

Chapter 3A

Guidance on the scope of the Electronic Money Regulations 2011

3A.1 Introduction

Q1. What is the purpose of these questions and answers ('Q&As') and who should be reading them?

The purpose of these Q&As is to help *persons* to consider whether they fall within the scope of the *Electronic Money Directive* which repealed and replaced an earlier *Electronic Money Directive* (2000/46/EC). The *Electronic Money Directive* is given effect in the *United Kingdom* by the *Electronic Money Regulations*. The Q&As are intended to help these *persons* consider whether they need to be authorised or registered for the purposes of *electronic money* issuance in the *United Kingdom*.

The *Electronic Money Regulations* create a separate authorisation and registration regime for issuers of *electronic money* that are not *full credit institutions*, *credit unions* or municipal banks:

- the conditions for authorisation as an *authorised electronic money institution* are set out at regulation 6 of the *Electronic Money Regulations*;
- *small electronic money institutions* have less stringent capital requirements than *authorised electronic money institutions*; however, they need to be registered in accordance with regulation 13 of the *Electronic Money Regulations*;
- *full credit institutions*, *credit unions* and municipal banks are exempt from requiring authorisation and registration under the *Electronic Money Regulations* but must have a *Part 4A permission* for *issuing electronic money* and are subject to some of the conduct of business requirements in the *Electronic Money Regulations*.

A reference in this chapter to:

- individual regulations is a reference to the *Electronic Money Regulations* unless otherwise stated; and
- 'municipal bank' means a company which, immediately before 1st December 2001, fell within the definition in section 103 of the Banking Act 1987.

The Q&As that follow are set out in the following sections:

- General issues (■ PERG 3A.2)
- The definition of electronic money (■ PERG 3A.3)
- Small electronic money institutions, mixed businesses, distributors, agents and exempt bodies (■ PERG 3A.4)
- Exclusions (■ PERG 3A.5)
- Territorial scope (■ PERG 3A.6)
- Transitional arrangements (■ PERG 3A.7)

3A.2 General issues

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Q2. Why does it matter whether or not we fall within the scope of the Electronic Money Regulations?

It matters because if you issue *electronic money* in the *United Kingdom* and do not fall within an exclusion or exemption you must be:

- (a) an *authorised electronic money institution*; or
- (b) a *small electronic money institution*; or
- (c) an *EEA authorised electronic money institution*; or
- (d) a *credit institution*; or
- (e) the Post Office Limited; or
- (f) the Bank of England or a central bank when not acting in its capacity as a monetary authority or other public authority; or
- (g) a government department or local authority when acting in its capacity as a public authority; or
- (h) a *credit union*, municipal bank or the National Savings Bank.

Otherwise you risk committing a criminal offence under regulation 63.

Q3. How much can we rely on these Q&As?

The answers given in these Q&As represent the *FCA's* views but the interpretation of financial services legislation is ultimately a matter for the courts. How the scope of *Electronic Money Regulations* affects the regulatory position of any particular *person* will depend on their individual circumstances. If you have doubts about your position after reading these Q&As, you may wish to seek legal advice. The Q&As do not purport to be exhaustive and are not a substitute for reading the relevant legislation. In addition to *FCA* guidance, some of the *Electronic Money Directive* provisions may be the subject of guidance or communications by the European Commission.

Q4. As an electronic money issuer am I carrying on the regulated activity of accepting deposits when I receive a sum in exchange for electronic money?

No, provided the sum paid over is exchanged immediately for *electronic money*; see article 9A of the *Regulated Activities Order*.

Some *electronic money* products may be charged up by means of scratch cards that can be purchased from shops. The price paid for the card is the monetary value of the *electronic money*. The card contains a number. The purchaser then enters the number on a web site to activate the *electronic money* account. There is thus a delay between the payment for the *electronic money* and its use by the holder. In our view, this delay does not make the payment for the *electronic money* a *deposit*. This is because the

means of spending the *electronic money* is put into the hands of the purchaser when they purchase the card.

Q5. I intend to issue electronic money in the United Kingdom. How does the authorisation and registration process apply to me?

