NATIONAL DIFFERENCES IN LEGAL ASPECTS OF HOLDING AND USING EUROe

Date: 11.09.2023

The examination presented in this note is based on the legal sources described below, on the interpretation of an independent third-party expert ("expert") contracted by Membrane Finance Oy ("Membrane") and prevailing market practices. In support of this note, the following laws and legal sources, among other materials, have been reviewed:

- Regulation (EU) 2023/1114 on markets in crypto-assets ("**MiCA**")
- Regulation (EC) 1126/2008 on adopting certain international accounting standards ("**ACAS**")
- Regulation (EC) 1606/2002 on the application of international accounting standards ("**AAS**")
- Directive (EU) 2018/843 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing ("**AMLD5**")
- Directive (EU) 2015/2366 on payment services in the internal market ("**PSD2**")
- Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings ("**ACRD**")
- Council directive 2011/16/EU on administrative cooperation in the field of taxation ("**DAC**")
- Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions ("**EMD2**")
- Loi portant des dispositions diverses relatives à la prévention du blanchiment de capitaux et du financement du terrorisme et à la limitation de l'utilisation des espèces ("**Belgian Law 2020**")
- Loi relative au statut et au contrôle des établissements de paiement et des établissements de monnaie électronique, à l'accès à l'activité de prestataire de services de paiement, et à l'activité d'émission de monnaie électronique, et à l'acce ("**Belgian Law 2018**")
- Arrêté royal relatif au statut et au contrôle des prestataires de services d'échange entre monnaies virtuelles et monnaies légales et des prestataires de services de portefeuilles de conservation ("**Royal Decree of 8 February 2022**")
- Code monétaire et financier ("**CMF**")
- Zahlungsdiensteaufsichtsgesetz vom 17. Juli 2017 ("**ZAG**")
- Geldwäschegesetz vom 23. Juni 2017 ("**GwG**")
- ZAG-Instituts-Eigenmittelverordnung vom 15. Oktober 2009 ("**ZIEV**")
- Kreditwesengesetz in der Fassung der Bekanntmachung vom 9. September 1998 ("**KWG**")
- Decreto legislative 21 novembre 2007, n. 231 ("**D. Lgs 231/2007**")
- Decreto Legislativo 16 aprile 2012, n. 45 ("**D. Lgs. 45/2012**")
- Decreto legislative 1 setembre 1993, n. 385 ("**TUB**")
- Wet op het financieel toezicht ("**WFT**")
- Wet ter voorkoming van witwassen en financieren van terrorisme ("**WWFT**")
- European Court of Justice: Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA (ECLI:EU:C:1990:395, "**ECJ C-106/89**)
- European Court of Justice: Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (ECLI:EU:C:1979:42, "**C-120/78 Cassis de Dijon**")
- European Court of Justice: Case 6/64 Flaminio Costa v E.N.E.L. (ECLI:EU:C:1964:66, "**C-6/64 Costa v E.N.E.L.**.")
- Craig, Paul – de Burca, Grainne: EU Law. Oxford University Press, 2011, fifth edition.
- European Commission proposal for Consil directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation ("**COM(2022) 707**")
- European Commission's website: Tax fraud & evasion – strengthening rules on administrative cooperation and expanding the exchange of information ("**EU Commission: Tax fraud & evasion**", visited 22.8.2023)
- European Commission's website: E-money ("**EU Commission: E-money**", visited 5.9.2023.)
- Global Legal Insight: "Blockchain & Cryptocurrency Laws and Regulations 2023 | France" ("**GLI France**", visited 18.8.2023)

- Global Legal Insight: "Blockchain & Cryptocurrency Laws and Regulations 2023 | Netherlands" ("**GLI Netherlands**", visited 21.8.2023)
- Banca D'Italia: Questioni di Economia e Finanze, Aspetti economici e regolamentari delle cripto-attività, Marzo 2019. ("**Aspetti economici e regolamentari delle cripto-attività**")

Disclaimer

This note has been produced by a third-party legal expert specialising in electronic money and blockchain-related legal questions in the EU. The expert's typical business does not include legal opinions regarding the legal systems of other EU member states. Furthermore, a specific time limit was set on how many hours the expert could use for the research presented in this document.

Henceforth, the observations made in this node about the contents of the legislation in other EU countries are only intended as general starting points to serve the purpose of this research, and the more precise contents needs to be studied in more detail before any final business decisions should be made.

Furthermore, e-money distribution, agent activities and provision of payment services are not addressed in this note, as they are an entirely separate matter from the general use and holding of e-money. Also, this research uses English translations of national laws. As none of the member states assessed use English as their official language, it is advisable to consult a local legal counsel before making business decisions.

