

**ELECTRONIC MONEY: COMPARATIVE ANALYSIS OF REGULATION IN THE  
EUROPEAN UNION, THE UNITED STATES AND UKRAINE**

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## **Abstract**

The purpose of this thesis is to provide a comprehensive comparative analysis of the electronic money regulation in the European Union, the United States and Ukraine. For this purpose the thesis analyses the current regulation of various aspects related to the issuance and circulation of electronic money in each of the stated jurisdictions. Analysis starts with discussing the main definitions and concepts of electronic money in each jurisdiction, the electronic money issuers and regulation of the issuance process. Further it focuses on the competent authorities controlling the electronic money issuers and various issues of the control and supervision they perform. In addition, it discusses the applicable anti-money laundering rules, the regulation of transactions with electronic money in mentioned jurisdictions and the protection of users in transactions with electronic money. In each case the thesis analyzes the existing legal framework and compares it with that in the other chosen jurisdictions. Based on the performed analysis, the thesis highlights the differences in regulation of the above issues in the European Union, the United States and Ukraine. However, it also points to the similarities of regulation in these jurisdictions, asserting that both the European Union and the United States have developed legislation sufficiently regulating the electronic money market. In addition, it draws attention to the issues to be further considered by Ukraine.

## Introduction

Each day people all over the world make millions of different payments. Their types vary significantly from the most common everyday payments for goods in local shops to complex settlements in the cross-border business transactions. The physical transfer of cash or other valuables by one party to another has lost the status of the main means of payment long ago. Instead, the present-day world offers a great variety of means of payment and different payment instruments. In particular, the cash in settlements may be substituted by electronic money which is already widely used in many states.

In some states the development of the electronic money market has started earlier resulting in the early development of legislation governing its issuance and circulation. Such legislation has been further tested by practice and modified, in particular, in response to the market challenges. However, in other jurisdictions such instruments as electronic money have been introduced only recently. For instance, in Ukraine the matters of electronic money were first addressed only in 2008. Although the Ukrainian legislation has been further amended so as to follow the example of more advanced regulation of the European Union, the legal framework for the issuance and circulation of electronic money in Ukraine has not been sufficiently tested by practice compared, for example, to the European Union or the United States of America.

At the same time, the more developed electronic money markets of the European Union and the United States are regulated in different ways. For instance, the European Union has aggregated the most important rules on electronic money and its issuers in several directives, such as 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 amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC and Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, the implementation of which in the national legislation of the Member States ensures the uniform approach to electronic money regulation in the European Union.

In contrast to the European Union, the regulation of the electronic money in the United States appears to be scattered and multi-layered, involving the regulation at the federal level and at the level of the states. The question of which model, the European or the U.S., is better and more favorable for the market and its players remains open. This work is an attempt to answer this question.

In order to assess whose regulation is more favorable and reveal the advantages and defects of each of the systems, I will make a comprehensive comparative analysis of regulation of various matters related to the issuance and circulation of electronic money in the European Union and the United States. I will discuss and compare such aspects of the electronic money regulation as the main concepts and definitions of electronic money itself, requirements to the issuers of electronic money, control and supervision over their activities, rules applicable to transactions with electronic money, as well as the protection of users of electronic money in the European Union and the United States. In addition to such comparative analysis of these two systems, I will discuss the same issues as they are currently addressed by the legislation of Ukraine and compare the approaches used by Ukrainian legislators to those applied in the European Union and the United States. Based on such comparison I will try to draw the lessons for Ukraine.

My analysis will be based on the legislative materials of the European Union, the United States and Ukraine, as well as on articles of experts and scholars. However, it is necessary to draw attention to the lack of monographs on this topic. The matters of electronic money are mostly addressed by the articles of practicing lawyers discussing the experience and practical issues arising in connection with the existing regulation of electronic money in the mentioned jurisdictions. In addition, there are articles providing the comparative analysis of the electronic money regulation in the European Union and the United States. However, most of them are rather brief and address only a limited number of questions. The goal of my work is to provide a more comprehensive analysis of the electronic money regulation in the European Union, the United States and Ukraine and summarize the recommendations for Ukraine based on such analysis.

In Chapter 1 the analysis will start with the comparison of the main terms and concepts of the electronic money in each of the stated jurisdictions. It will also discuss who can issue electronic money, the main requirements to such persons, and the regulation of the process of issuance of electronic money in the European Union, the United States and Ukraine.

Chapter 2 will focus on various aspects of control and supervision over the electronic money issuers in the European Union, the United States and Ukraine. It will discuss which authorities perform such control and supervision functions and which powers they have. In addition, it will address such ways of control and examination of the electronic money issuers as initial examination in the process of their authorization and/or licensing, as well as the question of control over the changes in shareholders of the electronic money issuers in order to prevent the detrimental effect of such changes on the operation of the electronic money issuers.

In Chapter 3 I will analyze and compare the rules applicable to transactions with electronic money in the European Union, the United States and Ukraine. Specific attention will be paid to such transaction as the redemption of the electronic money by the issuer.

Chapter 4 will further deal with legislative regulation and protection of rights of the electronic money users in the chosen jurisdictions.

Based on the performed analysis I summarize the pluses and minuses of the European and the U.S. systems of regulation of the electronic money, assess the level the electronic money regulation in Ukraine and make the recommendations as to further development of such regulation in Ukraine.



# 1. What is Electronic Money? Regulation of Issuance of Electronic Money

In order to perform a comprehensive analysis of regulation governing the issuance and use of electronic money in the European Union, the United States and Ukraine, first and foremost, it is necessary to scrutinize the very definition of electronic money and identify what constitutes electronic money in each of these jurisdictions. Furthermore, it is important to analyze who can issue electronic money, what the main requirements to such persons are, and how the issuance of electronic money is regulated in the European Union, the United States and Ukraine. This Chapter will consecutively discuss each of these questions and provide an overview of legal framework for issuance of electronic money in the above jurisdictions.

## 1.1. *European Union*

### 1.1.1. **Concept of Electronic Money**

In the European Union main rules relating to the electronic money and the issuers thereof are set forth in the 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 amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (“**E-Money Directive**”). According to Article 2 of the E-Money Directive, the term “electronic money” shall mean

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.<sup>1</sup>

The definition introduced by the E-Money Directive identifies several main characteristic features of electronic money. First of all, it broadly describes the media where the electronic

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<sup>1</sup> 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 amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (Text with EEA relevance) 2004 O.J. (L 267) 7, Article 1(2) [hereinafter *E-Money Directive*].

money can be stored. In contrast to the preceding Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions (“**Directive 2000/46/EC**”)<sup>2</sup> which took the restrictive approach stating that the electronic money is “stored on an electronic device”<sup>3</sup> only, E-Money Directive establishes that electronic money may be stored “electronically, including magnetically.”<sup>4</sup> Therefore, E-Money Directive extends the definition of what may be recognized as electronic money and what, thus, will fall within the scope of its regulation.

Second, according to the E-Money Directive, electronic money is issued and used to make “payment transactions as defined in point 5 of Article 4 of Directive 2007/64/EC”<sup>5</sup> which generally includes any “act, initiated by the payer or by the payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and the payee.”<sup>6</sup> Thus, it appears that the electronic money may be used in a large number and variety of payment transactions.

Third, the definition of electronic money set forth in the E-Money Directive refers its acceptance “by a natural or legal person other than the electronic money issuer”.<sup>7</sup> By this reservation the E-Money Directive, on the one hand, extends the scope of transactions in which electronic money may be used compared to Directive 2000/46/EC, which limited its use to transactions in which electronic money was “accepted as means of payment by

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<sup>2</sup> It was repealed by the E-Money Directive.

<sup>3</sup> Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions 2000 O.J. (L 275) 39, Article 1(3)(b) [hereinafter *Directive 2000/46/EC*].

<sup>4</sup> E-Money Directive, *supra* note 1.

<sup>5</sup> E-Money Directive, *supra* note 1.

