

Electronic Money Institutions in Spain

Banking and Finance Alert

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On 28 July 2011, Spanish Law 21/2011 on electronic money came into force (the **Law**).

This Law partially implements Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions (the **e-Money Directive**) and introduces a brand new regime on electronic money and electronic money institutions with the aim of modernizing and boosting the sector on the basis of the experience gained over the past 10 years (during which the previous Directive and the former Spanish regime have been in force).

This Law supersedes article 21 of Law 44/2002 and the regulation developing it, which was to date the regime in force for e-Money institutions. The e-Money Directive was due to be in force in all EU countries by 30 April 2011.

In particular, the aim of the Law is mainly to reinforce the legal certainty surrounding the nature of e-Money institutions and the rendering of their services (mainly the issuance of electronic money). In this line, 3 are the main objectives pursued by the new regime:

- a) Being more precise on the definition of E-Money and the scope of the Law.
- b) Designing a more accurate legal regime that makes less onerous to the e-Money institutions to access the market and render their services which, for instance, implies that these institutions shall no longer qualify as credit entities.
- c) Making the regime consistent with that on payment services currently in force,

mainly by bringing the prudential regime for e-Money institutions into line with the requirements for payment institutions.

On the date of issuance of this alert the Spanish Government has not yet approved and issued the regulation that develops in detail certain aspects of the Law (the **Regulation**), nor there is a reliable draft of such Regulation available. Therefore, certain issues described/explained below (such as the approval process or the own funds requirements) will or may be subject matter of further development.

1. Scope

The Law lays down the rules for issuing e-Money (on a professional basis) and the taking up, the pursuit and the prudential supervision of the business of e-Money institutions. For the purposes of the Law, e-Money is all sort of monetary value electronically or magnetically stored, which represents a claim on the issuer, which is issued on receipt of funds for the purpose of making payment transactions as defined in article 2.5 of Law 16/2009 on Payment Services (which basically implements point 5 of Article 4 of Directive 2007/64/EC), and which is accepted by a natural or legal person other than the e-Money issuer.

The Law, in accordance with its preamble and article 1.3 also sets forth the parameters for certain monetary values, such as (among others) store cards, petrol cards or meal vouchers¹, to be excluded from its scope of application, so that they do not to be necessarily issued by e-Money institutions.

¹ These are listed in the preamble of the Law by way of example, so there may be others.

Apart from credit entities and other public institutions such as the Bank of Spain, only duly authorized e-Money institutions can issue e-Money on a professional basis.

2. Approval

Despite the fact that e-Money institutions are no longer a category of credit entities, their incorporation or the establishment in Spain of branches of non-EU institutions must be previously approved by the Minister of Economy and Treasury (like other credit entities).

The application for approval must be resolved within 3 months from the reception of the full set of required documents. If after such period there is no express resolution from the Bank of Spain then the approval shall be deemed to be denied. It is also important to note that if there is an express denial resolution, it shall motivate the reasons for such denial, which may not be discretionary but only among those set forth in the Law and, as the case may be, the Regulation.

Once approval is obtained and after the incorporation of the relevant institution is registered with the relevant mercantile registry, these institutions must also be registered with a special registry of the Bank of Spain prior to initiating their activities.

Pending approval of the Regulation, we understand that the main documentation required to initiate the approval process must comprise, among other things, the following:

- i. information on the company by-laws and corporate structure;
- ii. information on financial structure and organizational structure;
- iii. a list of directors including information on experience and professional honesty, and a list of shareholders including information about the suitability requirements of significant shareholders (in principle, those with a direct or indirect stake of 10% of the voting rights in the company); and

- iv. the programme of activities (amongst those listed below).

According to the Law, e-Money institutions that were approved before 30 April 2011 can continue their activities without being required to obtain approval again. However, by 30 October 2011 these institutions shall submit to the Treasury General Directorate (*Dirección General del Tesoro y Política Financiera*) all relevant information required by the Law and the Regulation to assess that they comply with the new requisites and, if they do not comply, the measures that need to be taken to ensure compliance or withdraw the authorization. Those e-Money institutions that comply will be registered with the relevant Bank of Spain registry and those which have not evidenced compliance by 30 October 2011 shall be prohibited from issuing electronic money there onwards.

3. Main Features of e-Money institutions

For a legal person to obtain and maintain an e-Money institution license, it must be incorporated as a Spanish company (presumably as a *sociedad anónima* but yet to be determined by the Regulation).

The share capital must amount to at least €350,000 which, pending approval of the Regulation, shall be complemented with a sufficient volume of own funds.

Apart from the issuance of e-Money, these institutions can render a number of additional activities for so long as they are listed in their corporate purpose. These are mainly the following:

- a) the provision of payment services. The Bank of Spain may, on the basis of prudential supervision criteria, decide that these activities shall be rendered by incorporating a separate entity;
- b) the granting of credit related to certain payment services and where certain conditions are met. This credit shall not be granted from the funds received in exchange of e-Money. To date, e-

Money institutions were not allowed to grant credit;

- c) the provision of operational services and other ancillary services closely related to the issuing of e-Money or the provision of payment services;
- d) the operation of payment systems.

Electronic money institutions are not allowed to take deposits or other repayable funds from the public and the Law expressly says that any funds received by electronic money institutions from the electronic money holder shall not qualify as such.

Finally, it is also important to remark that electronic money institutions shall safeguard the funds that have been received for the issuance of e-Money.

For the purposes of ensuring compliance with the above and any other requisites and features applicable to e-Money institutions, the Bank of Spain will be in charge of their prudential supervision.

4. Passporting

E-Money institutions, which are authorized in other EU Member States, may initiate their activities in Spain, through a branch or on a cross-border basis, via the so-called passporting process. Therefore, the prior authorization of the Bank of Spain is not required but just the mere reception by the Bank of Spain of a communication from the supervisor of the Home Member State containing (i) in the case of branches, the name and address on the institution to be passported, the names of the persons responsible for the management of the branch, its organizational structure and corporate domicile, and the activities it intends to carry; and (ii) in the case of cross-border activity, simply the list of activities to be passported.

Although e-Money institutions cannot issue e-Money through agents, EU entities may distribute e-Money by contracting with legal or natural persons to such effect. In this case, the Bank of Spain shall also receive a communication from the supervisor of the Home Member State indicating the activities and details of the contracted distributors.

5. Significant shareholdings

Any legal or natural person intending to acquire or transfer, directly or indirectly, a significant shareholding in an e-Money institution shall first notify to the Bank of Spain such intention. Likewise, any person adopting the decision of increasing or reducing, directly or indirectly, its significant shareholding as a result of which its percentage in the share capital or voting rights in the company goes above or below the 20%, 30% or 50% thresholds (or gains control or ceases to have it) shall also notify the Bank of Spain in advance.

The proposed acquirer shall facilitate the Bank of Spain with certain information to assess the suitability of the acquisition and the Bank of Spain shall have 60 business days (from the date of acknowledgement of receipt of the above notification) to determine if the proposed acquisition may negatively impact the prudent management of the institution and, as the case may be, oppose to it. If the bank of Spain does not expressly oppose to the transaction within the said period, the transaction shall be deemed as not opposed.

Any transaction which the Bank of Spain has expressly opposed to on time or which has not been duly notified to it shall imply that the voting rights pertaining to the affected shares may not be exercised and, potentially, the institution may be intervened or its directors substituted.

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The content of this Alert is merely descriptive. Accordingly, the issues and matters dealt with in this Alert are not necessarily exhaustive and by no means constitute legal advice or the opinion of CMS Albiñana & Suárez de Lezo.

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