The information provided in this note is for informational purposes only and should not be construed as financial, legal, tax, or any other advice.

The State of National E-Money Legislation

1. Generally

Membrane is an electronic money institution ("**EMI**") licensed in Finland by the Finnish Financial Supervisory Authority ("**FIN-FSA**") in November 2022. As an EMI, Membrane issues and redeems electronic money ("**e-money**") – the e-money issued and redeemed by the company is called 'EUROe'.

EU Commission has classified e-money as "*a digital alternative to cash*",[1] and Article 2(2) of EMD2 defines e-money as:

> "'*electronic money' means 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 transactions as defined in point 5 of Article 4 of Directive 2007/64/EC, and which is accepted by a natural or legal person other than the electronic money issuer*;"

EMD2 is the foundational legislation on e-money in the EU, primarily focused on its issuance and redemption. Notably, its direct application is to EMIs rather than e-money holders. However, EMD2 is a directive, meaning it sets broad goals that EU member states must then adopt into their own laws. As such, individual member state laws might diverge slightly from EMD2, potentially including provisions about the use and holding of e-money.

At the same time, it must be acknowledged that in matters where the EU has issued legislative acts, **the EU legislation is the primary source of law compared to national legislation**.[2] Even though national courts do not directly apply EU directives, by the end of the implementation period, national laws should reflect the EU directive's objectives. In practice, this means a national court should interpret its laws to align with the spirit and wording of EU directives (**principle of consistent interpretation**).[3] Therefore, if a national legislation of an EU member state would contain provisions on the use and holding of e-money, they should correspond with the goals of the EU legislation.

Given the reasoning afore, and the fact that **the whole concept of e-money is based on the presumption of its acceptance by third parties**, the main rule must be that **the use and holding of e- money is permitted in the EU**, unless it is explicitly prohibited in an EU member state's national legislation. Also, in light of the afore reasoning, it can be reasonably argued that if the use or holding of e-money were explicitly prohibited in an EU member state's national legislation, it should be especially well justified.

Lastly, in the context of Membrane and EUROe, it must also be emphasised that the EU's single market is based on the **principle of mutual recognition**, according to which products that have legally been placed on the markets of an EU member state may be placed on the markets of another member state.[4] This effectively means that the products sold lawfully in one member state may not be prohibited for sale in another**.** Since

[1] EU Commission: E-money.
[2] C-6/64 Costa v E.N.E.L..
[3] ECJ C-106/89.
[4] C-120/78 Cassis de Dijon. See also Graig – de Burca 2011 p. 582 and 685—690.

EUROe is already legally classified as e-money by the FIN-FSA in accordance with Article 2(2) of EMD2, **according to the principle of mutual recognition EUROe should be mutually recognised in all member states as e-money**.

2. Belgium

Belgium has primarily implemented the EMD2 within its Belgian Law 2018. The law's Article 2 Section 77 defines e-money, and notably, Section 25 of the same Article classifies e-money alongside traditional forms like banknotes, coins, and scriptural money. More pertinent to our discussion on the use and holding of e-money, the Belgian law acknowledges the concept of an "electronic money holder." As per Article 2 Section 28 of Belgian Law 2018, this term refers to a natural or legal entity who gives funds to an issuer of electronic money in return for receiving electronic money.

As for restrictions on e-money issuance, there are several rules set for EMIs in the BOOK IV of the Belgian Law 2018, which contains provisions from Article 163 to Article 236. According to Article 163 of Belgian Law 2018, **issuing of e-money has only been restricted**, as it requires a relevant financial license.

Moving beyond traditional e-money to the realm of crypto-assets, the Belgian Law 2020, within its anti-money laundering (AML) provisions, defines a crypto-asset in Article 31 as:

> "*digital representations of a value which are not issued or guaranteed by a central bank or by a public, which are also not necessarily linked to a legally established currency and which do not have the legal status of money or money, but which are accepted as a medium of exchange by natural or legal persons and which can be transferred, stored and exchanged electronically*".

The Royal Decree of 8 February 2022 further clarifies the regulatory landscape for crypto-assets. It stipulates supervision rules for crypto-asset exchange service providers and custody wallet providers. In the Royal Degree it is stated that crypto-assets must be understood as it is defined in the referred AML legislation and, at the same time, ***legal currencies*** **are** coins and banknotes designated as legal tender **and electronic money** of a country, accepted as a medium of exchange in the relevant country.

