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**Report**  
**on the application of AML/CTF obligations to, and the AML/CTF supervision of**  
**e-money issuers, agents and distributors in Europe.**

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## List of abbreviations

AML – Anti-Money Laundering  
AMLC – Anti-Money Laundering Committee of the Joint Committee of EBA, ESMA and EIOPA  
CDD - Customer Due Diligence  
CPMLTF – Committee on the Prevention of Money Laundering and Terrorist Financing  
CTF – Counter Terrorist Financing  
EBA- European Banking Authority  
EEA- European Economic Area  
EIOPA - European Insurance and Occupational Pensions Authority  
E-money – Electronic Money  
E-money issuers – E-money Institutions and Credit Institutions (according to article 2(3) of the Directive 2009/110/EC)  
ESMA - European Securities and Markets Authority  
EU – European Union  
JC – Joint Committee of the European Banking Authority (EBA), European Securities and Markets Authority (ESMA) and European Insurance and Occupational Pensions Authority (EIOPA)  
MS – Member State of the European Union and/or the European Economic Area (EEA)  
PSD – Directive 2007/64/EC of the European Parliament and of the Council on payment services in the internal market  
3<sup>rd</sup> MLD - Third Money Laundering Directive (2005/60/EC)  
2<sup>nd</sup> EMD - Second E-money Directive (2009/110/EC)

## Chapter 1: Executive Summary

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The Joint Committee is a forum for cooperation that was established on 1st January 2011, with the goal of strengthening cooperation between the European Banking Authority, European Securities and Markets Authority and European Insurance and Occupational Pensions Authority, collectively known as the three European Supervisory Authorities. Through the Joint Committee, the three European Supervisory Authorities cooperate regularly and closely and ensure consistency in their practices. One of the areas the Joint Committee works in is regarding measures combating money laundering.

This paper provides an overview of Member States' implementation of European anti-money laundering and counter-terrorist financing requirements in the context of the issuing, distribution and redemption of electronic money. It describes Member States' approaches to the Anti-Money Laundering and Counter Terrorist Financing supervision of e-money issuers, their agents and distributors providing services on their domestic territory and/or across the European Union and identifies areas where differences in the national transposition of European legislation could affect the integrity of Europe's Anti-Money Laundering regime.

The analysis of Member States' approaches revealed significant differences in Member States' interpretation of the 2<sup>nd</sup> E-Money Directive and the treatment of e-money issuers, their agents and distributors for Anti-Money Laundering and Counter Terrorist Financing purposes. These differences are the result of legal uncertainty, caused by insufficient or ambiguous consideration, in the 2<sup>nd</sup> E-Money Directive and 3<sup>rd</sup> Money Laundering Directive, of concepts that are key to the understanding and regulation of the electronic money market. These include the definition of the point in time where e-money is issued; the definition of e-money agents and distributors; the application of passporting rules and guidelines to e-money entities; and the distribution of powers between home and host Anti-Money Laundering supervisors.

The Joint Committee considers that the Commission should take the opportunity afforded by the ongoing revisions to the 3<sup>rd</sup> Money Laundering Directive and 2<sup>nd</sup> E-Money Directive to address these issues as a matter of priority.

## Chapter 2: Introduction and Overview

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E-money is a comparatively new retail payment product, which is growing rapidly. Often described as a surrogate for cash and, increasingly, an alternative to more traditional payment services, e-money appears to have been most successful where its growth was spurred by demand for new payment solutions, such as the online purchase of goods and services. Since it does not constitute a deposit, issuers of electronic money do not need to be authorised as credit institutions.

### ***2.1 The Joint Committee's Subcommittee on Anti-Money Laundering***

In May 2011, the Joint Committee of the European Supervisory Authorities' Anti-money Laundering Subcommittee (AMLC) established a Working Group whose objective was to identify and assess issues arising from different national AML/CTF supervisory approaches with respect to entities involved in the electronic money distribution chain, in particular e-money issuers, their agents and distributors. The AMLC gathered data and sought dialogue with stakeholders to inform its analysis in three ways: a questionnaire, a seminar for supervisors and exchange of information with the European Commission.

#### **Questionnaire**

In September 2011, the Joint Committee (JC) circulated a questionnaire to its AMLC's Members and observers<sup>1</sup>, requiring detailed information on their approach to the AML/CTF supervision or regulation of e-money.

## Seminar

In March 2012, the JC organised a two-day seminar on e-money and AML/CTF, which was attended by over eighty e-money and/or AML/CTF supervisors and policy experts as well as supervisory staff responsible for authorisations and passporting, FIU representatives and central bank staff. This seminar brought together expert speakers from national supervisory agencies and central banks, law enforcement, industry and the European Commission to provide participants with a unique insight into, and understanding of, e-money, the money laundering and terrorist financing risks associated with e-money and different approaches to mitigating these risks, both from a supervisory and industry perspective. Above all, the seminar provided a platform for information exchange among supervisors, and among supervisors and industry.

## Work with the European Commission

In December 2011, the AMLC submitted an "informal" report to the European Commission, which provided an overview of its preliminary findings and asked the Commission to clarify the application of certain fundamental aspects of the EU's legal framework to e-money. It also shared the preliminary report with the Commission's Committee on the Prevention of Money Laundering and Terrorist Financing (CPMLTF) in January 2012. Since then, a representative of the EC Commission has provided the AMLC with some first elements of a response to the questions raised.

### 2.2 Scope and purpose

The report analyses MS' approaches to the AML/CTF supervision of e-money issuers and, where applicable, their agents and distributors, both in a national and cross-border context. MS are not named specifically in this report.

AML/CTF supervisors, payments experts and law enforcement point to the existence of several money laundering and terrorist financing risk factors linked to the emergence of electronic money, which affect the effective AML/CTF supervision of this sector. Reporting difficulties in e-money mean that information about the nature and extent of these risks could be improved but on the feedback received:

- **Product risk:** national law enforcement agencies and international standard-setting bodies, such as the FATF and Moneyval, have pointed to the money laundering and terrorist financing risk associated with e-money, which offers a rapid and often anonymous payment option. Since e-money products are used frequently to effect smaller payments, in particular where the product is non-reloadable or benefits from simplified due diligence thresholds, issuer's ability to understand their customers and detect unusual transactions can be limited.<sup>2</sup>
- **Firm risk:** the ML/TF risk associated with e-money products can be mitigated, but e-money products are often issued and distributed by firms with little or no prior exposure to financial services legislation, regulation and supervision. There is therefore, in some cases, limited

<sup>1</sup> The JC based its analysis of the questionnaire and its findings on data submitted by national authorities and the information gathered was updated as of 30 September 2011 (any further national legislative developments have been disregarded). The accuracy of the data remains the responsibility of these national authorities.

<sup>2</sup> The identification and analysis of money-laundering and terrorist financing vulnerabilities of e-money products is outside the scope of this report, but see, for example, the [FATF's 2010 typologies report 'Money Laundering using New Payments Methods](#) and the [Moneyval's 2012 report on 'Criminal money flows on the Internet: methods, trends and multi-stakeholder counteraction'](#).

awareness of AML/CTF risks and controls. Since e-money business models often involve complex networks of issuers, agents, distributors and, in some cases, other players that are outside the scope of legislation and regulation, such as programme managers, effective oversight by firms of those structures can be challenging.