<sup>6</sup> Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (Text with EEA relevance) 2007 O.J. (L 319) 1, Article 4(5) [hereinafter *Payment Services Directive*].

<sup>7</sup> E-Money Directive, *supra* note 1.

undertakings other than the issuer,”<sup>8</sup> with no reference made to the possibility of its acceptance as a means of payment by natural persons. On the other hand, the above reservation made by the E-Money Directive effectively excludes from the notion of electronic money and, thus, from the scope of the E-Money Directive the instruments which, although similar in characteristics to electronic money, are not accepted as payment by any person other than their issuer.

In addition, the experts draw attention to the exceptions from the scope of the E-Money Directive discussed in the preamble thereto.<sup>9</sup> Such exceptions include the monetary value on specific pre-paid media which may be used for the purchase of goods and/or services only in a specifically limited number of ways, for instance, “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... to acquire a limited range of goods or services.”<sup>10</sup> In this context the term “limited network” refers to “a specific store or chain of stores”<sup>11</sup> or the use of such monetary value for the acquisition of “a limited range of goods or services,”<sup>12</sup> irrespective of where the goods and/or services are geographically acquired.<sup>13</sup> According to preamble to the E-Money Directive, such exceptions to which it should not apply can include “store cards, patrol cards, membership cards, public transport cards, meal vouchers...”<sup>14</sup> However, the practicing lawyers believe that the provisions relating to such exceptions are

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<sup>8</sup> E-Money Directive, *supra* note 1.

<sup>9</sup> Hinal Patel & Craig Armstrong, *Changes in Electronic Money Regulations: For better or worse*, 7 Journal of Payments Strategy & Systems, 174, 176 (2013) (discussing the limited networks under E-Money Directive) available at:

<http://eds.a.ebscohost.com/eds/pdfviewer/pdfviewer?sid=d261a35f-bbd9-48f0-a925-eb4ce0298c33%40sessionmgr4004&vid=4&hid=4210> (last visited April 3, 2014).

<sup>10</sup> E-Money Directive, *supra* note 1, preamble, p. 5.

<sup>11</sup> E-Money Directive, *supra* note 1, preamble, p. 5.

<sup>12</sup> E-Money Directive, *supra* note 1, preamble, p. 5.

<sup>13</sup> E-Money Directive, *supra* note 1, preamble, p. 5.

<sup>14</sup> E-Money Directive, *supra* note 1, preamble, p. 5.

rather vague and in some cases may be mistakenly relied upon by the issuers erroneously believing them to be exempt from requirements of the E-Money Directive.<sup>15</sup>

Lastly, it should be noted that the electronic money is issued by specific “electronic money issuers” specifically identified as such in Article 1(1) of the E-Money Directive.<sup>16</sup> The notion of electronic money issuers will be discussed in more detail in the next section of this Chapter.

### 1.1.2. Issuers of Electronic Money

#### 1.1.2.1. Electronic Money Issuer v Electronic Money Institution

The E-Money Directive operates two different terms, i.e., the “electronic money issuer” and the “electronic money institution”. First of all, it provides the list of categories of the electronic money issuers which shall be recognized by the Member States, namely:

- (a) credit institutions as defined in point 1 of Article 4 of Directive 2006/48/EC including, in accordance with national law, a branch thereof within the meaning of point 3 of Article 4 of that Directive, where such a branch is located within the Community and its head office is located outside the Community, in accordance with Article 38 of that Directive;
- (b) electronic money institutions as defined in point 1 of Article 2 of this Directive including, in accordance with Article 8 of this Directive and national law, a branch thereof, where such a branch is located within the Community and its head office is located outside the Community;
- (c) post office giro institutions which are entitled under national law to issue electronic money;
- (d) the European Central Bank and national central banks when not acting in their capacity as monetary authority or other
- (e) public authorities;
- (f) Member States or their regional or local authorities when acting in their capacity as public authorities.<sup>17</sup>

Thus, as indicated in p. (b) of the above list, the electronic money institutions constitute one of the categories of the electronic money issuers. Under the E-Money Directive, an

<sup>15</sup> Patel & Armstrong, *supra* note 9.

<sup>16</sup> E-Money Directive, *supra* note 1, Article 1(1).

<sup>17</sup> E-Money Directive, *supra* note 1, Article 1(1).

“electronic money institution” is “a legal person that has been granted authorisation under Title II [of the E-Money Directive] to issue electronic money,”<sup>18</sup> while Title II sets forth a number of requirements to be met by the electronic money institutions, including the requirements as to the amount of the initial capital of the electronic money institutions,<sup>19</sup> their own funds,<sup>20</sup> activities,<sup>21</sup> etc. Such requirements apply exclusively to the electronic money institutions. They do not apply to the other types of the electronic money issuers, such as the credit institutions, post office giro institutions, etc., which, thus, shall comply with the capital and other requirements established by the specific statutes regulating their formation and operation.

Furthermore, it should be noted that the term “electronic money issuer” and its categories were introduced only in 2009 by the E-Money Directive. Previously, Directive 2000/46/EC operated only the term “electronic money institution”<sup>22</sup> which was generally similar to the “electronic money institution” under the E-Money Directive. The rationale behind introducing the notion of an “electronic money institution” by Directive 2000/46/EC was to distinguish it from, and make it subject to the regulation lighter than that established for, the credit institutions, thus attracting non-banking institutions to enter the electronic money market.<sup>23</sup> Nonetheless, the critics believe that, in general, Directive 2000/46/EC has failed to achieve this.<sup>24</sup>

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<sup>18</sup> E-Money Directive, *supra* note 1, Article 1(1).

<sup>19</sup> E-Money Directive, *supra* note 1, Article 4.

<sup>20</sup> E-Money Directive, *supra* note 1, Article 5.

<sup>21</sup> E-Money Directive, *supra* note 1, Article 6.

<sup>22</sup> Directive 2000/46/EC, *supra* note 3, Article 1(3)(a).

<sup>23</sup> Malte Krueger, *E-money regulation in the EU*, in E-MONEY AND PAYMENT SYSTEMS REVIEW, 239, 3 (Robert Pringle & Matthew Robinson eds., 2002) available at <http://www.paysys.de/download/Krueger%20e-money%20regul.pdf> (last visited April 2, 2014) (pages are not correctly displayed in the document).

<sup>24</sup> *Id.* (Krueger citing Godschalk, Hugo (2001a): Genesis of the EU-Directive on Electronic Money Institutions, ePSONewsletter 7, May; Lelieveldt, Simon (2001): Why is the Electronic Money-Directive Significant?, ePSO-Newsletter 7, May).

In addition, Directive 2000/46/EC expressly prohibited other persons and undertakings, except for such electronic money institutions and credit institutions, to issue electronic money.<sup>25</sup> Following the introduction of the broader concept of “electronic money issuer” and its categories by the E-Money Directive, the list of persons entitled to issue electronic money was significantly extended thus enhancing the development of the electronic money market in Europe.

For purposes of this research, I will discuss such categories of the electronic money issuers as the credit institutions and the electronic money institutions, with specific focus on the latter.

#### 1.1.2.2. Main Requirements to Credit Institutions

According to the Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on Prudential Requirements for Credit Institutions and Investment Firms and Amending Regulation (EU) No 648/2012 (Text with EEA relevance) (“**Regulation No 575/2013**”), the “credit institution” is “an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account.”<sup>26</sup> Currently the main requirements applicable to credit institutions at the European level are set forth in Regulation No 575/2013 and Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (Text with EEA relevance) (“**Credit Institutions Directive**”). Such requirements include, in particular, the rules with respect to the amount and composition of the initial capital of credit

<sup>25</sup> Directive 2000/46/EC, *supra* note 3, Article 1.

