contributing to the free movement of capital and to the freedom of cross-border services.

The consultants' evaluation concludes that the EMD has achieved most of its original objectives to a certain extent. Shortcomings of the Directive in terms of meeting its objectives primarily have to do with uncertainty over its scope and applicability, and/or with the perceived (dis)proportionality of the regulatory framework, i.e. whether it strikes the right balance between the prudential requirements and the actual risks facing e-money issuers and their customers.

The EMD has fostered legal certainty in terms of establishing a legal framework for ELMIs and waived institutions. However, questions about if and how the legal framework should apply to certain schemes (certain account-based schemes, electronic vouchers) and issuers (MNOs, transport providers) have led to a considerable degree of legal uncertainty. There is therefore a need to clarify the definition of e-money, either through revising the definition, through including specific exemptions, or through specifically adapted rules for certain "hybrid"<sup>6</sup> issuers.

The EMD has remained technologically neutral; with very few exceptions<sup>7</sup>, doubts over its applicability to certain business models have to do not with the electronic device used, but with the nature of the product and the issuer. While the EMD has not excluded any storage devices for technical reasons, whether it has actually encouraged, hampered, or made no difference to innovation depends mainly on the perceived appropriateness of the regulatory framework, and on the degree of legal (un)certainly regarding its applicability.

The question of whether the EMD has created a level playing field for all issuers of e-money is, according to the consultants' report, highly controversial. The most important concern in this regard is the appropriate treatment of the prepaid services of MNOs. While the limited practical experience to date makes it difficult to assess whether a level playing field exists between ELMIs and traditional credit institutions, there are concerns that some of the requirements and restrictions for ELMIs may be excessive. In this context, requirements that

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<sup>6</sup> The term "hybrid" is used to describe service providers who issue E-Money as an accessory activity to their core business (i.e. mobile phone operators, public transport companies, etc).

<sup>7</sup> In particular, the Directive has proven problematic for certain existing paper-based pre-paid value business models (e.g. luncheon vouchers), as the uncertainties surrounding the applicability of the Directive have prevented providers from making the switch to electronic solutions.

might be reviewed include the initial capital requirements. This would ease the transition of institutions operating under a waiver to full ELMI status.

The EMD has on the other hand been successful in ensuring the stability and soundness of e-money issuers, and there have not been any reported instances of insolvency, fraud, or consumer detriment. While there is clearly no need to impose a stricter regime, there is a considerable degree of support for the idea that certain elements of the regulatory framework (including the combination of ongoing own funds requirements and limitations of investments, certain national interpretations of the restriction of activities and requirements to ensure the sound and prudent operation of ELMIs) are disproportionate to the risks posed by the activities of e-money issuers.

The passporting regime of the EMD is widely appreciated as facilitating cross-border activity and providing a good basis for future integration of the market. Although only three ELMIs have made use of the single passport to date, this is due to the limited development of the market, not to any legal or administrative obstacles. The only problem that has surfaced to date is that in some respects, the passporting rights of ELMIs are inferior to those enjoyed by banks, and in particular, that an ELMI wishing to set up a branch in a Member State other than its own may be subject to additional requirements.

### **3.5 Results of Member State and Stakeholder Meetings**

Two meetings with a Member State expert working group and a further meeting also including industry stakeholders served to confirm the findings in the consultants' evaluation. It was confirmed that there was generally low take-up of E-Money licences which was restricted to certain Member States, and that some use was being made of the waiver regime. There were calls for greater legal certainty, for a level playing field as well as suggestions on how to facilitate E-Money business by consistently implementing special E-Money exemptions for money laundering and allowing bank and credit card receivables to be taken into the calculation of the float. There were also calls for further work to be carried out in order to assess the proportionality of any revised requirements in relation to the level of risk posed by ELMIs. Finally there was a preference expressed by a large majority of Member State e-money experts for a revision of the EMD on a standalone basis as opposed to an immediate integration within the context of the NLF proposal currently under negotiation.