- **Supervisory risk:** the effective AML/CTF supervision of e-money issuers and their use of agents and distributors can be challenging, not only due to the ongoing and rapid emergence of novel payment solutions, which may be conducive to a gap in supervisors' understanding of the market they are required to regulate, but also the cross-border nature of many e-money business models. This challenge is exacerbated by different national approaches to the AML/CTF supervision of e-money issuers, agents and distributors as well as legal uncertainty over supervisory competence and responsibilities in cross-border situations.

The objective of this work was to identify issues arising from the uneven transposition of the 2<sup>nd</sup> EMD across the EU and ways to support the effective implementation of AML/CTF supervisory regimes for e-money across the EU/EEA, with a view to informing the EC Commission's review of the 3<sup>rd</sup> Money Laundering Directive and the 2<sup>nd</sup> E-Money Directive.

### 2.3. Definitions

For the purpose of this report, the JC defined

E-money issuer as: an entity authorized to issue e-money as per Title II of the 2<sup>nd</sup> EMD. E-money issuers encompasses credit institutions and e-money institutions;

Agent as: a natural or legal person who can provide payment services as well as distribute and/or redeem e-money; and

Distributor as: a natural or legal person who can distribute and/or redeem e-money, but who cannot provide payment services. Distributors might include corner shops or petrol stations that sell prepaid e-money products.

### 2.4 The Second E-Money Directive and Third Anti-Money Laundering Directive

The AML/CTF regulation and supervision of e-money issuers is governed by European legislation, in particular the Second E-Money Directive (2<sup>nd</sup> EMD) and the Third Anti-Money Laundering Directive (3<sup>rd</sup> MLD). Other legislation, for example the Wire Transfer Regulation, is also relevant in this context.

#### 2.4.1. The 2<sup>nd</sup> EMD

The 2<sup>nd</sup> EMD is a maximum harmonisation Directive that creates a common European framework for the regulation of financial institutions that issue electronic money (electronic money issuers). It defines electronic money as

“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” (Art 2(2), 2<sup>nd</sup> EMD).

Prepaid instruments that can be used as a means of payment only within a limited network of service providers or for a limited range of goods and services are exempt from this definition.

In the EU, e-money can only be issued by credit institutions, e-money institutions, certain post office giro institutions, the European and national central banks when not acting as a monetary or other

public authority and public authorities (Art 1(1), 2<sup>nd</sup> EMD). According to Art 3 (4) and (5) 2<sup>nd</sup> EMD, e-money can be distributed and redeemed by persons other than the issuer who act on the issuer's behalf; and e-money institutions can provide payment services through agents in line with Art 17, PSD.

To be authorised, e-money issuers must satisfy their competent authority that they have put in place robust internal control mechanisms to comply with the 3<sup>rd</sup> MLD, among others. Where e-money issuers propose to distribute their products in other European MS through an establishment or agent, they must demonstrate how they will comply with the provisions of the 3<sup>rd</sup> MLD. Where the home competent authority has reasonable grounds to believe that the money laundering/terrorist financing risk associated with agents is increased, they may refuse to register these agents.

#### 2.4.2. The 3<sup>rd</sup> MLD

The 3<sup>rd</sup> MLD is a minimum harmonisation Directive that provides a common European basis for the transposition of the FATF's 40 Recommendations, which were issued in 2003. It introduces obligations on persons within its scope to prevent, detect and report money laundering and terrorist financing. The 3<sup>rd</sup> MLD applies to e-money issuers as it does to other credit and financial institutions, alongside certain non-financial persons.

#### 2.4.3. Exemptions and Thresholds

The EU's e-money regime provides for two exemptions that are relevant in the AML/CTF context<sup>3</sup>:

- The first exemption covers pre-paid instruments that may be used to purchase goods and services within a **limited network** of service providers or for a **limited range of goods or services**.
- The second, optional, exemption covers situations where an e-money product's features meet the conditions for **simplified due diligence**.

#### Limited Networks, Goods and Services

Recital 5, read in conjunction with Art 1(4) of the 2<sup>nd</sup> EMD, limits the Directive's application to payment service providers that issue electronic money as defined in Art 2(2), 2<sup>nd</sup> EMD. This means that monetary value stored on instruments that may be used for specific purposes only can be exempt from regulation, including in relation to AML/CTF. Examples of specific-purpose instruments include prepaid coffee shop cards, public transport cards and childcare vouchers – i.e. instruments that can be used to purchase goods and services only in or on the issuer's premises, under a commercial agreement with the issuer within a limited network of service providers or for a limited range of goods or services.

The 2<sup>nd</sup> EMD does not specify exactly where a limited network ends and what a limited range of goods and services are. National authorities therefore have to decide on their own criteria to determine whether such a prepaid instrument is e-money.

- Some national authorities have transposed Art 1(4) of the 2<sup>nd</sup> EMD as set out in the Directive

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<sup>3</sup> Another exemption, in Art 1(5) 2<sup>nd</sup> EMD, concerns the use of telecommunication, digital or IT devices to pay for some goods or services that are delivered to and are to be used through a telecommunication, digital or IT device. This exemption is of limited relevance in the AML/CTF context.

- Some national authorities have transposed Art 1(4) of the 2<sup>nd</sup> EMD as set out in the Directive and have issued guidance on what limited networks can be.
- Some national authorities have transposed Art 1(4) of the 2<sup>nd</sup> EMD and imposed additional conditions for exemptions, such as a maximum load limit of EUR 250 for e-money products.

National authorities have also opted for different approaches to granting and allowing firms to continue to benefit from limited network exemptions.

- Some national authorities require entities benefiting from this exemption to demonstrate periodically, for example once a year, that they continue to meet the criteria set out in national legislation, regulation or guidance.
- Some national authorities expect entities benefiting from this exemption to inform the competent authority of any changes that might affect their continued eligibility for a limited network exemption.

There is therefore a risk that differences in MS' definition of, and treatment of, limited networks mean that the same activities and e-money products are subject to different - or no – levels of regulation and oversight, including in relation to AML/CTF, in different MS; and EU legislation does not prohibit the cross-border provision of e-money products benefiting from this exemption.

### **Simplified Due Diligence**

The 3<sup>rd</sup> MLD introduces an optional exemption from customer due diligence – the obligation to identify, and verify the identity of, the customer and, where applicable, the customer's beneficial owner, to obtain information on the purpose and intended nature of the business relationship and to monitor the business relationship – in certain situations, including where the product is e-money as defined by the 2<sup>nd</sup> EMD and subject to the application of specific purse and redemption limits set out in Art 11(5)(d), 3<sup>rd</sup> MLD as amended by Art 19(2), 2<sup>nd</sup> EMD. This article provides for the exemption of e-money products that are either

- Non-reloadable and whose total purse limit does not exceed €250 (or €500 for domestic transactions); or
- Reloadable, cannot transact more than €2500 in a calendar year and be used to redeem more than €1000 in that same calendar year.

In addition, full Customer Due Diligence must apply where the issuer suspects money laundering or terrorist financing (Art 7, 3<sup>rd</sup> MLD). And where a single sending (debit) electronic money transaction exceeds €1,000, Regulation (EC) 1781/2006 requires that complete information on the payer be obtained and verified.<sup>4</sup>

Not all MS have taken advantage of this exemption.

- Nine MS have transposed this exemption in full;

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<sup>4</sup> Regulation (EC) 1781/2006 defines 'complete information on the payer' as comprising the payer's name, address and account number or their name, account number and either their date and place of birth, customer identification number or national identity number. This requirement applies where the destination payment service provider is located in a jurisdiction outside the European Union.