<sup>26</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (Text with EEA relevance) 2013 O.J. (L 176) 1, Article 4 (1)(1) [hereinafter *Regulation No 575/2013*].

institutions which generally must constitute at least EUR 5 million<sup>27</sup> and be formed in compliance with Regulation No 575/2013 (by capital instruments, share premium accounts, etc.<sup>28</sup>), shareholders of the credit institutions,<sup>29</sup> authorisation,<sup>30</sup> the credit institutions' capital (i.e., Tier 1<sup>31</sup> and Tier 2 capital<sup>32</sup>) and numerous requirements to it, as well as other numerous aspects of their operation. In general, given the importance of the proper operation of the banking and financial sector, similarly to many other jurisdictions, credit institutions are heavily regulated in the European Union.

### 1.1.2.3. Main Requirements to Electronic Money Institutions

In order to issue electronic money as an electronic money institution, a legal entity must comply with a number of requirements set out in Title II of the E-Money Directive, mainly aimed at ensuring the necessary consumer protection and due operation of the electronic money institutions,<sup>33</sup> be authorised as an electronic money institution by the competent authorities of the relevant Member States<sup>34</sup> and registered with the register of electronic money institutions.<sup>35</sup> Upon such registration, the legal entity “shall be treated as an electronic money institution”.<sup>36</sup>

<sup>27</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (Text with EEA relevance) 2013 O.J. (L 176) 338, Article 12(1) [hereinafter *Credit Institutions Directive*].

<sup>28</sup> Regulation No 575/2013, *supra* note 26, Article 26(1)(a) to (e).

<sup>29</sup> Credit Institutions Directive, *supra* note 27, Article 14.

<sup>30</sup> Credit Institutions Directive, *supra* note 27, Article 8.

<sup>31</sup> Regulation No 575/2013, *supra* note 26, Articles 25, 26, 27, *et al.*

<sup>32</sup> Regulation No 575/2013, *supra* note 26, Articles 62, 63, 64, *et al.*

<sup>33</sup> E-Money Directive, *supra* note 1, preamble, p. 11.

<sup>34</sup> Payment Services Directive, *supra* note 6, Article 5 (as referred to by the E-Money Directive, *supra* note 1, Article 3(1)).

<sup>35</sup> E-Money Directive, *supra* note 1, Article 9(1).

<sup>36</sup> E-Money Directive, *supra* note 1, Article 9(3).

The requirements with which a legal entity (and further, upon authorisation and registration, an electronic money institution) must comply under the E-Money Directive include, in particular, the following:

- requirements regarding the initial capital of an electronic money institution. At the moment of authorisation, it shall constitute at least EUR 350,000<sup>37</sup>. The initial capital requirements established by the E-Money Directive appear to be much lower than the rules previously introduced by Directive 2000/46/EC which requested the initial capital to constitute at least EUR 1 million,<sup>38</sup> thus permitting more players to enter the market;<sup>39</sup>
- requirements to the own funds of the electronic money institution (i) for activities not linked to the electronic money issuance, and (ii) for issuance of electronic money;<sup>40</sup>
- requirements to the additional activities of an electronic money institution. Additionally to the issuance of electronic money, an electronic money institution may perform a number of other activities from the list of permitted activities set forth in Article 6 of the E-Money Directive. Such activities include, in particular, providing payment services, operational and other closely related ancillary services related to the electronic money issuance, operating as a payment system, etc.<sup>41</sup> However, unlike the credit institutions, the electronic money institutions cannot “take deposits or other repayable funds from the public;”<sup>42</sup>

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<sup>37</sup> E-Money Directive, *supra* note 1, Article 4.

<sup>38</sup> Directive 2000/46/EC, *supra* note 3, Article 4.

<sup>39</sup> EU DIRECTIVE MAKES IT EASIER TO PRINT E-MONEY. OUT WITH THE OLD [http://www.theregister.co.uk/2009/10/22/e\\_money/](http://www.theregister.co.uk/2009/10/22/e_money/) (last visited April 2, 2014) (citing Jacob Ghanty, expert at Pinsent Masons).

<sup>40</sup> E-Money Directive, *supra* note 1, Article 5.

<sup>41</sup> E-Money Directive, *supra* note 1, Article 6.

<sup>42</sup> E-Money Directive, *supra* note 1, Article 6 (2).



- prudential rules, including the requirements on prior notification of the competent authorities on acquisitions and disposals of a qualifying holding in an electronic money institution.<sup>43</sup>

Additional requirements to be complied with by the electronic money institutions are also set forth in the Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (Text with EEA relevance) (“**Payment Services Directive**”), including the requirements to be fulfilled in case of involvement of the third parties for performing operational functions<sup>44</sup> and specific record-keeping requirements.

However, the Member States are entitled to waive the requirements and conditions established by the E-Money Directive and permit the registration of a legal entity with the register of electronic money institutions if the following two requirements are met:

- (a) the total business activities generate an average outstanding electronic money that does not exceed a limit set by the Member State but that, in any event, amounts to no more than EUR 5 000 000; and
- (b) none of the natural persons responsible for the management or operation of the business has been convicted of offences relating to money laundering or terrorist financing or other financial crimes.<sup>45</sup>

Thus, although most of the requirements may be waived, certain minimum requirements will still ensure the necessary customer and business protection.

### 1.1.3. Regulation of Issuance of Electronic Money

The E-Money Directive does not provide clear guidelines as to the process of issuing electronic money, establishing only several general rules, such as the prohibition for the

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<sup>43</sup> E-Money Directive, *supra* note 1, Article 3.

<sup>44</sup> Payment Services Directive, *supra* note 6, Articles 18 and 19.

<sup>45</sup> E-Money Directive, *supra* note 1, Article 9 (1).

persons other than the electronic money issuers to issue electronic money,<sup>46</sup> and the requirement for the electronic money issuers to issue electronic money “at par value on the receipt of funds.”<sup>47</sup> In view of absence of the clear-cut regulations at the European level, it may be reasonable to expect such issues to be regulated by the national legislation of the Member States (although in certain aspects the Member States may not derogate from the provisions of the E-Money Directive). However, for instance, The Electronic Money Regulations 2011 governing the electronic money issues in the United Kingdom appears not to introduce any rules regarding the process of the electronic money issuance, other than those set forth in the E-Money Directive.<sup>48</sup> In absence of strict rules, the issuers may enjoy more freedom in carrying out their business activities.

## **1.2. United States**

### **1.2.1. Concept of Electronic Money**

The very concept of the electronic money and its regulation in the United States significantly differ from the European approach. First of all, it appears that at the federal level there is no statute similar to the E-Money Directive which would consolidate a large number of rules and requirements with respect to the electronic money and its issuers. Some experts believe that, due to this, the issuance and use of electronic money may generally be considered insufficiently regulated in the United States which, however, may be proven incorrect after a close analysis of the U.S. multiple levels of regulation, including the regulation at the level of states.<sup>49</sup>

In contrast to the European Union, there is no uniform definition of what should be deemed electronic money in the United States. Moreover, there is no uniform term to refer to the

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<sup>46</sup> E-Money Directive, *supra* note 1, Article 10.

<sup>47</sup> E-Money Directive, *supra* note 1, Article 11.

<sup>48</sup> See Electronic Money Regulations, 2011, c. 5, § 39 (U.K.), available at: <http://www.legislation.gov.uk/ukxi/2011/99/introduction/made> (last visited April 2, 2014).