In summarising the use and holding of e-money within the Belgian legal framework, it is evident that Belgium recognises and integrates European directives into its own legal landscape. Belgian Law 2018 not only defines e-money but also equates it to traditional forms of monetary value like banknotes and coins. The recognition of "electronic money holders" underscores that Belgium acknowledges both the entities that issue e-money and those that use or hold it. While issuance requires regulatory oversight and a financial licence, the overarching sentiment is one of acceptance and normalisation. The further distinction and regulation of crypto-assets highlight Belgium's proactive approach to emerging financial technologies. This suggests that while Belgium operates within the EU's legal parameters, it actively defines and refines its stance on e-money, ensuring clear guidelines for both issuance and usage. As a result, e-money holders should be able to utilise e-money in Belgium.

Based on the aforementioned and since there are no restrictions for the use or holding of e-money, EUROe should be available to use and hold in Belgium.

3. France

France has implemented the EMD2 mainly in the CMF. The most of the EMD2's articles are in Articles L133-29 – L133-38 (about redeeming e-money), L315-1 – L315-9 (about issuing and managing e- money), L525-1 – L252-13 (about issuers of electronic money) and L526-1 – L526-40 (about EMIs).

There is also a specific provision about crypto-assets in the same law. According to Article L54-10-1 of CMF:

> *"any digital representation of a security which is not issued or guaranteed by a central bank or by a public authority, which is not necessarily attached to a currency having legal tender and which does not have the legal status of a currency, but which is accepted by natural or legal persons as a medium of exchange and which can be transferred, stored or exchanged electronically*."

The said legislation has led to the outcome where:

> "*The legal qualification of stablecoins should be based on a case-by-case analysis. As cryptocurrency is not necessarily attached to legal tender, the AMF considers that stablecoins could fall within the scope of the definition of digital assets. In this sense, the AMF recently registered a stablecoin issuer as a DASP.* ***However, the banking regulator considers that stablecoins, especially "fiat-pegged" (i.e., whose stable value is backed by an official currency), should be classified as e-money***."[5]

According to Article L525-3 of CMF:

> "*It is prohibited for any person other than those mentioned in Articles L. 525-1 and L. 525-2 to issue and manage electronic money within the meaning of Article L. 315-1 as a regular profession*."

The persons referred to in said Article are EMIs and credit institutions, whereas Article L315-1 defines e-money as more or less the same as EMD2. However, there is also an exception as Article 525-5 of CMF states:

> "*By exception to Article L. 525-3, a company is allowed to issue and manage electronic money for the purpose of acquiring goods or services, solely within the premises of that company or, within the framework of a commercial agreement with it, within a limited network of individuals accepting these means of payment or for a limited range of goods or services, on the condition that the maximum loading capacity of the electronic medium provided to electronic money holders for payment purposes does not exceed an amount set by decree. For the part of its activity that meets the conditions mentioned in this paragraph, the company is not subject to the rules applicable to electronic money issuers*."

[5] GLI France.

According to the referred Articles, it seems that there are some restrictions set for the issuing and managing of e-money, but at the same time there are clearly also exceptions where those restrictions do not apply. However, since EUROe and Membrane are both legitimately founded and approved by the FIN-FSA, Membrane should be allowed distribution of EUROe to operators in France, and without clear and especially well justified reasons that cannot be prohibited.

Based on the aforementioned and since there are no restrictions for the use or holding of e-money, EUROe should be available to use and hold in France.

4. Germany

Germany has implemented the EMD2 mainly in the ZAG. However, some parts of EMD2 are implemented in the KWG and the ZIEV. On a general level, the rules set in the German law comply with the EMD2. For example, e-money is defined in Section 1 of ZAG (in compliance with Article 2 of EMD2):

> *"as electronically, including magnetically, stored monetary value in the form of a claim on the issuer, which is issued against payment of a sum of money in order to use it to carry out payment transactions within the meaning of Section 675f (4) sentence 1 of the German Civil Code, and which also accepted by any natural or legal person other than the issuer*."

Also, the concept of *e-money holder* is recognised in Section 33 of ZAG. The said Section does not, however, govern how the e-money holder may use and hold e-money.

Also, noteworthy is **that according to Section 1 Subsection 11 of KWG, e-money is not a crypto-asset** and because of that, for example, Section 16 a of GwG,[6] which prohibits the use of crypto-assets in legal transactions aimed at the purchase or exchange of domestic real estate, **does not apply to e-money**.

Based on the aforementioned and since there are no restrictions for the use or holding of e-money, EUROe should be available to use and hold in Germany.