- Six MS have transposed this exemption in part, either by lowering the thresholds, the purchase of goods and services; or by applying the CDD measures on a reduced level contrary to a full exemption.
- One MS has not transposed this exemption.
- Moreover, the national AML/CTF legislation of three MS impose that, in case of electronic funds transfers the complete information about the payer is verified even below the €1,000 threshold.

A report by the Joint Committee, which was published in April 2012, found that MS had interpreted the 3<sup>rd</sup> MLD's Simplified Due Diligence provisions differently. Simplified Due Diligence meant an exemption from customer identification in nearly half of all MS, whereas the beneficial owner and customer had to be identified in a limited way in one MS only. Six MS required firms to verify the customer's identity and 22 MS did not exempt firms from ongoing monitoring of the business relationship.<sup>5</sup> In two MS simplified due diligence provisions are not applied in respect of EMIs and products.

As a result, issuers' ability to take advantage of Simplified Due Diligence varies greatly across the EU, as does the extent to which Simplified Due Diligence means a true exemption from Customer Due Diligence. This may create problems for issuers wishing to distribute their products in other EU MS, affect the effectiveness of national sanctions regimes and undermine national authorities' efforts to address the risk they associate with electronic money in a way they consider appropriate where the issuer distributes their products under the free provision of services.

### Chapter 3: Issuers, agents and distributors – national concepts

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E-money issuers distribute their products in different ways, for example by establishing a direct business relationship with the customer, or through distance selling means (such as the internet).

E-money can also be distributed and redeemed by persons other than the issuer. In addition, agents can provide payment services on an e-money institution's behalf. But although agents and distributors play a central role in many e-money business models, the concepts of 'agents' and 'distributors' and the role they play in the e-money distribution chain are not clearly defined.<sup>6</sup> As a result, MS' recognition and, where applicable, use of both terms varies significantly.

#### E-money issuers

The large majority of MS define e-money issuers as legal entities or persons authorised or licensed to issue e-money under relevant legislation, in accordance with the 2<sup>nd</sup> EMD. One MS does not define e-money issuers, only e-money institutions, which are financial institutions authorised to issue and redeem e-money and to settle transactions involving e-money.

#### Agents

Most MS broadly define agents as natural or legal persons who can provide payment services and act on behalf of an e-money issuer but cannot issue e-money. One MS's regulation states that a payment

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<sup>5</sup> [Report on the legal and regulatory provisions and supervisory expectations across EU Member States of Simplified Due Diligence requirements where the customers are credit and financial institutions under the Third Money Laundering Directive \[2005/60/EC\]](#): para 31-34.

<sup>6</sup> The Commission confirmed in informal exchanges with the JC that the term 'distributor' was not clearly defined in the 2<sup>nd</sup> EMD and that the question whether a definition was needed was to be considered in the forthcoming review of the Directive.

institution can commission another legal person to execute parts of the activity, but does not specify which ones. Three MS specified that agents cannot distribute and/or redeem e-money unless they are also a distributor. In two MS, the legislation does not define agents.

## Distributors

Fifteen MS do not define distributors; of these, two consider agents and distributors to be the same and therefore do not provide a definition of distributor. A further three provide that distribution and redemption of e-money may be done by – unnamed - natural or legal persons acting on the EMI's behalf.

Eleven MS define distributors as natural or legal persons who can distribute and/or redeem e-money on behalf of an EMI, but who cannot provide payment services. One MS defines distributors as persons authorised to distribute and/or redeem e-money acting on behalf of an EMI.

## Chapter 4: Issuers, agents, distributors - AML/CFT legislation and regulation

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Issuers of electronic money are credit or financial institutions and therefore within the scope of the 3<sup>rd</sup> MLD. Since the 3<sup>rd</sup> MLD does not recognise the concepts of agents and distributors and the PSD holds payment institutions and, by implication, e-money institutions, responsible for anything their agents or distributors do on their behalf, MS have some discretion in the application of AML/CFT legislation to agents and distributors. This can create problems in a cross-border context, which are further exacerbated by legal uncertainty in relation to the application of AML/CFT obligations to agents and distributors based in another MS.

### 4.1 Legal context

Article 2.1 (2) of the 3<sup>rd</sup> MLD provides that the Directive applies to credit and financial institutions, among others. Where credit and financial institutions provide relevant services through branches and subsidiaries in another European MS, these branches and subsidiaries will be within scope of the host state's legal and regulatory AML regime.

The Commission's Interpretative Communication SEC(97) 1193 of 20 June 1997 on the "*freedom to provide services and the interest of the general good in the second banking directive*" states that intermediaries of banks that have a permanent mandate, are subject to the management and control of the credit institution they represent and are able to commit the credit institution constitute 'establishments'. In line with the 3<sup>rd</sup> MLD's territoriality principle, these 'establishments' are subject to host state AML legislation, regulation and oversight.

However, neither this note, nor the 3<sup>rd</sup> MLD, apply to agents or distributors unless they are themselves credit or financial institutions.

Article 25, PSD provides that payment institutions can provide payment services in other MS through agents. The Commission has sought to clarify the extent to which the host state's AML provisions will apply to agents in a paper "on Anti-money laundering supervision of and reporting by payment institutions in various cross-border situations".<sup>7</sup> In particular, the Commission considers that "if the Payment Institution maintains a permanent presence in another MS, even if that presence consists merely of an office managed by an agent who is independent but authorised to act on a permanent basis for the undertaking, it has to be considered as having, through its agents, a form of establishment in the host country"; and that a combined reading of both the PSD and 3<sup>rd</sup> MLD suggests that PIs have to respect, as regards their branches or agents, the AMLD rules of the host

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<sup>7</sup> Commission Staff Working Paper SEC(2011) 1178 of 4 October 2011.

country and are subject to the AML supervision of the host country performed in close cooperation with the home country authorities." This means that payment institutions are responsible for ensuring that their agents who are based in another MS comply with, and are subject to, local AML legislation and regulation.

The Commission acknowledged that similar legal questions arise in relation to agents and distributors acting on behalf of e-money issuers in another MS. It considered that its analysis would apply to e-money agents by analogy but that "distributors do, however, give rise to quite different legal questions - potentially requiring different legal answers - given their legal status vis-à-vis e-money issuers and the nature of activities that they perform. The question whether distributors constitute establishments for AML purposes therefore remains unresolved.

#### **4.2. E-money issuers**

European legislation is clear on the extent to which electronic money issuers are within scope of AML/CTF legislation and supervision. Consequently, MS follow a broadly similar approach in the application of AML/CTF legislation to domestic issuers and their supervision; however, some differences emerge in relation to MS' approach to the AML/CTF supervision of issuers who are based in another EU/EEA jurisdiction.

##### **Legislation**

In all MS, domestic e-money issuers as well as domestic branches and subsidiaries of EEA e-money issuers are directly within scope of domestic AML/CFT legislation.

In six MS, e-money issuers based in another MS that provide e-money services domestically without being physically present – neither through branches or subsidiaries, nor through agents or, where applicable, distributors - are also subject to domestic AML/CFT legislation.

In one MS, EEA e-money issuers relying on the free provision of services are not within scope of domestic AML/CTF legislation but are required to file STRs to the domestic FIU.

##### **Supervision**

Domestic e-money issuers as well as domestic branches and subsidiaries of e-money issuers based in another MS are directly supervised for compliance with their AML/CFT obligations in all 27 MS that replied to the questionnaire or provided information.