It depends on a number of factors:

- i) Unless you are a person falling within ii) to iv) below you must apply under the *Electronic Money Regulations* for either:
 - authorisation to be an *authorised electronic money institution* (see regulation 6 for the relevant conditions); or
 - registration to be a *small electronic money institution* (see regulation 13).
- ii) If you are a *credit union*, municipal bank or a UK or non-EEA *full credit institution*:
 - authorisation and variation of permission remains that imposed by Part 4A of the Act. This means you will need to have a separate *Part 4A permission* in order to issue *electronic money*;
 - where you issue *electronic money* you will be subject to the provisions on issuance and redeemability of *electronic money* in the *Electronic Money Regulations*;
 - note that you may also be subject to the conduct of business requirements in the *Payment Services Regulations*.
- iii) If your head office is located in an *EEA state* other than the *United Kingdom* you cannot apply for authorisation or registration under the *Electronic Money Regulations*. However, you may be entitled to issue *electronic money* in the *United Kingdom* as an *EEA authorised electronic money institution*, in which case the Competent Authority in your Home State will be responsible for your authorisation.
- iv) Government departments, local authorities, the Post Office Limited and the National Savings Bank cannot apply for authorisation or registration under the *Electronic Money Regulations* but they must give notice to the FCA if they issue or propose to issue *electronic money*.

Transitional arrangements may also be relevant, see ■ PERG 3A.7.

Q6. We are a payment institution. How will the Electronic Money Regulations apply to us?

If you are a *payment institution* that does not intend to issue *electronic money* or act as agent for an *electronic money institution* the *Electronic Money Regulations* are unlikely to apply to you.

If you are a *payment institution* that wishes to also issue *electronic money* then, in our view, you should cancel your authorisation or registration as a *payment institution* and apply to be an *electronic money institution*. An *electronic money institution* does not need to be authorised or registered under the *Payment Services Regulations* to provide *payment services*.

Q7. As an electronic money institution how will the Payment Services Regulations apply to us?

The issuance of *electronic money* is not itself a *payment service* but it is likely to entail the provision of *payment services*. For example, issuing a *payment instrument* is a *payment service* and *electronic money* is likely to be issued on a *payment instrument* in order to make a payment transaction. See Q20 at ■ PERG 15 for more detail on what amounts to issuing *payment instruments*.

As an *electronic money institution* you are permitted to engage in the provision of *payment services* as well as other activities, see regulation 32 and Q19 below, without needing to be separately authorised or registered under the *Payment Services Regulations*.

The conduct of business requirements in Parts 6 and 7 of the *Payment Services Regulations* apply to *electronic money issuers*.

Transitional arrangements may also be relevant; see ■ PERG 3A.7.

3A.3 The definition of electronic money

Q8. How is electronic money defined in the Electronic Money Regulations?

The definition in the *Electronic Money Regulations* mirrors that in the *Electronic Money Directive*. *Electronic money* means monetary value as represented by a claim on the issuer which is:

- (1) stored electronically, including magnetically;
- (2) issued on receipt of funds;
- (3) used for the purposes of making payment transactions (as defined in regulation 2 of the *Payment Services Regulations*);
- (4) accepted as a means of payment by persons other than the issuer;

and is not otherwise excluded by the *Electronic Money Regulations*, see

■ PERG 3A.5.

Electronic money is an electronic payment product. The value is held electronically or magnetically on the payment instrument itself (either locally or remotely) and payments using the value are made electronically. So, for example, monetary value stored on a:

- prepaid payment card;
- personal computer; or
- a *plastic card* that uses magnetic stripe technology;

may all fall within the definition if the value is intended to be used for the purposes of making payment transactions.

Q9. Does the electronic money definition only apply to card-based schemes?

No. Any electronic payment scheme that involves prepaid monetary value that can be used to purchase goods and services directly from third party merchants is capable of being *electronic money*. This would include account-based schemes.

Recital (7) of the *Electronic Money Directive* states that the intention is to introduce a definition of *electronic money* in order to make it technically neutral so as to cover all situations where the payment service provider issues pre-paid stored value in exchange for funds. Hence the definition expressly captures both electronically and magnetically stored value and there is no longer a reference to there needing to be an 'electronic device' on which the *electronic money* is stored. These changes make it clear that *electronic money* stored on computers hard drives or account-based schemes are caught.