<sup>49</sup> Kruger, *supra* note 23.

electronic money. For instance, the Financial Crimes Enforcement Network of the United States Department of Treasury uses the term “virtual currency,”<sup>50</sup> while some scholars, such as Anita Ramasastry, still refer to it as “electronic money.”<sup>51</sup> In addition, given the absence of the uniform concept of electronic money, in her article “Nonbank Issuers of Electronic Money: Prudential Regulation in Comparative Perspective” Anita Ramasastry listed several categories of what may be viewed as electronic money in the United States:

- Internet based e-money identified as “money or a money substitute that is transformed into information stored on computer chip or ... a personal computer (PC) so that it can be transferred over information systems such as the Internet.”<sup>52</sup> Internet-based e-money includes “token[s] or notational system”<sup>53</sup> where a user acquires electronic tokens from a bank or non-bank issuer and uses them as money substitutes in the Internet transactions. After the user’s counterparty accepts the tokens as payment in a transaction, such counterparty can request the issuer to redeem them;<sup>54</sup>
- “stored-value products,”<sup>55</sup> for example, the pre-paid or stored-value cards which can be further accepted as payment for the acquisition of goods and/or services.<sup>56</sup>

Describing this type of products Anita Ramasastry refers to the U.S. Federal Reserve identifying three characteristics of the stored-value products, such as

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<sup>50</sup> THE FINANCIAL CRIMES ENFORCEMENT NETWORK, FIN-2013-G001, GUIDANCE OF THE FINANCIAL CRIMES ENFORCEMENT NETWORK OF THE UNITED STATES DEPARTMENT OF TREASURY ON APPLICATION OF FINCEN’S REGULATIONS TO PERSONS ADMINISTERING, EXCHANGING, OR USING VIRTUAL CURRENCIES (2013), available at: [http://fincen.gov/statutes\\_regs/guidance/html/FIN-2013-G001.html](http://fincen.gov/statutes_regs/guidance/html/FIN-2013-G001.html) (last visited April 2, 2014).

<sup>51</sup> Anita Ramasastry, *Nonbank Issuers of Electronic Money: Prudential Regulation in Comparative Perspective*, in 4 CURRENT DEVELOPMENTS IN MONETARY AND FINANCIAL LAW (EPub), 676, at 676

<sup>52</sup> *Id.* (in making this analysis Anita Ramasastry also refers to Michael A. Froomkin, “Flood Control on the Information Ocean: Living with Anonymity, Digital Cash, and Distributed Databases,” 15 University of Pittsburgh Journal of Law and Commerce (1996), at 395) at 679-681.

<sup>53</sup> Ramasastry, *supra* note 51, at 679-681.

<sup>54</sup> Ramasastry, *supra* note 51, at 679-681.

<sup>55</sup> Ramasastry, *supra* note 51, at 681.

<sup>56</sup> Ramasastry, *supra* note 51, at 681.

(1) [a] card or other device electronically stores or provides access to a specified amount of funds selected by the holder of the device and available for making payments to others; (2) the device is the only means of routine access to the funds; and (3) the issuer does not record the funds associated with the device as an account in the name of (or credited) to the holder.<sup>57</sup>

Depending on the number and range of persons accepting the stored-value cards, they may be grouped into the so-called closed systems (i.e., where they are accepted as payment only by the issuer), open systems (i.e., where the store-value cards may be generally accepted as payment by a large number of persons), or mixed systems (i.e., where there are certain restrictions as to the persons accepting the stored-value cards).<sup>58</sup> In this context, the closed systems and, depending on a system, mixed systems of the stored-value cards generally appear to be close to the concept of the “limited network” discussed in the Preamble to the E-Money Directive.<sup>59</sup> Notably, the stored-value cards in closed systems where they are accepted as payment only by their issuer will not constitute electronic money within the meaning set forth in Article 2(2) of the E-Money Directive and will not be subject to regulation by this Directive.

Furthermore, with respect to the stored-value products, it should be noted that they include not only the stored-value cards, but other products where the value is stored on other devices;<sup>60</sup>

- “electronic scrip”<sup>61</sup> which may be used and is accepted as a means of payment in transactions performed in the Internet, but which may not be exchanged for real money;<sup>62</sup>

<sup>57</sup> Ramasastry, *supra* note 51, at 681. (citing Federal Reserve proposal to amend Federal Reserve Regulation E to include stored value).

<sup>58</sup> Ramasastry, *supra* note 51, at 681-683.

<sup>59</sup> E-Money Directive, *supra* note 1, preamble, p.5

<sup>60</sup> Ramasastry, *supra* note 51, at 681-683.

<sup>61</sup> Ramasastry, *supra* note 51, at 683-684.

<sup>62</sup> Ramasastry, *supra* note 51, at 683-684.

- various services of funds transfer in the Internet which are provided by banks and/or non-banks<sup>63</sup>;
- mobile payments,<sup>64</sup> etc.

Similar categories of what can be viewed as electronic money are discussed in the Prefatory Note to the Uniform Money Services Act<sup>65</sup> (“**UMSA**”) which was approved and is recommended to all states by the National Conference of Commissioners on Uniform State Laws. The UMSA also addresses the issue of the “stored value” which is defined therein as the “monetary value that is evidenced by an electronic record,”<sup>66</sup> where the “monetary value” is “a medium of exchange, whether or not redeemable in money.”<sup>67</sup> Thus, the “stored value” under the UMSA may generally be viewed as an equivalent of the European “electronic money,” irrespective of the fact that the E-Money Directive provides a much more detailed definition including the description of factors and traits which should be taken into account in order to determine whether an instrument may be viewed as electronic money.

The UMSA has been enacted only in a limited number of states and territories (i.e., Alaska, Arkansas, Iowa, Puerto Rico, Texas, U.S. Virgin Islands, Vermont, and Washington<sup>68</sup>) whose legislation now generally follows the same approach. For instance, the Texas Money Services Act defines stored value as:

monetary value evidenced by an electronic record that is prefunded and for which value is reduced on each use. The term includes prepaid access as defined by 31 C.F.R. Section 1010.100(w). The term does not include an electronic record that is:

<sup>63</sup> Ramasastry, *supra* note 51, at 684.

<sup>64</sup> Ramasastry, *supra* note 51, at 684.

<sup>65</sup> UNIFORM MONEY SERVICES ACT (2004) (with prefatory note and comments), available at: [http://www.uniformlaws.org/shared/docs/money%20services/umsa\\_final04.pdf](http://www.uniformlaws.org/shared/docs/money%20services/umsa_final04.pdf) (last visited April 2, 2014) [hereinafter *UMSA*].

<sup>66</sup> UMSA, *supra* note 65, § 102 (21).

<sup>67</sup> UMSA, *supra* note 65, § 102 (11).

<sup>68</sup> LEGISLATIVE FACT SHEET - MONEY SERVICES ACT, [http://uniformlaws.org/LegislativeFactSheet.aspx?title=Money Services Act](http://uniformlaws.org/LegislativeFactSheet.aspx?title=Money%20Services%20Act) (last visited April 2, 2014).

- (A) loaded with points, miles, or other nonmonetary value;
- (B) not sold to the public but distributed as a reward or charitable donation;
- or
- (C) redeemable only for goods or services from a specified merchant or set of affiliated merchants, such as:
  - (i) a specified retailer or retail chain;
  - (ii) a set of affiliated companies under common ownership;
  - (iii) a college campus; or
  - (iv) a mass transportation system.<sup>69</sup>

In view of the limitations set out in p. (C) of the definition, the concept of stored value under the Texas Money Services Act appears even closer to the concept of electronic money under the E-Money Directive.

Furthermore, the states which have not enacted the UMSA also have their money services laws addressing the issues of stored value. For instance, in Florida The Regulation of Trade, Commerce, Investments, and Solicitations defines the stored value as “funds or monetary value represented in digital electronic format, whether or not specially encrypted, and stored or capable of storage on electronic media in such a way as to be retrievable and transferred electronically”<sup>70</sup> which is also close to the European concept of electronic money.

In addition, at the federal level 31 CFR § 1010.100 introduces such term as the “prepaid access” which means “access to funds or the value of funds that have been paid in advance and can be retrieved or transferred at some point in the future through an electronic device or vehicle, such as a card, code, electronic serial number, mobile identification number, or personal identification number”<sup>71</sup> which may be generally interpreted as access to electronic money.

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<sup>69</sup> TEX. MONEY SERVICES ACT, FIN. CODE, § 151.301(8) (2005), available at: <http://www.statutes.legis.state.tx.us/Docs/FI/htm/FI.151.htm> (last visited on April 2, 2014).

<sup>70</sup> FLA. STAT. ANN. § 560.103(35) (West).

<sup>71</sup> Regulations Relating to Money and Finance, 31 Code of Federal Regulations (CFR) § 1010.100 (ww).