Supervisors in five MS have supervisory powers in relation to e-money-issuers based in another MS who are providing services in their jurisdiction through the free provision of services, i.e. without being physically present in their national territory. Neither of these distinguish between issuers who are a credit institution or an EMI. And, since the Commission Staff Working Paper SEC(2011) 1178 considered that the responsibility for AML/CTF supervision is shared between the home and host MS, five MS consider that they have powers to supervise, and impose conditions (such as central contact points) on, issuers based in another MS who provide services in their jurisdiction through agents or distributors.

#### **4.3. Agents**

European legislation is clear that e-money cannot be issued through agents. But it is not clear about the extent to which agents of payment institutions can also distribute and redeem e-money on the issuer's behalf, nor about the extent to which agents should be directly within scope of the domestic AML/CTF regime. There is, therefore, no common approach to the treatment of domestic agents of payment institutions for AML/CTF purposes.

## Legislation

Just over half of all MS have brought domestic agents of at least some e-money issuers directly within scope of their AML/CTF legislation:

- In twelve MS, all domestic agents of electronic money issuers are within scope of domestic AML/CTF legislation or regulation, irrespective of where the issuer is based. Of these, one has brought all agents within scope of their AML/CTF legislation, even where the agent is based in another jurisdiction.
- A further two MS have brought domestic agents of electronic money institutions within scope of domestic AML/CTF legislation, but not domestic agents of credit institutions.
- Three MS have not brought agents directly within scope of AML/CTF legislation or regulation; but in line with the Commission Staff Working Paper SEC(2011)1178), these MS require agents to comply with domestic AML/CTF legislation. This obligation stems not from legislation but finds its source in the contract that they have signed with the issuer, who is responsible for the oversight of its agents and distributors.

Two MS do not recognise the concept of agent in the e-money context.

## Supervision

A highly varied picture emerges in relation to the AML/CTF supervision of agents; while nearly half of all MS directly supervise all agents of all issuers for compliance with their AML/CTF obligations irrespective of where the issuer is based, the majority either directly supervise only some agents, or do not directly supervise agents at all.

- Thirteen MS directly supervise all domestic agents of all issuers, irrespective of where the issuer is based. Of these, one MS supervise agents of issuers even where the agent provides services from its base in another MS;
- Three MS directly supervise all agents of issuers based in another MS, but do not directly supervise agents of domestic issuers;
- One MS indirectly supervises all agents of domestic issuers, but not agents of issuers based in another MS;
- Two MS directly supervise all agents of electronic money institutions (irrespective of where these are based). One of these MS does not supervise agents of credit institutions as in their jurisdiction as credit institutions are not able to provide services through agents whilst the other does allow credit institutions to provide services through agents; and
- Nine MS do not directly supervise agents.

### 4.4. Distributors

EC legislation does not define distributors nor require that anyone distributing or redeeming e-money on an issuer's behalf be subject to AML/CTF legislation. Where distributors are alone in providing an issuer's e-money services in another jurisdiction, legislation or other official papers do not discuss the extent to which distribution and redemption alone qualify distributors as establishments for passporting purposes. As a result, there is some variety in MS' approaches to the AML/CTF treatment of distributors.

## Legislation

Of the eleven MS that recognise the concept of distributor in their legislation, only two have brought all domestic distributors directly within scope of AML/CTF legislation. One MS subjects distributors to domestic AML/CFT legislation even when they are located in another EEA country and provide services without being physically present in that MS.

## Supervision

Since, in the majority of MS, distributors are outside the scope of domestic AML/CTF legislation and regulation, most do not supervise distributors for AML/CTF purposes.

However of the MS that do include distributors within scope,

- Five directly supervise all distributors for compliance with domestic AML/CTF legislation;
- One directly supervises all domestic distributors if they act on behalf of the issuer, irrespective of where the issuer is based
- One directly supervises distributors distributing and redeeming e-money on behalf of e-money institutions only, as in their jurisdiction, credit institutions are not able to provide services through distributors; and
- One directly supervises distributors distributing and redeeming e-money on behalf of issuers based in another MS, but not distributors acting on behalf of domestic issuers.

## Chapter 5: Passporting / Notifications

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E-money business models frequently involve the distribution of the product in other MS, either through the free provision of services or the freedom of establishment. Legal uncertainty over the definition of agents and distributors, the extent to which these entities constitute 'establishments' for passporting purposes and different expectations relating to compliance with domestic AML/CTF requirements have created challenges in cross-border situations, where competent authorities register, or expect notification of, different entities for passporting purposes.

### Notification of Agents/Distributors of E-Money

Recital 9 of the 2<sup>nd</sup> EMD states that a reference in the PSD to a "payment institution" needs to be read as a reference to electronic money.

Article 17 of the PSD sets out the obligation of a Payment Institution to notify their home competent authority when they wish to provide payment services through an agent – but neither the PSD, nor the 2<sup>nd</sup> EMD refer to distributors<sup>8</sup>.

Payment institutions are obliged to provide:

- the name and address of the agent

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<sup>8</sup> Art 3(4), 2<sup>nd</sup> EMD merely refers to issuer's ability to 'distribute and redeem electronic money through natural or legal persons which act on their behalf'; it does not refer to distributors.

- a description of the internal control mechanisms that will be used by agents in order to comply with the obligations in relation to money laundering and terrorist financing under Directive 2005/60/EC
- the identity of directors and persons responsible for the management of the agent to be used in the provision of payment services and evidence that they are fit and proper persons.

Article 25 (per Article 17(5)) of the PSD requires a Payment Institution, where it will have agents abroad, to notify the home competent authority of:

- the name and address of the payment institution
- the names of those responsible for the management of the branch
- its organisational structure
- the kind of payment service it intends to provide.

In addition Article 25(4) obligates competent authorities to provide each other “*with all essential and/or relevant information*”.

The information requested about agents may vary whether it is provided at initial notification or in the course of activities.

Two MS do require some information but did not explain what that information would be.

### Agents

Most MS do not make a differential whether an agent is based abroad or within the home MS. One MS stated that an agent based abroad would need evidence of compliance with 3<sup>rd</sup> MLD and the home legislation and another noted that it cannot require anything if the issuer of e-money is under the supervision of another supervisory body.

Most MS that do require specific information about agents operating in the home MS or abroad in a host MS require only the information set out in Article 17(5) in conjunction with Article 25(1) of the PSD, although one MS responded that they only required a list of agents that is then published on the website. Other MS require information from the e-money issuer planning to provider services through an agent such as a business plan and AML policies and procedures or, if relevant, the plan to establish a ‘central contact point’.

Five MS do not require the issuer regularly to provide information about agents throughout the relationship, though some stressed that agents must still comply with applicable AML laws. Twelve MS require any changes to information at initial registration to be notified. Of those three requires an annual report on AML/CTF by the domestic e-money issuer and another the amount of e-money in question and STRs filed.

### Distributors

Six MS do not require e-money issuers to notify of their use of distributors either in their home MS or host MS, although in at least some cases, the application of the Payment Committee’s passporting guidelines agreed by European supervisors mean that in practice, this information is gathered.

Three MS apply the same information requirements as for agents and two MS requires only the name and contact details for distributors.

## **Chapter 6: Analysis and next steps**

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The analysis of members' responses to the JC's e-money questionnaires reveals significant differences in MS' interpretation of the 2<sup>nd</sup> EMD and the treatment of e-money issuers, their agents and distributors for AML/CTF purposes. Legal uncertainty, including in relation to key concepts in the 2<sup>nd</sup> EMD, appears to have led to a situation where different rules apply to different entities in the e-money distribution chain across the EU and where the possibility of gaps in the AML supervision of e-money issuers, agents and distributors cannot be excluded.