### **3.6 Technical advice from CEBS (Committee of European Banking Supervisors)**

CEBS received a mandate from the Commission to assess the implementation of the EMD's waiver provision. Following consultation of its membership, CEBS found that while from a banking supervisory perspective there may be no need to adjust the legal framework governing the application of E-Money waivers, a review of the waiver threshold might be appropriate from a different perspective. CEBS also commented on the application of the EMD to MNOs and other hybrid issuers, and proposed a temporary solution whereby such undertakings would set up subsidiaries whose exclusive activity would be to manage the financial liabilities of E-Money issuance. Prudential requirements would then be adapted to the structure. The revision of the Directive would need to produce a workable solution to the definition of E-Money issued by hybrids.

## 4 REVISION OF THE DIRECTIVE

### 4.1 How and whether to revise the Directive?

The Commission services are of the view that maintaining the status quo by leaving the Directive unchanged in anticipation of further market developments would not be an adequate response to the evidence thrown up as a result of the Review process. One alternative solution would be to abandon the concept of E-Money altogether and to replace it by the current provisions in the proposed PSD, although the review process has revealed that this option would have to be discussed in further detail with the European Parliament, the Council and other stakeholders. Furthermore, this option seems at this stage difficult to implement given that the negotiation on the PSD is already well advanced and that its urgent adoption is required to meet the 2008 deadline for the Single Euro Payment Area. The Commission services believe that there is therefore a strong case to consider a more "middle ground" policy. This would be to revise the E-Money provisions, add certainty as regards the scope and remove the more onerous requirements on business that have proved to be unnecessary or undesirable. As regards the legal instrument most suited to achieve this, it would appear most desirable to seamlessly integrate a set of E-money provisions into the PSD once the PSD has been adopted. Maintaining over the long term two separate directives on payment providers would run counter basic better regulation principles.

### 4.2 Which elements are in need of revision?

The review process has demonstrated that there is a need to clarify the scope of the Directive in order to establish greater legal certainty for the business community and regulators alike about which business models fall within the regulatory framework, as well as a need to relax certain of the Directive's core requirements with a view to ensuring that the rules match in a more proportionate manner the risks posed by ELMIs. The revision will also need to ensure that the provisions are fully consistent and coherent with PSD provisions.

### 4.3 Scope

Clarification of the definition and the scope is necessary in response to concerns expressed by a wide variety of stakeholders during the review process that the current definitions are contributing to legal uncertainty.

The existing Directive establishes, through the definition of electronic money, three criteria which determine whether or not a product should be qualified as E-Money (i.e. it should be stored on an electronic device, issued in receipt of funds of an amount not less in value than the monetary value issued and accepted as a means of payment by undertakings other than the issuer).

- As regards the first criterion, the reference to "electronic device" has led to some Member States questioning whether this would include "server-based" E-money. *Clear confirmation that this is indeed the case would therefore be appropriate.*
- In the second criterion, the stipulation "of an amount not less in value than the monetary value issued" has raised concerns of a potential loophole, in that issuance of an amount which is less in value than the monetary value might be sufficient to disqualify such products from being considered to be E-Money. *It would be appropriate therefore to remove this phrase from the definition and to include such a prohibition in a specific article.*

- The third criterion is arguably the most open to interpretation. The Commission services have already issued guidance on the application of the Directive to MNOs which, for the purposes of interpretation of the definition, places emphasis on the form of the direct payment relationship between a mobile customer and a third party vendor. *The definition will need to be clarified in this respect to ensure that the same services carrying the same systemic and consumer risks are subject to the same rules and will also need to be modified in order to address other issues where uncertainty prevails, such as the inclusion/exclusion of electronic vouchers as well as franchising arrangements. In this respect, consistency with the approach adopted as a result of the PSD negotiations will be necessary<sup>8</sup> and consideration will also need to be given to the situation regarding VAT treatment of vouchers as well as more general payment and transfer systems in the 6<sup>th</sup> VAT Directive. The legislation in these areas is currently under review and, in consequence, may raise issues having an impact on e-money*

#### 4.4 Core requirements

The review process provides evidence which broadly confirms the Commission services' initial impression that certain requirements are disproportionate to the risks posed by ELMIs. This impression is reinforced if the cumulative effects of the overall regime are considered. The Commission services would wish to draw some preliminary conclusions on the basis of the available evidence:

- The issue of **redeemability** at par value does not appear to have posed major problems for authorised ELMIs, although it would appear to pose problems for MNOs or electronic vouchers if they fall within the scope of the Directive. *Suitable accommodation will therefore be necessary.*
- The **initial capital requirement of EUR 1 million** was deemed to be excessive by a number of stakeholders. *There may be a case to lower the threshold with a view to removing an obstacle for smaller firms to apply for a licence.*
- The **2% own funds requirement** would not of itself appear to have given rise to major difficulties for authorised ELMIs, although its combination with other aspects of the Directive (e.g. initial capital, limitation of investments, restriction of activities) have led to complaints that the overall regime is excessive.
- The **limitation of investments**, whilst it fulfils an important function of protecting the float, significantly reduces the opportunity of ELMIs to earn money on funds they receive

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<sup>8</sup> The Payment Services Directive is currently under negotiation in Council and Parliament. The most recent Presidency text is dated 25<sup>th</sup> April and by virtue of point 8 of the Annex includes as a payment service "Execution of payment transactions by any means of communication at a distance such as mobile telephones or other digital or IT devices where the service provider operating the telecommunication or IT system or network is either facilitating the payment of goods or services that are not digital goods or electronic communication services and so are not provided (...) to the device itself, or simply arranging the transfer of funds to a third party for the payment of digital goods or electronic communication services provided to the device itself". Article 3 (negative scope) further clarifies that "payment transactions executed by means of a mobile telephone or any other digital or IT device, where (...) the digital goods or electronic communication services are provided to the device itself and payment is made directly to the service provider operating the telecommunication or IT system or network and not to a third party are excluded from the scope of the Directive". While this text is still subject to change, it is indicative of how MNO's are likely to be dealt with in the PSD and as a consequence how E-Money provisions will also apply.

in return for the issuance of E-Money, and puts them at a competitive disadvantage with fully licensed credit institutions. The restricted nature of the list has also given rise to a clear and arguably unintended problem in that it excludes bank and credit card receivables, which in Directive 2000/12/EC have been accorded the same 20% risk weighting as other asset items listed in Article 5 (EMD). This has resulted in a funding gap for e-money business models<sup>9</sup> which credit e-money immediately but which must wait a number of days for receivables to be credited and accounted for under the float. In one case known to the Commission services, this has resulted in an ELMI being obliged to inject significant amounts of additional capital into the business. *The Commission services consider that the exclusion of bank and credit card receivables from the list of eligible investments is disproportionate to the aim of protecting the float and will examine how to remedy this situation. The list of investments will also need to be reviewed in light of the recently adopted capital requirements Directive.*

- The **restriction of activities** is another measure intended to ensure the financial stability and soundness of ELMIs. ELMIs are prohibited from any business other than the issuance of E-Money and closely related services. However it is questionable whether the cumulation of robust prudential requirements aimed at protecting the float with the prohibition of other activities is in proportion to the level of risk posed (this provision is furthermore in contradiction with the approach taken in the PSD, where the range of activities which fall under the scope of "payment service" is broader and, where "the business activities of authorised payment institutions shall be non-exclusive and shall not be restricted to payment services"). The Commission services are of the view that the restriction of activities represents a significant constraint for E-Money institutions and is problematic in the case of businesses which issue E-Money as a "non-core" part of their business. *Consideration will therefore need to be given to de-restricting activities of ELMIs and to ensuring a more coherent approach vis-à-vis the PSD.*

#### 4.5 Waivers

Member States have adopted different approaches with regard to Article 8 of the EMD. The application of a waiver is optional, and as waived institutions do not benefit from an EU passport, it is hard to see how unequal application of the provision could constitute an impediment to the Internal Market. Different approaches to the application of waivers may create competitive distortions on national markets, although where applied more flexibly, they may also have facilitated entry for new market participants. The Commission services are conscious of the need to strike a balance between facilitating market access, ensuring adequate safeguards and avoiding competitive distortions. They are also of the view that there is a need to provide incentives to institutions operating under a waiver to transform into a fully licensed institution. *Any change of the waiver regime must also therefore be seen in the context of relaxing the entry requirements for fully licensed ELMIs and will need to be consistent with the waiver regime in the PSD.*

#### 4.6 Anti-Money Laundering Rules

Requirements aimed at countering money laundering and terrorist financing pose a particular challenge in the case of E-Money, and have been highlighted by a number of respondents as being a key concern. In view of the low average amounts involved in E-Money transactions,