Therefore, in contrast to the European Union, the uniform approach to the electronic money is in fact absent in the United States. The regulation of the electronic money (i.e., its U.S. equivalents) appears to be rather scattered. The issued stored value or a similar instrument may be regulated by the legislation of the state of its issuance and, simultaneously, it may fall within the definition of the “prepaid access” at the federal level. This makes the U.S. regulation multi-layered and to a certain extent complicated compared to a more straightforward regulation of the money in the European Union.

### 1.2.2. Issuers of Electronic Money

In the United States the electronic money (its U.S. equivalents) may be issued by the banks which are regulated at the federal level and non-banks which are mainly regulated at the state level.<sup>72</sup> However, the sellers and providers of the prepaid access will also be subject to a number of federal rules.

Let us start the analysis with the UMSA which establishes a number of rules applicable to the issuers of electronic money (or, as referred by the UMSA, of the “stored value”<sup>73</sup>). First of all, it should be noted that, unlike the E-Money Directive in the European Union, the UMSA addresses not the activity of issuance of electronic money and persons who issue the electronic money respectively, but the so-called “money transmission”<sup>74</sup> activities and those who carry out such activities. According to the UMSA, money transmission constitutes the “selling or issuing payment instruments, stored value, or receiving money or monetary value for transmission.”<sup>75</sup> Thus, instead of addressing a limited range of the electronic money issuers as in case of the E-Money Directive, the UMSA generally refers to persons which carry out money transmission.

<sup>72</sup> Ramasastry, *supra* note 51, at 686.

<sup>73</sup> UMSA, *supra* note 65, § 102 (21).

<sup>74</sup> UMSA, *supra* note 65, § 102 (14).

<sup>75</sup> UMSA, *supra* note 65, § 102 (14).

Furthermore, the UMSA does not specifically restrict the list of persons who can perform the money transmission activities in the way the E-Directive limits the list of persons that can become the electronic money issuers (i.e., credit institutions, electronic money institutions, etc.). At the same time, according to the UMSA, in order to validly perform the money transmission business, or “advertise, solicit, or hold itself out as providing money transmission”<sup>76</sup> a person must be duly “licensed . . . or approved to engage in money transmission,”<sup>77</sup> or be “an authorized delegate of such licensed or approved person.”<sup>78</sup> The licensing and approval procedures and requirements will be discussed in the next Chapters in more detail.

In addition, it is necessary to pay attention to the term “person” as it is defined by the UMSA. According to the UMSA, this term includes “an individual, corporation, business trust, estate, trust, partnership . . . or any other legal or commercial entity.”<sup>79</sup> Thus, the term “person” includes the individuals. Based on the language of the other sections of the UMSA stating, in particular, that “[a] person may not engage in the business of money transmission . . . unless the person . . .”<sup>80</sup> and “[a] person applying for a license,”<sup>81</sup> it is possible to conclude that the money transmission services, including issuing the stored value, may be provided by an individual. This significantly differs from the European approach which does not foresee the possibility of issuing electronic money by individuals, presumably due to considerations of consumers and market protection.

On the other hand, similarly to the E-Money Directive, the UMSA establishes certain requirements the licensees pursuing the money transmission activities must comply with.

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<sup>76</sup> UMSA, *supra* note 65, § 201 (a).

<sup>77</sup> UMSA, *supra* note 65, § 201 (a).

<sup>78</sup> UMSA, *supra* note 65, § 201 (a).

<sup>79</sup> UMSA, *supra* note 65, § 102 (17).

<sup>80</sup> UMSA, *supra* note 65, § 201 (a).

<sup>81</sup> UMSA, *supra* note 65, § 202 (b).



However, such requirements, which are also aimed at ensuring the proper and sound operation of the licensee, appear to be less extensive than those imposed on the electronic money institutions by the E-Money Directive. In particular, the UMSA requires the licensees to permanently maintain “permissible investments that have a market value computed in accordance with generally accepted accounting principles of not less than the aggregate amount of all of its outstanding payment instruments and stored value obligations issued or sold in all states and money transmitted from all states by the licensee.”<sup>82</sup> The list of investments which are considered permissible is directly set forth by the UMSA.<sup>83</sup> Moreover, the UMSA expressly specifies that such “permissible assets . . . are held in trust for the benefit of the purchasers and holders of the licensee's outstanding payment instruments and stored value obligations in the event of bankruptcy or receivership of the licensee.”<sup>84</sup> This should provide additional protection to the customers and enhance the safety of the market.

Furthermore, at the federal level, in connection with the concept of the “prepaid access” established by 31 CFR § 1010.100, the U.S. legislation defines the “providers of prepaid access” and the “sellers of prepaid access.” According to 31 CFR § 1010.100, the “seller of prepaid access” means

Any person that receives funds or the value of funds in exchange for an initial loading or subsequent loading of prepaid access if that person:

- (i) Sells prepaid access offered under a prepaid program that can be used before verification of customer identification . . .; or
- (ii) Sells prepaid access (including closed loop prepaid access) to funds that exceed \$10,000 to any person during any one day, and has not implemented policies and procedures reasonably adapted to prevent such a sale.<sup>85</sup>

At the same time, the “provider of prepaid access” is a “participant within a prepaid program that agrees to serve as the principal conduit for access to information from its fellow program

<sup>82</sup> UMSA, *supra* note 65, § 701 (a).

<sup>83</sup> UMSA, *supra* note 65, § 702.

<sup>84</sup> UMSA, *supra* note 65, § 701 (c).

<sup>85</sup> Regulations Relating to Money and Finance, 31 CFR § 1010.100 (ff)(7).

participants.”<sup>86</sup> In this context, the “prepaid program,” subject to certain specific qualifications established by 31 CFR § 1010.100, including providing the possibility to transmit funds between the users within such program, as well as make international transfers, is defined as an “arrangement under which one or more persons acting together provide(s) prepaid access,”<sup>87</sup> generally being the access to the U.S. equivalents of the electronic money. Thus, both the sellers and the providers of prepaid access appear to be involved in providing access to certain types of electronic money in the United States, which generally may be viewed as one of the functions performed by the electronic money issuers in Europe.

Both the sellers and the providers of prepaid access are considered to be the “money services businesses”<sup>88</sup> subject to the registration and a number of other requirements which will be additionally discussed in more detail in the next chapters hereof.

### **1.2.3. Regulation of Issuance of Electronic Money**

In the United States the process of issuance of the electronic money (U.S. equivalents of the electronic money) is not heavily regulated thus leaving more freedom to the issuers. However, some rules may be found in state laws. For instance, in Florida the Regulation of Trade, Commerce, Investments, and Solicitations sets forth certain general rules to apply in this case, such as the requirements to imprint specific data, e.g., the licensee’s name, on the payment instruments (including the stored value) which are issued and sold.<sup>89</sup>

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<sup>86</sup> Regulations Relating to Money and Finance, 31 CFR § 1010.100 (ff) (4).

<sup>87</sup> Regulations Relating to Money and Finance, 31 CFR § 1010.100 (ff) (4)(iii).

<sup>88</sup> Regulations Relating to Money and Finance, 31 CFR § 1010.100 (ff).

<sup>89</sup> FLA. STAT. ANN. § 560.213 (West).