### 6.1. Findings

The JC found that

- More than half of the MS stated that national legislation or draft legislation only defined either agents or distributors and, in one case, neither. However a significant number of MS stated that national legislation or draft legislation defined both agents and distributors.
- Nearly half of all MS stated that the issuer alone was directly within scope of AML/CTF legislation. But more than half of all respondents stated that agents were themselves within scope of domestic AML/CTF legislation and nearly a quarter considered distributors to be within scope of domestic AML/CTF legislation.
- In just over half of all MS, only the issuer is directly supervised for compliance with its AML/CTF obligations and is held ultimately responsible for anything its agents and/or distributors do on its behalf. But nearly half of all respondents stated their regime also required agents and/or distributors to be directly supervised for compliance with their AML/CTF obligations, in some cases even where they acted on behalf of a domestic issuer.

The questionnaire responses also pointed to different national practices and requirements regarding the notification or registration of agents and distributors; most MS require issuers to register or notify agents but less than a quarter also required registration or notification of distributors. This was despite an e-money passporting guideline, which appears to suggest that distributors should be notified.

Finally, some members' responses pointed to an inconsistent interpretation of the 2<sup>nd</sup> EMD's limited network exemption and the application of Simplified Due Diligence in the e-money context; this mirrored differences in the application of Simplified Due Diligence in relation to credit and financial institutions, which were highlighted in the JC's 2012 report on Simplified Due Diligence.

### 6.2 Implications

These findings confirm feedback from AML/CTF supervisors, law enforcement and payments experts that points to the inconsistent application of legal and regulatory rules to e-money issuers, their agents and distributors across the EU. They suggest that the Commission's aims of fostering the emergence of a single European e-money market and preventing money laundering and terrorist financing may not have been achieved.<sup>9</sup> This has serious implications for governments, supervisors and the e-money industry.

- **Implications for the Commission and national governments:** The 2<sup>nd</sup> EMD's objective to foster the development of a European e-money market by reducing barriers to market entry has created gaps in Europe's AML/CTF defences and exposed MS to the risk of falling short of the FATF's new AML/CTF standards<sup>10</sup>. For example, where MS have transposed the 3<sup>rd</sup> MLD's simplified due diligence provisions as amended by the 2<sup>nd</sup> EMD, many have created

<sup>9</sup> Recitals to 2<sup>nd</sup> EMD and 3<sup>rd</sup> MLD

<sup>10</sup> See, in particular, FATF Recommendations 1 and 10.

blanket exemptions from customer due diligence for certain e-money products irrespective of the risk associated with these products and in potential breach of European or national sanctions regimes.<sup>11</sup> Some legislators have sought to address this by enacting legislation aimed at limiting or eliminating the 3<sup>rd</sup> MLD's optional SDD threshold for certain e-money products. However, such unilateral actions have at times come at the expense of the single market and the level playing field for e-money issuers, their agents and distributors.

- **Implications for supervisors:** Legal uncertainty in relation to the definition of, and the application of AML/CTF obligations to agents and distributors in the e-money context as well as the absence of unambiguous guidance on the division of home and host supervisory responsibility and competence in the cross-border context have led to the development of different national approaches in relation to the AML/CTF supervision of issuers, agents and distributors both at the national level and in a cross-border context. Efforts to find a common solution, for example the adoption of the Payment Committee's 2011 passporting guidelines, have been unable to resolve the underlying issue of incompatible domestic approaches and associated regulatory arbitrage. Shared home/host responsibility has been hampered further by different expectations on what constitute 'reasonable grounds' for rejecting or reviewing the registration of agents and, where applicable, distributors, practical difficulties associated with assessing an issuer's compliance with other MS' AML/CTF regimes that apply to their agents and distributors based abroad and uncertainty in relation to the sharing of costs associated with joint AML/CFT supervision.<sup>12</sup>
- **Implications for firms:** Firms operating in different MS do not benefit from a level playing field since the legal and regulatory AML/CTF obligations and associated costs of compliance differ significantly among MS. And since compliance with the national AML/CTF regime does not guarantee compliance with a host's AML/CTF regime, e-money issuers, their agents and distributors operating in a cross-border context are faced with legal uncertainty in relation to the application of different MS' AML/CTF regime to their business and a potentially higher cost of compliance than that affecting other payment services providers. This is further exacerbated by a passporting regime that applies unevenly across the e-money market, with credit institutions issuing e-money being subject to potentially less onerous requirements than e-money institutions.<sup>13</sup>

### 6.3 Next Steps

The JC therefore considers that, in order to support the successful implementation of an AML/CTF regime for the e-money sector across the EU, three main actions are necessary:

- The strengthening of supervisory cooperation in the e-money space through extending the [AML Supervisory Cooperation Protocol between "Home Supervisor" and "Host Supervisor\(s\) of Agents and Branches of Payment Institutions in Host Member State](#) (hereinafter, the Protocol), to electronic money, while stressing the non-binding nature of the Protocol;

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<sup>11</sup> See Chapter 2.4.3; see also the JC's 2012 [Report on the legal and regulatory provisions and supervisory expectations across EU Member States of Simplified Due Diligence requirements where the customers are credit and financial institutions under the Third Money Laundering Directive \[2005/60/EC\]](#).

<sup>12</sup> The cost issue arises where e-money institutions pay fees in the home jurisdiction, but distribute and redeem their products through establishments in other MS. These establishments must comply with local AML/CTF legislation and are supervised for compliance by the host state's competent authority without, however, bearing the cost of regulation in that MS.

<sup>13</sup> This is because the Banking Directive (CRD) has not been amended by the PSD or the 2<sup>nd</sup> EMD to require credit institutions to reflect the use of agents and distributors by credit institutions. Credit institutions therefore do not have to notify their competent authority of such arrangements – including in a cross-border context.

- Mapping what different competent authorities consider 'reasonable grounds' for the purpose of Art 17(6), PSD to be; and
- The review, by the Commission, of the AML/CTF regime applicable to electronic money issuers, agents and distributors with a view to providing legal certainty for legislators, supervisors and the industry and bringing it in line with the 2012 FATF standards.

## The Protocol

The Protocol can be applied to all situations where an e-money issuer provides payment services. This will be the case for EMIs using agents for the performance of payment services (cf. article 3.5 of the PSD).

Furthermore, and regardless of any payment services activity, the Protocol can also be applied in all circumstances where the EMD explicitly refers to the applicability of certain articles of the PSD, i.e. for the cases mentioned in articles 3.1 and 3.4. In such cases, the applicability of the above mentioned articles of the PSD on EMIs stems directly from the EMD itself. Consequently, there is a sufficient legal basis to apply the existing Protocol to EMIs in all of these cases without having to modify the actual text. However, for the sake of clarity and to avoid any misunderstanding, it would be better to formally extend the wording of the Protocol to EMIs governed by said articles.

There is, however, no legal basis for applying article 17.6 of the PSD to distributors. The AMLC will therefore consider examining further how AML/CFT risks can be managed adequately through a close collaboration between home and host supervisors based on article 25 of the PSD (cf. see also Guidelines on Electronic Money Directive Passport Notifications, Annex 2). The existing Protocol will be expanded to address this.

