2ND E-MONEY DIRECTIVE EVALUATION – TOO LITTLE & TOO LATE?

MARCH 2018

The 2nd E-money Directive's ambitions

The first e-money directive 200/46/EC was not as successful as initially expected. Some of its provisions limited the development of the European e-money market, notably due to certain over-demanding prudential requirements and uncertainties about its scope of application. The second e-money directive 2009/110/EC of 16 September 2009 ("***2EMD***") was meant to solve these shortcomings and to give a fresh start to the e-money market. This objective was pursued through facilitating the application process for e-money licenses and bringing its provisions in line with the payment service directive 2007/64/EC ("***PSD1***").

Article 17 of the 2EMD required the European Commission to present a report on the implementation and impact of this directive, accompanied, where appropriate, by a proposal for its revision. The deadline imposed by the 2EMD for this review was 1 November 2012.

Too late

Besides a partial report in 2013 on the conformity of the transposition of the 2EMD in the different member states[1], it was only on 25 January 2018 (*i.e.* more than five years late) that the EU Commission released its report on the actual impact of the 2EMD[2]. Oddly enough, the report itself mentions that it was already finalised in 2014 and therefore only covers the years 2009-2014. Only the data on the number of e-money institutions has been updated until January 2017.

The official reason to postpone this report was that by the initial deadline, only 23 member states had fully - and in most cases, only recently - transposed the 2EMD into domestic law. At that time, the Commission felt that the e-money market had too little practical experience with the 2EMD to provide meaningful feedback on the actual effects of the new legislation. Other reasons mentioned in the report were that the introduction of the PSD2 (November 2015) and the 4AMLD (May 2015) could potentially impact the 2EMD. Given the fact that the report itself was finalised in 2014 and that only minor and very general comments are added on the PSD2 and the 4AMLD, one can regret that the report was not released earlier.

Too little

The actual analysis of the application and impact of the 2EMD is extremely limited and does not even exceed two full pages. The overall conclusion is

[1] https://ec.europa.eu/info/publications/e-money-transposition-status-country_en

[2] http://eur-lex.europa.eu/legal-content/EN/TXT/DOC/?uri=CELEX:52018DC0041

that the effect of the 2EMD on the market is positive. However, the text of the report itself is much more nuanced. It states that although the definition of e-money and the overall scope of the 2EMD are broadly considered appropriate, member states and stakeholders still struggle in deciding on the legal framework that should apply to more complex products for which it is difficult to make a distinction between a payment account, an e-money account, and a bank account. Divergences of approach also remain regarding the concepts of agents, distributors, and the limited network exemption.

According to the Commission's report, there is evidence of increased interest in e-money licenses. We cannot fully agree with this conclusion. The report indicates a total of 172 e-money institutions and 74 so-called small e-money institutions for the whole European Union, which remains insignificant if compared to the + 2,750 payment institutions in the EU. Additionally, 87 (about 50%) of the current e-money institutions are UK-based, while the second and third countries in the list are Malta (13) and Cyprus (10). Major member states such as France (7), Germany (6) and Italy (4) on the other hand, lack far behind. For Belgium specifically, the report indicates a total of 8 full e-money institutions, while the official list held by the Belgian National Bank reports only 5 full e-money institutions and 3 waived institutions. These numbers make it hard to believe that e-money institutions have the potential to become a widespread phenomenon in the EU.

It is true that, at least theoretically, interest in e-money institutions has increased. However, and the report acknowledges it, e-money remains very much a niche market which seems, quite paradoxically, hardly affected by the recent technological changes and the rise of FinTech companies, if compared to payment institutions for example.

PSD2 and the future of e-money

The 2EMD, if compared to the 1EMD, never really was a 'stand-alone' directive, given the multiple references to PSD1. While now we see that PSD2 is changing a lot of 2EMD's provisions, without this leading to a full review of the 2EMD. For years, some authorities and stakeholders have demanded the merger of these two directives. When we see that the follow up on the 2EMD was never given much attention, that PSD2 and payment institutions in general clearly became the priority for the EU Commission, and that the difference between e-money accounts and payment accounts sometimes becomes blurry in practice, one could wonder if there is still a future for (an independent legislation on) e-money.

On a seminar held in May 2017, representatives of the National Bank of Belgium stated that, in their view, e-money was fading away. They felt that the business case for e-money was dead and they were uncertain on whether a '3EMD' would ever see the light. Given the very light impact report on the 2EMD, the significant changes introduced by the PSD2 in the e-money legislation and the relatively low market interest in e-money, we tend to agree with their arguments.

In its report, the EU Commission concludes that a future revision of the 2EMD and its possible merger with the payment service directive would require further analysis and believes that it is important to consider such steps only after they have gained experience with the adoption of PSD2 and the likely impact it will have on e-money institutions. Such a position leads us to believe that not much news is to be expected from the e-money front for the coming years.

* * *

*For more information, please contact **Simont Braun's Digital Finance Team:***
digitalfinance@simontbraun.eu ***-*** *+32 (0) 2 543 70 80*