Q10. Can you explain why pre-payment is a necessary ingredient of electronic money?

The definition of *electronic money* says that for a product to be *electronic money*, it must be issued on receipt of funds. This part of the definition means that *electronic money* is a prepaid product. That is, unlike credit provided through a credit card, the *customer* pays for the spending power in advance. This is why credit cards are excluded from the definition of *electronic money*. This does not mean that *electronic money* paid for with a credit card falls outside the definition. The purchase of the *electronic money* represents the purchase of monetary value. The fact that the purchaser is lent the funds to buy the *electronic money* does not affect this. There are two contracts, one for the *sale* of *electronic money* and one for credit.

Value on a debit card may be *electronic money* or a *deposit*. Guidance on this is given in Q15.

Q11. Does it matter that the device on which electronic value is held may be used for other purposes?

No. The fact that the device on which monetary value is stored is made available, for example, on a *plastic card* that also functions as a debit or credit card or is a mobile phone does not stop that monetary value from being *electronic money*.

Q12. Does it matter that the monetary value can be spent with the issuer and third parties?

No. If monetary value can be spent with third parties, it does not stop being *electronic money* just because the *electronic money* can also be spent with the issuer. This is so even if in practice most of the *electronic money* is spent with the issuer and only a small portion spent with third parties.

Q13. Are electronic travellers cheques electronic money?

An electronic travellers cheque is a product, based on a plastic card, designed to replace paper travellers cheques. There are two types of electronic travellers cheques:

- (1) ones that can also be used to buy goods and services from third parties; and
- (2) ones whose only function is to allow the holder to withdraw cash in a foreign currency from ATMs when abroad.

The plastic card is loaded with value, the holder pays for the value on issue and uses the value to purchase goods and services. It is likely then to meet the first three conditions in the definition of *electronic money* listed at Q8. The remaining condition is whether the value is accepted as a means of payment by persons other than the issuer.

An electronic travellers cheque falling into (1) above is likely to be *electronic money* as it can be used to purchase goods from third parties.

An electronic travellers cheque falling into (2) is unlikely to be *electronic money* provided that:

- it can only be used to withdraw foreign currency from ATMs owned by the issuer of the value; or
- the withdrawal of foreign currency by a cardholder will never involve the purchase of the currency from the owner of the ATM but instead the repayment of prepaid value by the issuer of the prepaid value.

Q14. If I use a trust account to store monetary value in respect of funds I have accepted payment for, will I be issuing electronic money?

Putting monetary value into a trust account does not, of itself, prevent the *person* who accepts the payment for electronic value from issuing *electronic money*.

Q15. How does electronic money differ from deposits?

Recital (13) of the *Electronic Money Directive* provides that *electronic money* does not constitute a deposit-taking activity under the BCD "in view of its specific character as an electronic surrogate for coins and banknotes, which is used for making payments, usually of limited amount and not as a means of saving."

In distinguishing *electronic money* and *deposits*, relevant factors include the following:

- If the monetary value is kept on an account that can be used by non-electronic means, that points towards it being a *deposit*. For example, an account on which cheques can be drawn is unlikely to be *electronic money*.
- If a product is designed in such a way that it is only likely to be used for making payments of limited amounts and not as a means of saving, that feature points towards it being *electronic money*. Relevant features might include how long value is allowed to remain on the account, disincentives to keeping value on the account and the payment of interest on it.
- One should have regard to whether the product is sold as *electronic money* or as a *deposit*.

In other words, a *deposit* involves the creation of a debtor-creditor relationship under which the *person* who accepts the *deposit* stores value for eventual return. *Electronic money*, in contrast, involves the purchase of a means of payment.

Q16. What sort of factors will the FCA take into account in deciding whether a particular scheme might be electronic money?

In considering this question relevant factors include:

- the risks incurred by the holder of the value;
- the nature of the rights and obligations of the holder of the prepaid value, the issuer of the value and third parties involved in the scheme; and
- what the scheme allows the holder of the value to do.