### 1.3. Ukraine

#### 1.3.1. Concept of Electronic Money

Ukrainian law addressed the issue of electronic money for the first time only in 2008 when the National Bank of Ukraine (the “NBU”) adopted its first *Polozhennia pro elektronni hroshi v Ukraïni* [Regulation on Electronic Money in Ukraine]<sup>90</sup> (“**Regulation 2008**”), which was further cancelled in 2010. In substitution thereof, by its *Postanova Pravlinnia Natsionalnoho Banku Ukraïny “Pro vnesennia zmin do deiakykh normatyvno-pravovykh aktiv Natsionalnoho Banku Ukraïny z pytan rekhuliuvannia vypusku ta obihu elektronnyh hroshei” vid 4 lystopada 2010, № 481* [Resolution of the Board of the National Bank of Ukraine “On Amending Certain Regulatory Acts of the National Bank of Ukraine Concerning the Regulation of Issuance and Circulation of Electronic Money” dated 4 November 2010, No. 481]<sup>91</sup>, the NBU adopted new *Polozhennia pro elektronni hroshi v Ukraïni* [Regulation on Electronic Money in Ukraine]<sup>92</sup> (“**E-Money Regulation**”) which currently regulates the matters of issuance of, and transactions with, the electronic money in Ukraine. Further, in 2012 the Parliament of Ukraine addressed this issue by introducing relevant amendments<sup>93</sup> to *Zakon Ukraïny “Pro platizhni systemy ta perekaz koshtiv v*

<sup>90</sup> Postanova Pravlinnia Natsionalnoho Banku Ukraïny “Pro zatverdzhennia Polozhennia pro elektronni hroshi v Ukraïni” vid 25 chervnia 2008, No. 178 [Resolution of the Board of the National Bank of Ukraine “On Approval of Regulation on Electronic Money in Ukraine” dated 25 June 2008, No. 178 (in author’s translation)], registered with the Ministry of Justice of Ukraine on 25 July 2008 under No. 688/15379, available at: <http://zakon1.rada.gov.ua/laws/show/z0688-08> (last visited April 2, 2014).

<sup>91</sup> Postanova Pravlinnia Natsionalnoho Banku Ukraïny “Pro vnesennia zmin do deiakykh normatyvno-pravovykh aktiv Natsionalnoho Banku Ukraïny z pytan rekhuliuvannia vypusku ta obihu elektronnyh hroshei” vid 4 lystopada 2010, № 481 [Resolution of the Board of the National Bank of Ukraine “On Amending Certain Regulatory Acts of the National Bank of Ukraine Concerning the Regulation of Issuance and Circulation of Electronic Money” dated 4 November 2010, No. 481 (in author’s translation)], registered with the Ministry of Justice of Ukraine on 24 December 2010 under No. 1336/18631, available at: <http://zakon2.rada.gov.ua/laws/show/z1336-10> (last visited April 2, 2014).

<sup>92</sup> In author’s translation.

<sup>93</sup> Zakon Ukraïny “Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukraïny shchodo funktsionuvannia platizhnykh system ta rozvytku bezhotivkovykh rozrakhunkiv” vid 11 serpnia 2012, No. 5284-VI [Law of Ukraine “On Amending Certain Legislative Acts of Ukraine on Functioning of Payment Systems and Development of Non-Cash Settlements” dated 11 September 2012, No. 5284-VI (in author’s translation)], published at Holos Ukraïny on 17 October 2012, No. 195, available at: <http://zakon2.rada.gov.ua/laws/show/5284-17> (last visited April 2, 2014).

*Ukraini*” vid 5 kvitnia 2001, No. 2346-III [Law of Ukraine “On Payment Systems and the Transfer of Funds in Ukraine” dated 5 Aril 2001, No. 2346-III].<sup>94</sup> Therefore, compared to the European Union and the United States, the regulation of electronic money in Ukraine is relatively new and has not been sufficiently developed and tested by practice yet.

According to the Ukrainian E-Money Regulation, the term “electronic money” means “the units of value which are stored at an electronic device, accepted as a means of payment by persons, other than the issuer, and constitute monetary obligations of the issuer.”<sup>95</sup> For purposes of this definition, the term “electronic device” shall include “a chip on a plastic card or at another place, computer memory, etc, which are used for storing electronic money.”<sup>96</sup>

The definition of electronic money under the Ukrainian E-Money Regulation is similar in many aspects to its definition set out in the E-Money Directive in the European Union, which is natural given that, according to the information provided at the official website of the NBU, the requirements of the E-Money Directive were taken into account when the E-Money Regulation was elaborated in Ukraine.<sup>97</sup>

<sup>94</sup> Zakon Ukraïny “Pro platizhni systemy ta perekaz koshtiv v Ukraïni” vid 5 kvitnia 2001, No. 2346-III (zi zminamy ta dopovnenniamy) [Law of Ukraine “On Payment Systems and the Transfer of Funds in Ukraine” dated 5 Aril 2001, No. 2346-III (as amended) (in author’s translation)], initially published at Holos Ukraïny on 15 May 2001, No. 84, current version available at: <http://zakon2.rada.gov.ua/laws/show/2346-14> (last visited April 2, 2014).

<sup>95</sup> Polozhennia pro elektronni hroshei v Ukraïni, zatverdzhene Postanovoiu Pravlinnia Natsionalnoho Banku Ukraïny “Pro vnesennia zmin do deiakykh normativno-pravovykh aktiv Natsionalnoho Banku Ukraïny z pytan rekhliuvannia vypusku ta obihu elektronnykh hroshei” vid 4 lystopada 2010, № 481, p. 1.3. Hlavy 1 [p. 1.3. of Chapter 1 of Regulation on Electronic Money in Ukraine approved by the Resolution of the Board of the National Bank of Ukraine “On Amending Certain Regulatory Acts of the National Bank of Ukraine Concerning the Regulation of Issuance and Circulation of Electronic Money” dated 4 November 2010, No. 481 (in author’s translation)], registered with the Ministry of Justice of Ukraine on 24 December 2010 under No. 1336/18631, available at: <http://zakon2.rada.gov.ua/laws/show/z1336-10> (last visited April 2, 2014) [hereinafter *E-Money Regulation*].

<sup>96</sup> *Id.* (in author’s translation).

<sup>97</sup> ZAHALNI POLOZHENNIA (GENERAL PROVISIONS) (in author’s translation), [http://www.bank.gov.ua/control/uk/publish/article?art\\_id=54070](http://www.bank.gov.ua/control/uk/publish/article?art_id=54070) (last visited April 2, 2014).

First of all, according to the E-Money Regulation, electronic money is “the units of value which . . . constitute monetary obligations of the issuer.”<sup>98</sup> In general, this corresponds to the European concept of electronic money as “monetary value as represented by a claim on the issuer.”<sup>99</sup>

Second, the definition of an “electronic device” established by the E-Money Regulation provides a non-exhaustive list of devices where the electronic money can be stored. Thus, it is sufficiently broad to cover all the existing and potential future technologies and devices which may be used for storing electronic money. This approach corresponds to the relevant rule of the E-Money Regulation referring to the “electronically, including magnetically, stored monetary value”<sup>100</sup> which is also rather extensive.

Third, similarly to the E-Money Directive, the NBU recognizes that the electronic money must be “accepted as a means of payment by persons, other than the issuer”<sup>101</sup> thus excluding the instruments which are not accepted as payment by any other person, except for their issuer, from the notion of the electronic money and the scope of the E-Money Regulation.

In addition, the E-Money Regulation expressly excludes “the activities of persons which carry out the issuance and/or servicing of such pre-paid cards of single-purpose use: traders’ discount cards, cards of the petrol-filling stations, municipal transport tickets, etc. which are accepted as a means of payment exclusively by their issuers”<sup>102</sup> from its scope of regulation. This is similar to the approach of the E-Money Directive.

Therefore, the concept of “electronic money” under Ukrainian law is very close to the concept of “electronic money” introduced in the European Union by the E-Money Directive.

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<sup>98</sup> E-Money Regulation, *supra* note 95, p. 1.3 of Chapter 1 (in author’s translation).

<sup>99</sup> E-Money Directive, *supra* note 1.

<sup>100</sup> E-Money Directive, *supra* note 1.

<sup>101</sup> E-Money Regulation, *supra* note 95, p. 1.3 of Chapter 1 (in author’s translation).

<sup>102</sup> E-Money Regulation, *supra* note 95, p. 1.1 of Chapter 1 (in author’s translation).