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<sup>9</sup> According to Article 5(1), all ELMIs are obliged to "have investments of an amount of no less in value than their financial liabilities relating to outstanding electronic money".

full application of identification and record keeping requirements could render such systems uneconomic. The EMD contains no specific provisions covering anti-money laundering, however the recently adopted Directive 2005/60/EC<sup>10</sup> does introduce a simplified customer due diligence regime which applies to E-Money, and considerations are being given to the introduction of a similar regime into the proposal for a regulation on information on the payer accompanying transfers of funds<sup>11</sup>. *The Commission services consider that it is appropriate that such issues are addressed in the specific legislation dealing with financial crime as opposed to within the EMD.*

#### **4.7      Passporting Regime**

There has so far been only very limited take-up of the EU passport by fully licensed ELMIs. While the application process might be simple and straightforward, there are apparent problems with regard to the limited nature of activities an ELMI can undertake through its branch office which stem from the fact that Article 2 EMD disapplies certain articles<sup>12</sup> in Directive 2000/12/EC providing for the authorisation of branches in other Member States and setting out the scope of permitted activities. *The Commission services are of the view that the passporting regime should allow ELMIs to conduct the same business in host Member States as they are entitled to conduct in their home Member State under the ELMI licence, without additional hindrances. This issue merits to be addressed.*

#### **4.8      The need to ensure consistency with the PSD**

The above areas where the Commission services recommend changes reflect the findings of the evaluation with regard to the existing E-Money regime as established by Directive 2000/46/EC. However, given the close interrelationship between E-Money and electronic payments, it is clear that any solutions that are ultimately proposed for E-Money institutions will need to be adapted so as to reflect the outcome of the current ongoing negotiations on the PSD.

In this respect, it will be of vital importance to ensure seamless consistency between the respective regimes for payment institutions and ELMIs. While there may be a need to continue to differentiate between prudential regimes to take account of the different risks associated with payment services as opposed to the holding of E-Money, any solutions adopted in the context of the PSD negotiations in this respect will need to be analysed to see whether they might be suitably adapted to also apply to ELMIs. As regards the *scope* of the PSD, any finally adopted solutions will need wherever possible to also apply in the context of E-Money. This is particularly the case for any solutions which are adopted as regards the applicability/non applicability of the Directive to specific business models (e.g. how to deal with MNO's, electronic vouchers, how to apply the waiver regime, etc.). Finally any potential conflicts resulting from the application of minimum versus maximum harmonisation will also need to be avoided.

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<sup>10</sup> on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

<sup>11</sup> COM (2005) 343 final

<sup>12</sup> Articles 13 and 19 of Directive 2000/12/EC

## 5 CONCLUSIONS

This report fulfils the mandate set out in Article 11 EMD. The Commission services are of the view that the evidence gathered during the course of the review process establishes that, six years after its adoption and some four years since its implementation in the Member States, there is a case for a fundamental overhaul of the Directive.

The purpose of such a revision should be to improve legal certainty through refinement of the definition of E-money, clarification of the scope and facilitation of business entry under a much more proportionate regulatory regime. The end goal should be to create a more business-friendly and streamlined regulatory framework for the issuance of E-Money, in line with the stated objectives of the original Directive. The Commission services have outlined those specific areas where they believe change would be necessary and appropriate. In particular by lowering the initial capital requirement and widening the scope of activities permitted under an E-Money licence, the Commission services believe that a better balance could be struck between the need to ensure financial stability and soundness and the desire, in line with the Lisbon agenda, to assist the market to reach its full potential.

Prior to proposing concrete new measures, it will be necessary to conduct an impact assessment with a view to determining an appropriate set of measures in line with the risks posed by institutions involved in the E-Money business.

Finally, the Commission services are fully aware of the need to ensure coherence and consistency with the PSD proposal, currently under negotiation in Council and the European Parliament. From a purely legislative perspective, the ideal objective should be to incorporate the E-money Directive into the Payment Services Directive. The Commission services therefore consider that the most appropriate course of action is to await the adoption of the PSD before adopting a new proposal which would integrate E-Money Institutions into the new legal framework for payments. This approach will enable further consideration to be given to the design of an appropriate prudential regime for ELMIs in light of the outcome of negotiations on the PSD.