Therefore artificial features of a scheme that disguise, or try to disguise, the payment function as the supply of another sort of service are not likely to prevent the scheme from involving the issuance of *electronic money*.

3A.4 Small electronic money institutions, mixed businesses, distributors, agents and exempt bodies

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Q17. What criteria must we meet to be a small electronic money institution?

The relevant conditions are set out at regulation 13 and include the following:

- your total business activities immediately before the time of registration generates an *average outstanding electronic money* that does not exceed 5 million euros;
- the monthly average, over the period of 12 months preceding the application, of the total amount of payment transactions which are not related to the issuance of *electronic money* and are executed by you or your agents in the *United Kingdom*, must not exceed 3 million euros;
- immediately before the time of registration you must hold such initial capital, if any, which is required in accordance with Part 1 of Schedule 2 to the regulations;
- you must have taken adequate measures for the purposes of safeguarding *electronic money* holders' fund as set out at regulation 20;
- you must satisfy the *FCA* that the persons responsible for the management of your *electronic money* and *payment services* are of good repute and possess appropriate knowledge and experience to issue *electronic money* and provide those *payment services* that you intend to undertake;
- none of the individuals responsible for the management or operation of your business has been convicted of offences relating to money laundering, or terrorist financing or *financial crime*;
- you must be a body corporate whose head office is in the *United Kingdom*;
- you must comply with the registration requirements of the *Money Laundering Regulations* where they apply to you.

Q18. We satisfy the conditions for registration as a small electronic money institution - does that mean we have to register as one?

Not necessarily, there are other options available to you.

If you register as a *small electronic money institution*, you cannot acquire passport rights under the *Electronic Money Directive*. So you may wish to become an *authorised electronic money institution* if you wish to take advantage of a passport.

If your business does not currently exceed the thresholds referred to in the first two bullets at Q17, but you expect that it will, you may also wish to apply for authorisation rather than registration.

Q19. We are a firm providing non-financial products and services to the general public. Would it be possible for us to obtain authorisation as an electronic money institution?

Yes. One of the changes made by the *Electronic Money Regulations* is to allow *electronic money institutions* to undertake mixed business. So, *electronic money institutions* may, in addition to issuing *electronic money*, engage in the following activities:

- the provision of *payment services*; and
- the provision of operational and closely related ancillary services, including ensuring the execution of payment transactions, foreign exchange services, safe-keeping activities and the storage and processing of data; and
- the operation of payment systems, as defined at regulation 2(1); and
- business activities other than the issuance of *electronic money*.

Q20. We are a branch of a firm which has its head office outside the EEA. If we became an electronic money institution can we also engage in mixed business?

Yes, but you can only provide *payment services* that are linked to the issuance of *electronic money*. You cannot undertake any of the other *payment services*.

Q21. We act as agent for an electronic money institution. What is the scope of our activities under the regulations?

As such an agent you may provide *payment services* on behalf of your principal, but only if you are registered by them on the *Financial Services Register*. You may also distribute or redeem *electronic money* for your principal. You cannot however issue *electronic money* on their behalf.

Q22. We distribute and redeem electronic money. What is the scope of our activities under the regulations?

In some *electronic money* schemes an originator creates *electronic money* and then sells it to banks and other distributors. The latter then sell the *electronic money* to the public. In our view reference to the issuer of *electronic money* in the *Electronic Money Regulations* is a reference to the originator and not the distributor.

So, provided you are not:

- issuing *electronic money* yourself; or
- acting as an agent for an *electronic money institution*, see Q21;

you do not need to be authorised or registered under the *Electronic Money Regulations*. However, the *electronic money institution* that is acting as your principal should notify the FCA that you are acting as a distributor, see regulations 26 and 37 and Schedule 1.

You should also bear in mind that if, in distributing and redeeming *electronic money*, your activities amount to *payment services* you will need to consider whether you are required to be authorised or registered under the *Payment Services Directive*, see ■ PERG 15 for further guidance.

Q23. We have been registered by one of our principals as an agent under the Payment Services Regulations. If we wish to act as agent for an electronic money institution as well will we need to be registered again?