### 1.3.2. Issuers of Electronic Money

In Ukraine, under the E-Money Regulation, only banks can issue electronic money. Ukrainian legislation does not provide for any exceptions or derogations from this rule. On the one hand, this may provide additional protection for the users, since in Ukraine the banks are heavily regulated and closely monitored by the NBU. Ukrainian law imposes a number of requirements the banks and their shareholders must comply with, in particular, with respect to the initial registered capital of a bank, which may not be less than UAH 120 million<sup>103</sup> (i.e., approximately EUR 8 million), its regulatory capital, regulatory capital adequacy ratio, ratio of the regulatory capital to the total assets of the bank and its liabilities<sup>104</sup>, as well as the necessity for an acquirer to obtain prior approval of the NBU for the acquisition of 10, 25, 50, and 70 per cent of a bank's registered capital or votes under its shares, or, "irrespective of formal ownership, the ability to exercise decisive influence on management or operation of a bank."<sup>105</sup> On the other hand, such requirements hinder the entrance of the new players to the electronic money market and, thus, impede its further development.

### 1.3.3. Regulation of Issuance of Electronic Money

The issuance of electronic money in Ukraine is generally governed by the E-Money Regulation. First of all, it defines the issuance of electronic money as "an action of bringing of the electronic money into circulation by way of making it available to the users or agents in exchange to cash or non-cash funds."<sup>106</sup>

<sup>103</sup> Zakon Ukraïny "Pro banky i bankivsku diïalnist" vid 7 hrudnia 2000, No. 2121-III (zi zminamy ta dopovnenniamy), Stattia 31 [Article 31 of the Law of Ukraine "On Banks and Banking Activity" dated 7 December 2000, No. 2121-III (as amended) (in author's translation)], initially published at Holos Ukraïny on 17 January 2001, No. 8, current version available at: <http://zakon2.rada.gov.ua/laws/show/2121-14/page> (last visited April 2, 2014) (in author's translation).

<sup>104</sup> Zakon Ukraïny "Pro banky i bankivsku diïalnist" [Law of Ukraine "On Banks and Banking Activity"], *supra* note 103, Article 35 (in author's translation).

<sup>105</sup> Zakon Ukraïny "Pro banky i bankivsku diïalnist" [Law of Ukraine "On Banks and Banking Activity"], *supra* note 103, Article 34 (in author's translation).

<sup>106</sup> E-Money Regulation, *supra* note 95, p. 1.3 of Chapter 1 (in author's translation).

Second, the E-Money Regulation sets out a number of rules and requirements with respect to the issuance of electronic money. In particular, in Ukraine the electronic money may be denominated only in the national currency of Ukraine, Hryvnia (UAH)<sup>107</sup>. In addition, unlike the E-Money Directive which does not specifically indicate the moment when electronic money is considered issued, generally referring to the necessity to provide it to the electronic money holder without delay after the receipt of funds in payment thereof,<sup>108</sup> in Ukraine the E-Money Regulation expressly sets the moment when electronic money is deemed to be issued, namely “from the time of its upload by the issuer or the operator to an electronic device at command of a user or an agent.”<sup>109</sup>

Shortly (i.e., within 10 days) after the issuer starts issuing electronic money it is required to notify this to the NBU and further to report quarterly on the activities related to the issuance and circulation of electronic money.<sup>110</sup>

Furthermore, the E-Money Regulation limits the amounts of electronic money to be issued. In particular, the amount of issued electronic money shall not exceed “the amounts of cash or non-cash funds received by him [the issuer] from the users and agents (except for the replenishment agent<sup>111</sup>), and the amounts of cash received by the replenishment agent which must be transferred to the issuer.”<sup>112</sup> Such requirements are generally aimed at restricting the issuance of electronic money in excess of the funds actually received by the issuers from the agents and users, thus contributing to preserving the balance of the issuer’s monetary obligations and its assets and maintaining its sound financial condition. They should also be

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<sup>107</sup> E-Money Regulation, *supra* note 95, p. 2.1 of Chapter 2 (in author’s translation) .

<sup>108</sup> E-Money Directive, *supra* note 1, Article 6(3).

<sup>109</sup> E-Money Regulation, *supra* note 95, p. 2.3 of Chapter 2 (in author’s translation).

<sup>110</sup> E-Money Regulation, *supra* note 95, p. 2.5 and p. 2.6. of Chapter 2 (in author’s translation).

<sup>111</sup> E-Money Regulation, *supra* note 95, p. 1.3 of Chapter 1 (stating that the replenishment agent is an agent providing the means of replenishment of electronic devices with electronic money under agreement with the electronic money issuer) (in author’s translation).

<sup>112</sup> E-Money Regulation, *supra* note 95, p. 2.5 and p. 2.6. of Chapter 2 (in author’s translation).

viewed as supporting the issuer's ability to redeem electronic money when required and in this way protecting the users of electronic money.

In contrast to the E-Money Directive, Ukrainian E-Money Regulation specifically establishes certain limits of electronic money to be stored on an electronic device at command of the user. For instance, "the amount of electronic money on a non-replenishable electronic device shall not exceed UAH 2,000"<sup>113</sup> (approximately EUR 133) and UAH 8,000 (approximately EUR 530) on a replenishable electronic device.<sup>114</sup> These provisions appear to be aimed at controlling the payments made with the use of electronic money, avoiding money-laundering and potential use of electronic money for the circumvention of settlement rules established by Ukrainian law. For example, Ukrainian law establishes a limit on payments in cash between the individual entrepreneurs at UAH 10,000 per day<sup>115</sup> which could potentially be circumvented with the use replenishable electronic device, if there is no limit on the amount of electronic money stored on it.

#### 1.4. Conclusion

The initial analysis of the European and the U.S. approaches to the regulation of electronic money at the level of main terms and concepts performed in this Chapter clearly shows that both the European Union and the United States have introduced rather elaborate regulation of the electronic money issues. At this stage none of these jurisdictions may be viewed as insufficiently addressing the questions of electronic money. However, the approaches to such regulation slightly differ in the European Union and the United States.

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<sup>113</sup> E-Money Regulation, *supra* note 95, p. 2.4 of Chapter 2 (in author's translation).

<sup>114</sup> E-Money Regulation, *supra* note 95, p. 2.4 of Chapter 2 (in author's translation).

<sup>115</sup> Postanova Pravlinnia Natsionalnoho Banku Ukraïny "Pro vstanovlennia hranychnoi sumy rozrakhunkiv hotivkou" vid 6 chervnia 2013, No. 210, p. 1 [p. 1 of Resolution of the Board of the National Bank of Ukraine "On Establishing the Limit on Settlements in Cash" dated 6 June 2013, No. 210 (in author's translation)], registered by the Ministry of Justice of Ukraine on 2 July 2013, under No. 1109/23641, available at: <http://zakon2.rada.gov.ua/laws/show/z1109-13> (last visited April 2, 2014).



In the European Union the legislators introduced and operate a uniform concept and definition of “electronic money.” The E-Money Directive clearly defines this term and strictly specifies who can become an electronic money issuer. Further, the regulation directly addressed this narrow circle of persons and various aspects of their conduct.

In the United States the matters of electronic money are regulated in a different way. First of all, the United States lack a uniform concept and definition of “electronic money.” The U.S. legislation, at the federal level and the level of states, uses a number of different terms, such as the “stored value,” “money transmission,” “prepaid access” and “money services business,” to refer to the instruments similar to the European “electronic money” and the persons issuing them. On the one hand, it makes the regulation more complicated, especially taking into account that it may vary from state to state. On the other hand, it ensures that the relevant regulation will reach all persons involved in issuance of the instruments similar to the European electronic money.

Ukrainian approach to the regulation of electronic money currently significantly resembles the European approach. However, one of the most considerable differences between the European (as well as the U.S.) and Ukrainian regulation is that in Ukraine the electronic money may be issued only by the banks. This clearly precludes other players interested in the electronic money issuing business, but not in providing other purely banking services, from entering the market.

In addition, from the viewpoint of business and profitability, the banks may be more interested in developing other banking products, not related to issuance and circulation of electronic money, which would additionally hinder the development of the electronic money market in Ukraine, while other issuers (such as the electronic money institutions in the European Union) specifically focused on this product would contribute to its development.