## Mapping 'reasonable grounds'

The 2<sup>nd</sup> EMD and PSD require host competent authorities to inform the competent authorities of the home MS of instances where the money-laundering and terrorist financing risk associated with the (intended) engagement of an agent or other establishment is increased or has crystallised. But neither the PSD, nor the 2<sup>nd</sup> EMD, set out clearly what constitute 'reasonable grounds'.

The AMLC will therefore map different competent authorities' expectations and requirements to manage expectations and facilitate the cooperation of home and host authorities in this matter.

## EC legislation

The analysis of MS' practices identified a number of issues where legal uncertainty in relation to the application of the 2<sup>nd</sup> EMD and the 3<sup>rd</sup> MLD has jeopardized the implementation of a coherent European approach to electronic money.

The AMLC thus considers that the Commission should take the opportunity afforded by the ongoing revisions to the 3<sup>rd</sup> MLD and 2<sup>nd</sup> EMD to address the following issues as a matter of priority:

- **Clarify the definition of e-money as opposed to that of banking money**, since lighter rules can be applied only in cases where the risks are lower, but that equivalent levels of requirement should be applied to competing products that do not present significant differences regarding their nature and their levels of risk.
- **Clarify at what point in time e-money is issued**. There is no uniform view across the EU whether e-money is issued at point of purchase or whether it is issued only when the issuer registers the transaction.

Some MS consider that Art 6(3) 2<sup>nd</sup> EMD, read in conjunction with Art 2(2) and 7(1) 2<sup>nd</sup> EMD means that e-money is issued immediately, upon receipt of funds, even where the funds are accepted by a distributor or agent who acts on behalf of an e-money issuer and therefore does not themselves provide a payment service.

Other MS consider that because the acceptance of funds constitutes a payment service (which distributors cannot provide), Art 2(2) 2EMD, read in conjunction with Art 6 (3) 2EMD means that e-money is issued only when the funds paid by the customer are received by the issuer.

The Commission's answer has important implications from an AML/CTF point of view, as it will help determine whether distributors and/or agents carry out regulated functions that should be within scope of AML/CTF legislation (see below); it is also important from a consumer protection perspective, as the second interpretation creates a gap between the customer handing over funds and the issuance of e-money where safeguarding requirements do not apply.

- **Clarify the definition of the terms agent and distributor** and the extent to which agents and distributors should themselves be within scope of AML legislation. Agents and distributors play a central role in many e-money business models, yet 2<sup>nd</sup> EMD does not define these terms. The analysis of the AMLC's e-money questionnaire and some of the Commission's publications highlighted significant differences in the use of these terms and, more significantly, their recognition in national legislation or draft legislation. This suggests that the same activities are not subject to the same levels of oversight in different MS and creates problems in cross-border situations where competent authorities register, or expect notification of, different entities for passporting purposes (see below).
- **Clarify who should be the competent authority for monitoring AML/CTF compliance of e-money issuers, and, where applicable, agents and distributors in cross-border situations** either directly, or indirectly through, for example, AML/CTF supervision of the issuer. This would include clarifying:
  - whether both agents and distributors of e-money issuers established in another MS are always to be notified under Freedom of Establishment as suggested by European Commission Staff Working Paper 1178 in relation to agents of payment institutions<sup>14</sup>
  - whether a host state has the right to insist on notification of both agents and distributors under Freedom of Establishment (as opposed to free provision of services) as suggested by Commission Staff Working Paper 1178 in relation to agents of payment institutions and by the Guidelines on Electronic Money Directive passport notification;
  - what the status of the three criteria to determine whether an entity is an establishment, which are set out in the Commission's Interpretative Communication SEC(97) 1193, would be in this context;
  - whether all notifications under Freedom of Establishment are subject to host state AML/CTF requirements; and
  - whose AML/CTF regime applies to issuers and, where applicable, agents and distributors, whose products are available in other jurisdiction only online, and who is the competent authority for supervising compliance with AML/CTF obligations in

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<sup>14</sup> Commission Staff Working Paper 1178 on anti-money laundering supervision of and reporting by payment institutions in various cross-border situations; see in particular para 1 (b).

those situations; a minority of respondents indicated that such products and services were within the scope of their domestic AML/CTF legislation or regulation even if the issuer, agent or distributor had no physical presence in their jurisdiction.

In the absence of legal certainty, there is a risk that some entities might be entirely unsupervised while others will be supervised by both home and host state authorities for compliance with their respective AML regimes.

- **Confirm that it is the FIU of the country where the operations are conducted which should receive suspicious transaction reports** in crossborder situations, as set out in Commission Staff Working Paper 1178.
- **Clarify who is the customer in e-money business relationships**; internal discussions revealed that some, but not all, members considered that in addition to the holders of e-money products, merchants accepting an issuer's e-money products as means of payment, are the issuer's customers and therefore subject to CDD and monitoring obligations.
- **Clarify, using worked examples, what a "limited network" is**. Differences in MS' definition of limited networks present a risk that the same activities and e-money products are subject to different - or no – AML/CTF requirements in different MS.
- **Clarify how the Commission expects e-money issuers to comply with the European sanctions regime** where products benefit from an exemption from customer identification and verification under Art 11, 3<sup>rd</sup> MLD (which, as set out above, has been interpreted differently across the EU).
- **Clarify the extent to which the Wire Transfers Regulation applies to e-money transactions**;
- **Clarify which AML/CTF measures MS can require e-money issuers, agents and distributors to take while continuing to comply with the 2EMD**, which is a maximum harmonisation directive. Examples include a requirement to create a central contact point. The Commission could usefully clarify to what extent its analysis in the European Commission Staff Working Paper 1178 also applies to e-money issuers, agents and distributors, either directly, or indirectly.
- **Consider whether a threshold approach to simplified due diligence remains appropriate**; some supervisors were concerned that a blanket exemption from customer due diligence for all e-money products below certain thresholds was not justifiable in light of the large variety of e-money products currently in circulation, which present with very different levels of ML/TF risk, or compatible with the FATF's renewed focus on the risk-based approach.
- **Consider the risk associated with e-money products issued outside the EEA that are available to EC customers via the internet**. Respondents pointed to cases where such products were issued by firms outside the scope of AML/CTF legislation and benefited from unlimited thresholds with no, or no meaningful, CDD or monitoring obligations.

## Annex 1 – Questionnaire

30 September 2011

### Questionnaire

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**of the Joint Committee of the European Supervisory Authorities  
Sub Committee on Anti Money Laundering**

(The AML Committee)

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**Jurisdiction:**  
**Authority/contact:**  
**Date:**

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**For the purpose of this questionnaire, the terms e-money issuer, agent and distributor are used as follows:**

- e-money issuer:** An entity authorised to issue e-money as per Title II of the 2EMD. E-money issuers include credit institutions and e-money institutions.
- agent:** a natural or legal person who can provide payment services as well as distribute and/or redeem e-money.
- distributor:** a natural or legal person who can distribute and/or redeem e-money, but who cannot provide payment services. Distributors might include corner shops or petrol stations that sell prepaid e-money products.

### **I. Legal / regulatory framework**

**1. Your replies to this questionnaire are based on (please tick) :**

- Your jurisdiction's legislation or regulation, which transposes the 2EMD
  - Please indicate when the legislation or regulation came into force:
- Your jurisdiction's draft legislation or regulation, which will transpose the 2EMD
  - Please indicate when you expect the legislation or regulation to come into force:
- Your jurisdiction's legislation or regulation transposing the 1EMD
  - Please indicate when the legislation or regulation transposing 1EMD came into force:

**2. In the e-money context, how does your jurisdiction's (draft) legislation or regulation define<sup>15</sup>**

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<sup>15</sup> This question is about the definition you use in your jurisdiction, which may differ from the definitions set out above

E-money issuers:

Agents:

Distributors:

In answering this question, please ensure you explain the differences between these actors.