Yes. If your principal is an *electronic money institution*, it is its responsibility to apply for registration on your behalf even if you have been registered as agent under the *Payment Services Regulations*. Assuming your principal is not an *EEA firm*, you are required to be registered on the *Financial Services Register* before you provide *payment services* for your principal, subject to any relevant transitional provisions which may delay or avoid the need for registration. If your principal is an *EEA firm*, your principal will need to comply with the relevant Home State legislation relating to your appointment, and your Home State competent authority will need to notify the *FCA*.

Q24. We are a credit union. Are we exempt from the regulations?

Yes, in part. You are exempt from the authorisation and registration requirements in the regulations. However, if you wish to issue *electronic money* you must ensure you have the relevant *Part 4A permission*. You will also be subject to the safeguarding requirements in Part 3 and the redeemability provision in Part 5 of the *Electronic Money Regulations*.

Q25. We are a municipal bank. Are we exempt from the regulations?

Save that you are not subject to the safeguarding requirements in Part 3 of the regulations, your position is identical to that of *credit unions*, see Q24.

3A.5 Exclusions

Q26. Are there any exclusions from the definition of electronic money that we should be aware of?

Yes. The *Electronic Money Regulations* have two express exclusions:

- the first covers monetary value stored on specific payment instruments that may be used only in a limited way (the 'limited network' exclusion) (regulation 3(a)). See ■ PERG 15 Q40 which deals with the same exclusion for the purposes of the *Payment Services Regulations*; and
- the second covers monetary value used to make certain payment transactions resulting from services provided by a provider of electronic communications networks or services in addition to their provision of electronic communications services, where the payment is charged to the related bill (the 'electronic communications exclusion') (regulation 3(b)). See ■ PERG 15 Q41A which deals with the same exclusion for the purposes of the *Payment Services Regulations*.

Q27. We offer branded prepaid cards which consumers can use to purchase goods in a particular shopping centre . Are we issuing electronic money?

Yes, it is likely that you will be issuing *electronic money* unless you are able to fall within an exclusion. The most likely exclusion is the limited network exclusion (see Q26). In our view you will not be able to take advantage of this exclusion here unless:

- it is made clear in the relevant terms and conditions of the card that the purchaser of the value is only permitted to use the card to buy from merchants located within that particular shopping centre with whom you have direct commercial agreements; and
- the facility to use the card to purchase goods and services outside this shopping centre does not exist. A card that can be used at a number of different shopping centres, or where use is restricted only by the terms and conditions that apply to the card and is not functionally restricted to one shopping centre is unlikely to fall within this exclusion.

Q28. [deleted]



3A.6 Territorial scope

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Q29. We are a non-EEA firm with a branch in the United Kingdom and we wish to issue electronic money. Can we apply for authorisation or registration?

Yes. You may apply to be an *authorised electronic money institution* if you are a body corporate (regulation 6(4)(b)). However, you cannot apply to be a *small electronic money institution* unless your head office is in the *United Kingdom* (regulation 13(9)).

3A.7 Transitional arrangements

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Q30. We were authorised as an electronic money institution before 13 January 2018 (when the Payment Services Regulations 2017 (PSRs 2017) came into force). Can we continue to provide services under the Electronic Money Regulations?

Yes, but only for a limited time. The PSRs 2017 amend the *Electronic Money Regulations* to require *authorised electronic money institutions* and *small electronic money institutions* that wish to continue to provide services under the *Electronic Money Regulations* on or after 13 July 2018 to provide additional information to the FCA before 13 April 2018 (section 78A of the *Electronic Money Regulations*). The FCA must then determine whether the institution's authorisation or registration should be continued.

Q31. We are an authorised electronic money institution. Can we provide account information services and payment initiation services after 13 January 2018?

In relation to the *payment services* introduced by the PSRs 2017 (account information services and payment initiation services), from 13 January 2018 all *electronic money institutions* authorised before that date will be treated as if the FCA had imposed a requirement to refrain from providing those services for an indefinite period. Institutions wishing to provide those services must comply with a number of requirements before they can apply for a variation of this requirement.

More information on these transitional arrangements can be found in Chapter 3 (Authorisation and Registration) of the Payment Services and Electronic Money Approach Document.