5. Italy

Italy has implemented the EMD2 mainly by the D. Lgs 45/2012, which changes some Articles in the TUB. After the D. Lgs 45/2012, the Title V of TUB contains most of the EMD2 articles, for example issuance of e-money (Article 144-bis), distribution of e-money (Article 114-bis.1) and EMIs (Article 114- quarter).

According to Article 114-ter of TUB:

[6] Germany's **AML** legislation.

> *1. "The issuer of electronic money shall redeem the electronic money at the request of the holder at any time and at the nominal value, in accordance with the terms and conditions specified in the issuance contract in conformity with Article 126-novies. The right to redeem expires due to the lapse of the ordinary terms of prescription as provided in Article 2946 of the Civil Code.*
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> *2. The holder may request redeem:*
> *a) before the contract's expiration, to the extent requested; b) at the contract's expiration or subsequently:*
> *1) for the total monetary value of the electronic money held;*
> *2) to the extent requested, if the issuer is an authorized electronic money institution as per Article 114-quinquies, paragraph 4, and the funds belonging to the same holder can be used for purposes other than the use of electronic money, without a predetermined amount usable as electronic money.*
>
> *3. Entities other than consumers that accept electronic money in payment may contractually settle their right to redeem with the issuer of electronic money, even deviating from paragraph 2."*

Thus, it seems that Italy's legislation fully acknowledges the situation where third parties accept e- money.

Based on the aforementioned and since there are no restrictions for the use or holding of e-money, EUROe should be available to use and hold in Italy.

6. The Netherlands

Netherlands has implemented EMD2 mainly in the WFT. EMD2's term e-money is implemented Article 1 Section 1 of WTF and it states:

> "*monetary value stored electronically or magnetically, representing a claim against the issuer, issued in exchange for money received to effect payment transactions as referred to in Article 4(5) of the Payment Services Directive and with which payments can be made to a person other than the issuer*"

The same Article has a definition for an EMI, in accordance with which the EMI is "*the party whose business is the issue of electronic money*".[7] One observation is also that e-money is seen as *financial product* and *funds* according to Article 1 Section 1 of WTF. Other financial products are: an investment object; a payment account including the associated payment facilities; a financial instrument; credit; savings account including the associated savings facilities; insurance that is not reinsurance; a premium pension claim – where other funds are cash and book money.

Crypto-assets are defined in the Netherlands AML legislation and according to Article 1(1) of WWFT crypto-asset is:

[7] See also Articles 4:31—4:31b of WFT, where the issuing and redeeming of e-money is regulated in compliance with EMD2.

> "*a digital representation of value that is not issued or guaranteed by a central bank or a government, that is not necessarily linked to a legally established currency and that does not have the legal status of currency or money, but is used by natural persons or legal persons is accepted as a medium of exchange and can be transferred, stored and traded electronically*;"

The mentioned provisions are interpreted as follows:

> "*According to the FSA, electronic money is – in short – electronically, including magnetically, stored monetary value as represented by a claim on the issuer that is issued on receipt of funds for the purpose of making payment transactions, and which is accepted by a natural or legal person other than the electronic money issuer. This definition has been derived from the E- Money Directive 2009/110/EC. Most cryptocurrencies are not issued by a central body but are decentralized. Cryptocurrencies therefore do not represent a claim on the issuer and are not necessarily issued in exchange for traditional money. This means that under the FSA, cryptocurrencies do not qualify as electronic money. If a cryptocurrency does qualify as electronic money because it has an issuer and meets the other requirements of the definition, it is prohibited to issue said electronic money without a licence from DNB.*"[8]

Based on the aforementioned and since there are no restrictions for the use or holding of e-money, EUROe should be available to use and hold in Netherlands.

7. Summary

The EUs foundational legislation on electronic money, EMD2, defines e-money as a digital alternative to traditional cash. Though the directive primarily focuses on EMIs, it sets the broad legislative framework that individual EU member states should adopt in their national laws. Despite EMD2 primarily targeting EMIs, the legislation's goals should permeate national laws and ensure the use and holding of e-money in the EU is fundamentally permitted unless explicitly prohibited by individual member state laws. Consequently, any restrictions or prohibitions at a national level on e-money usage or holding must be exceptionally justified.

Across the EU member states analysed, the prevailing sentiment underscores the recognition and normalisation of e-money. These nations have not only incorporated the European directives but have also defined and often equated e-money to traditional forms of money, ensuring clear guidelines for its use. While regulatory oversight is apparent, particularly concerning issuance, e-money holders in these countries can generally utilise e-money without any explicit restrictions.

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[8] GLI Netherlands.