**3. In your jurisdiction, who can issue e-money (please tick)?**

- Domestic credit institutions (i.e. those authorised in your jurisdiction)
- Domestic e-money institutions (i.e. those authorised in your jurisdiction)
- EEA credit institutions providing services in your jurisdiction through :
  - the free provision of services (i.e. no physical presence)
  - a branch or subsidiary
  - any other institutional set-up? (Please specify)
- EEA e-money institutions providing services in your jurisdiction through :
  - the free provision of services (i.e. no physical presence)
  - a branch or subsidiary
  - any other institutional set-up? (Please specify)
- Anyone else? Please specify.

**4. In your jurisdiction, who can distribute / redeem e-money (please tick)?**

- Domestic credit institutions (i.e. those authorised in your jurisdiction)
- Domestic e-money institutions (i.e. those authorised in your jurisdiction)
- EEA credit institutions providing services in your jurisdiction through :
  - the free provision of services (i.e. no physical presence)
  - a branch or subsidiary
  - any other institutional set-up? (Please specify)
- EEA e-money institutions providing services in your jurisdiction through :
  - the free provision of services (i.e. no physical presence)
  - a branch or subsidiary
  - any other institutional set-up? (Please specify)
  
- Domestic agents of domestic credit institutions
- Domestic agents of EEA credit institutions
- Domestic agents of domestic e-money institutions
- Domestic agents of EEA e-money institutions
- Domestic distributors of e-money issued by domestic credit institutions

- Domestic distributors of e-money issued by EEA credit institutions
- Domestic distributors of e-money issued by domestic e-money institutions
- Domestic distributors of e-money issued by EEA e-money institutions
- Agents based in another EEA country and acting on behalf of an EEA e-money issuer
- Distributors based in another EEA country and distributing e-money issued by an EEA e-money issuer
- Anyone else? Please specify.

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## **II. AML/CTF obligations on e-money issuers, agents and distributors**

### **1. In your jurisdiction, who is subject to *domestic* AML/CTF legislation or regulation (please tick):**

- Domestic credit institutions (i.e. those authorised in your jurisdiction)
- Domestic e-money institutions (i.e. those authorised in your jurisdiction)
- EEA credit institutions providing services in your jurisdiction through :
  - the free provision of services (i.e. no physical presence)
  - a branch or subsidiary
  - any other institutional set-up? (Please specify)
- EEA e-money institutions providing services in your jurisdiction through :
  - the free provision of services (i.e. no physical presence)
  - a branch or subsidiary
  - any other institutional set-up? (Please specify)
- Domestic agents of domestic credit institutions
- Domestic agents of EEA credit institutions
- Domestic agents of domestic e-money institutions
- Domestic agents of EEA e-money institutions
- Domestic distributors of e-money issued by domestic credit institutions
- Domestic distributors of e-money issued by EEA credit institutions
- Domestic distributors of e-money issued by domestic e-money institutions
- Domestic distributors of e-money issued by EEA e-money institutions
- Agents based in another EEA country and acting on behalf of an EEA e-money issuer
- Distributors based in another EEA country and distributing e-money issued by an EEA e-money issuer

Anyone else? Please specify.

**2. For those entities that are subject to AML/CTF legislation or regulation, does this legislation or regulation differ from that applicable to other credit or financial institutions?**

- Yes (please specify)  
 No (the same AML/CTF legislation or regulation applies)

**3. Are there any exemptions (e.g. some, but not all distributors are subject to AML/CTF legislation or regulation)?**

- Yes (please explain)  
 No

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**III. AML/CTF Supervision of e-money issuers, agents and distributors**

**1. Who is directly supervised for compliance with their AML/CTF obligations (please tick)?**

- Domestic credit institutions (i.e. those authorised in your jurisdiction)
- Domestic e-money institutions (i.e. those authorised in your jurisdiction)
- EEA credit institutions providing services in your jurisdiction through :
- the free provision of services (i.e. no physical presence)
  - a branch or subsidiary
  - any other institutional set-up? (Please specify)
- EEA e-money institutions providing services in your jurisdiction through :
- the free provision of services (i.e. no physical presence)
  - a branch or subsidiary
  - any other institutional set-up? (Please specify)
- Domestic agents of domestic credit institutions
- Domestic agents of EEA credit institutions
- Domestic agents of domestic e-money institutions
- Domestic agents of EEA e-money institutions
- Domestic distributors of e-money issued by domestic credit institutions
- Domestic distributors of e-money issued by EEA credit institutions
- Domestic distributors of e-money issued by domestic e-money institutions
- Domestic distributors of e-money issued by EEA e-money institutions
- Agents based in another EEA country and acting on behalf of an EEA e-money issuer
- Distributors based in another EEA country and distributing e-money issued by an EEA e-money issuer
- Anyone else? Please specify.

- 2. Who is the competent authority for supervising these entities' compliance with their AML/CTF obligations?**
  - 3. Who is the competent authority for authorising/registering/receiving notifications of these entities?**
  - 4. What AML information do you require e-money institutions to supply about their agents and distributors?**
    - At registration/authorisation/ notification
    - Throughout the relationship between the issuer and their agents or distributors
  - 5. Does the information you require the issuer to submit as per QIII 4 differ depending on whether the issuer proposes to use domestic agents or distributors, agents or distributors based in another EEA country or domestic agents or distributors of e-money products issued in another EEA country? If so, please explain.**
  - 6. For those entities that are subject to AML/CTF supervision, does the supervisory approach differ from that applied to other credit or financial institutions?**
    - Yes (please explain)
    - No
  - 7. Are there any exemptions to your jurisdiction's AML/CTF supervision (e.g. some, but not all distributors are subject to AML/CTF supervision; some entities are only supervised indirectly, etc)?**
    - Yes (please explain)
    - No
  - 8. Where applicable, please explain your approach to those entities that are not directly supervised for compliance with their AML/CTF obligations.**
  - 9. Does your legislation provide specific obligation for e-money issuers providing services through agents or distributors (e.g. an obligation to have a central contact point)?**
    - Yes (please explain)
    - No
  - 10. Have you encountered or do you anticipate any issues with the AML supervision of e-money issuers and, where applicable, e-money agents and distributors? If so, which ones?**
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#### **IV. 2EMD v 3MLD**

- 1. Regardless the stage of the transposition of the 2EMD in your jurisdiction, have you identified any AML/CTF/CTF issues arising specifically from the 2EMD? Which ones?**
- 2. 2EMD is a maximum harmonisation directive, 3MLD is a minimum harmonisation directive. Does this create any problems?**

## **Annex 2 – Relevant articles from the 2<sup>nd</sup> E-Money Directive 2009/110/EC**

### **Definition of E-Money:**

Article 2(2) “‘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 an electronic money issuer”

### **E-money issuers:**

Article 2(3): “‘electronic money issuer’ means entities referred to in Article 1(1), institutions benefiting from the waiver under Article 1(3) and legal persons benefiting from a waiver under Article 9.”

### **E-money distributors and agents**

The 2<sup>nd</sup> EMD does not define the concepts of agents and distributors but describes what activities these are allowed to perform under the 2<sup>nd</sup> E-money Directive:

Preamble 10: “It is recognised that electronic money institutions distribute electronic money, including by selling or reselling electronic money products to the public, providing a means of distributing electronic money to customers, or of redeeming electronic money on the request of customers or of topping up customers’ electronic money products, through natural or legal persons on their behalf, according to the requirements of their respective business models. While electronic money institutions should not be permitted to issue electronic money through agents, they should none the less be permitted to provide the payment services listed in the Annex to Directive 2007/64/EC through agents, where the conditions in Article 17 of that Directive are met.”

Article 3(4) stipulates that “Member States shall allow electronic money institutions to distribute and redeem electronic money through natural or legal persons which act on their behalf.”

Article 3(5) stipulates that “Notwithstanding paragraph 4, electronic money institutions shall not issue electronic money through agents. Electronic money institutions shall be allowed to provide payment services referred to in Article 6(1)(a) through agents only if the conditions in Article 17 of Directive 2007/64/EC are met.”

### **Issuance and redeemability**

Article 11: “1. Member States shall ensure that electronic money issuers issue electronic money at par value on the receipt of funds.

2. Member States shall ensure that, upon request by the electronic money holder, electronic money issuers redeem, at any moment and at par value, the monetary value of the electronic money held.

3. The contract between the electronic money issuer and the electronic money holder shall clearly and prominently state the conditions of redemption, including any fees relating thereto, and the electronic money holder shall be informed of those conditions before being bound by any contract or offer.

4. Redemption may be subject to a fee only if stated in the contract in accordance with paragraph 3 and only in any of the following cases:

(a) where redemption is requested before the termination of the contract;

(b) where the contract provides for a termination date and the electronic money holder terminates the contract before that date; or

(c) where redemption is requested more than one year after the date of termination of the contract.

Any such fee shall be proportionate and commensurate with the actual costs incurred by the electronic money issuer.

5. Where redemption is requested before the termination of the contract, the electronic money holder may request redemption of the electronic money in whole or in part.

6. Where redemption is requested by the electronic money holder on or up to one year after the date of the termination of the contract:

- (a) the total monetary value of the electronic money held shall be redeemed; or
- (b) where the electronic money institution carries out one or more of the activities listed in Article 6(1)(e) and it is unknown in advance what proportion of funds is to be used as electronic money, all funds requested by the electronic money holder shall be redeemed.

7. Notwithstanding paragraphs 4, 5 and 6, redemption rights of a person, other than a consumer, who accepts electronic money shall be subject to the contractual agreement between the electronic money issuer and that person.”

### **Limited Network**

Recital 5- “It is appropriate to limit the application of this Directive to payment service providers that issue electronic money. This Directive should not apply to monetary value stored on specific pre-paid instruments, designed to address precise needs that can be used only in a limited way, because they allow the electronic money holder to purchase goods or services only in the premises of the electronic money issuer or within a limited network of service providers under direct commercial agreement with a professional issuer, or because they can be used only to acquire a limited range of goods or services. An instrument should be considered to be used within such a limited network if it can be used either for the purchase of goods or services in a specific store or chain or stores, or for a limited range of goods or services, regardless of the geographic location of the point of sale. Such instruments could include store cards, petrol cards, membership cards, public transport cards, meal vouchers or vouchers for services (such as vouchers for childcare, or vouchers for social or services schemes which subsidise the employment of staff to carry out household tasks such as cleaning, ironing or gardening), which are sometimes subject to a specific tax or labour legal framework designed to promote the use of such instruments to meet the objectives laid down in social legislation. Where such a specific-purpose instrument develops into a general-purpose instrument, the exemption from the scope of this Directive should no longer apply. Instruments which can be used for purchases in stores of listed merchants should not be exempted from scope of this Directive as such instruments are typically designed for a network of service providers which is continuously growing.”

Article 1(4)- This Directive does not apply to monetary value stored on instruments as specified in Article 3(k) of Directive 2007/64/EC.”

### **Annex 3 – Relevant article from the 3<sup>rd</sup> MLD**

#### **Financial Institution – scope of the directive**

For the purpose of the 3<sup>rd</sup> MLD, and according to its [article 3\(2\)a](#)), the definition of financial institutions shall apply to: “an undertaking, other than a credit institution, which carries out one or more of the operations included in points 2 to 12 and points 14 and 15 of Annex I to Directive 2006/48/EC, including the activities of currency exchange offices (bureaux de change)” including the activity of issuing electronic money.

#### **Simplified Due Diligence**

Article 11(5)(d) (as amended by Article 19(2) of 2<sup>nd</sup> EMD)- “By way of derogations from Articles 7(a), (b) and (d), 8 and 9(1), Member States may allow the institutions and persons covered by this directive not to apply customer due diligence in respect of:

(d) electronic money, as defined in point 2 of Article of Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions where, if it is not possible to recharge, a limit of EUR 250, or where, if it is possible to recharge, a limit of EUR 2500 is imposed on the total amount transacted in a calendar year, except when an amount of EUR 1000 or more is redeemed in that same calendar year upon the electronic money holder’s request in accordance with Article 11 of Directive 2009/110/EC. As regards national payment transactions, Member States or their competent authorities may increase the amount of EUR 250 referred to in this point to a ceiling of EUR 500.”

### **Annex 4- Relevant article from the Payment Services Directive 2007/64/EC**

#### **Electronic Money with the PSD**

Recital 9- “This Directive should lay down rules on the execution of payment transactions where the funds are electronic money, as defined in Article 1(3)(b) of Directive 2006/EC. This Directive should, however, neither regulate issuance of electronic money nor amend the prudential regulation of electronic money institutions as provided for in directive 2000/46/EC. Therefore, payment institutions should not be allowed to issue electronic money. “

#### **Use of agents**

Article 17- Use of agents, branches or entities to which activities are outsourced

“(1) When a payment institution intends to provide payment services through an agent it shall communicate the following information to the competent authorities in its home Member State:

- (a) the name and address of the agent
- (b) a description of the internal control mechanisms that will be used by agents in order to comply with the obligations in relation to money laundering and terrorist financing under Directive 2005/60/EC
- (c) the identity of directors and persons responsible for the management of the agent to be used in the provision of payment services and evidence that they are fit and proper persons.

(5) If the payment institution wishes to provide services in another member state by engaging an agent it shall follow the procedures set out in Article 25. In that case, before the agent may be registered under this Article, the competent authorities of the home Member State shall inform the competent authorities of the host Member State of their intention to register the agent and take their opinion into account.“

Article 25- Exercise of the rights of establishment and freedom to provide services

1. “Any authorised payment institution wishing to provide payment services for the first time in a Member State other than its home Member State, in exercise of the right of establishment or

freedom to provide services, shall so inform the competent authorities in its home Member State.

Within one month of receiving that information, the competent authorities of the home Member State shall inform the competent authority of the host Member State of the name and address of the payment institution, the names of those responsible for the management of the branch, its organisational structure and of the kind of payment services it intends to provide in the territory of the host Member State.

4. The competent authorities shall provide each other with all essential and/or relevant information, in particular in the case of infringements or suspected infringements by an agent, branch or an entity to which activities are outsourced. In this regard, the competent authorities shall communicate, upon request all relevant information
5. Paragraphs 1 to 4 shall be without prejudice to the obligation of competent authorities under Directive 2005/60/EC and Regulation (EC) No 1781/2006, in particular under Article 37(1) of Directive 2005/60/EC and Article 15(3) of Regulation (EC) No 1781/2006 to supervise or monitor the compliance with the requirements laid down in those instruments.”