Thus, at this stage it appears that the Ukrainian market would benefit from lifting the restrictions on the issuance of electronic money solely by the banks and providing other legal entities with possibility to pursue the electronic money issuing business, similarly to the way it was made in the European Union. At the same time, providing the possibility to engage in the money issuance to individuals (as proposed by the UMSA) now seems inappropriate.

## 2. Control and Supervision

Obviously, the proper operation of the electronic money market is impossible without a certain level of control and supervision by the competent authorities. Such control and supervision may take the form of the initial examination of a person intending to commence a business, usually performed during the licensing, registration or a similar authorization process which is necessary to certify that such person indeed possesses the necessary qualifications and resources to engage in the relevant business activity without creating an immediate threat to the customers and market. Further, such control and supervision may involve the scrutiny of transactions leading to changes in the major shareholders and controllers of a legal entity performing specific business activities to ensure that its shareholders and/or controllers have appropriate financial status, reputation, qualifications, etc. and will not adversely affect the legal entity whose shares they acquire and its business. In addition, specific control is necessary to avoid using the business for the purposes of money laundering or financing the terrorist activities.

This Chapter will focus the above aspects of control and supervision over the persons involved in money issuance in the European Union, the United States and Ukraine. However, before the analysis of these issues, it will first discuss the question of which authorities perform such control and supervision in the said jurisdictions and which competence and powers they have.

### **2.1. *European Union***

As indicated in Section 1.1.2. above, this research will mainly focus on such categories of the electronic money issuers recognized in the European Union as the credit institutions and the electronic money institutions, with specific focus on the latter. Therefore, the control and

supervision issues will also be discussed herein with respect to these two categories of the electronic money issuers.

### **2.1.1. Control and Supervision Bodies**

#### **2.1.1.1. Credit Institutions**

According to the Credit Institutions Directive regulating a broad range of issues related to the authorization and operation of the credit institutions in the European Union, “Member States shall designate competent authorities that carry out the functions and duties provided for in this Directive and in Regulation (EU) No 575/2013.”<sup>116</sup> The information about such authorities, including on how their functions are divided, must be provided to the Commission and the European Supervisory Authority (European Banking Authority).<sup>117</sup>

Thus, the Member States must themselves determine and appoint the competent authorities which will carry out, as required by the Credit Institutions Directive, the assessment of information provided by applicants for the purposes of obtaining the authorization as a credit institution, granting or refusal of such authorization,<sup>118</sup> its withdrawal,<sup>119</sup> as well as permanent monitoring of the credit institutions’ compliance with requirements of the Credit Institutions Directive.<sup>120</sup> In addition, such competent authorities of the Member States shall decide on the transactions of acquisition and/or increase of the qualifying holdings in credit institutions (i.e., whether such transactions may be detrimental to credit institutions and must be opposed)<sup>121</sup> and on the possibility for credit institutions to open branches in other Member States.<sup>122</sup> They will also perform prudential supervision of credit institutions<sup>123</sup> and will enjoy

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<sup>116</sup> Credit Institutions Directive, *supra* note 27, Article 4(1).

<sup>117</sup> Credit Institutions Directive, *supra* note 27, Article 4(1).

<sup>118</sup> Credit Institutions Directive, *supra* note 27, Article 15.

<sup>119</sup> Credit Institutions Directive, *supra* note 27, Article 18.

<sup>120</sup> Credit Institutions Directive, *supra* note 27, Article 14(3).

<sup>121</sup> Credit Institutions Directive, *supra* note 27, Articles 22, 23.

<sup>122</sup> Credit Institutions Directive, *supra* note 27, Article 35.

<sup>123</sup> Credit Institutions Directive, *supra* note 27, Article 49(1).

“supervisory powers to intervene in the activity of institutions that are necessary for the exercise of their function.”<sup>124</sup> Moreover, such competent authorities of the Member States will have “all information gathering and investigatory powers that are necessary for the exercise of their functions,”<sup>125</sup> while credit institutions in the Member States are required to provide such authorities with all the data necessary to assess if they fulfill all the applicable requirements,<sup>126</sup> and will have the power to impose sanctions, directly or together with other authorities.<sup>127</sup>

Thus, Member States themselves designate such competent authorities. For example, in Germany the supervision over the banking sector is performed by Bundesanstalt für Finanzdienstleistungsaufsicht [Federal Financial Supervisory Authority] (“**BaFin**”) in cooperation with Deutsche Bundesbank (Central Bank of Germany).<sup>128</sup> In Greece Τράπεζα της Ελλάδος (The Bank of Greece), the central bank of Greece, performs supervision over the credit institutions which are authorized in Greece and Greek branches of foreign credit institutions.<sup>129</sup>

<sup>124</sup> Credit Institutions Directive, *supra* note 27, Article 64(1).

<sup>125</sup> Credit Institutions Directive, *supra* note 27, Article 65(3).

<sup>126</sup> Credit Institutions Directive, *supra* note 27, Article 4(5).

<sup>127</sup> Credit Institutions Directive, *supra* note 27, Article 64(2).

<sup>128</sup> BANKS & FINANCIAL SERVICES PROVIDERS, [http://www.bafin.de/EN/Supervision/BanksFinancialServicesProviders/banksfinancialservicesproviders\\_node.html](http://www.bafin.de/EN/Supervision/BanksFinancialServicesProviders/banksfinancialservicesproviders_node.html) (last visited April 2, 2014).

*See also* GUIDELINE ON CARRYING OUT AND ENSURING THE QUALITY OF THE ONGOING MONITORING OF CREDIT AND FINANCIAL SERVICES INSTITUTIONS BY THE DEUTSCHE BUNDESBANK OF 21 MAY 2013 (English translation for information purposes only), [http://www.bafin.de/SharedDocs/Aufsichtsrecht/EN/Richtlinie/rl\\_130521\\_aufsichtsrichtlinie\\_en\\_ba.html?nn=2690730](http://www.bafin.de/SharedDocs/Aufsichtsrecht/EN/Richtlinie/rl_130521_aufsichtsrichtlinie_en_ba.html?nn=2690730) (last visited April 2, 2014).

<sup>129</sup> ENGLISH VERSION OF THE LAW No. 3601 DATED 1 AUGUST 2007 (GREECE), Article 25 (1), [http://www.bankofgreece.gr/BogDocumentEn/Law\\_3601\\_2007.pdf](http://www.bankofgreece.gr/BogDocumentEn/Law_3601_2007.pdf) (last visited April 2, 2014).

Starting from 4 November 2014 the European Central Bank will take a more active part in the prudential supervision of credit institutions in the European Union.<sup>130</sup> In Member States which have Euro as their official currency, as well as in those non-Euro Member States, “where close cooperation has been established between the European Central Bank and the national competent authority of such Member State,”<sup>131</sup> it will, *inter alia*, adopt final decisions as to the authorization of credit institutions<sup>132</sup> and proposed acquisitions of qualified holdings in credit institutions,<sup>133</sup> as well as perform other regulatory and supervision tasks, especially with respect to the credit institutions which are considered to be significant (i.e., “of significant relevance to with regards to the domestic economy”).<sup>134</sup> Thus, the operation of system of the competent authorities regulating and supervising such category of electronic money issuers as credit institutions will change at the end of 2014.

#### 2.1.1.2. Electronic money institutions.

Except for listing a number of powers the competent authorities shall exercise, the E-Money Directive does not set out any other rules with respect to the competent authorities to supervise the operation of the electronic money institutions. However, such provisions are established by the Payment Services Directive whose provisions on the competent authorities and supervision apply to the electronic money institutions *mutatis mutandis*.<sup>135</sup>

The Payment Services Directive requests the Member States to nominate as competent authorities to be “responsible for the authorisation and prudential supervision”<sup>136</sup> of the

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<sup>130</sup> Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, 2013 O.J. (L 287) 63, Article 33 (2) [hereinafter *ECB Regulation*].

<sup>131</sup> *Id.* at Article 7(1).

<sup>132</sup> ECB Regulation, *supra* note 81, Article 14.

<sup>133</sup> ECB Regulation, *supra* note 81, Article 15.

<sup>134</sup> ECB Regulation, *supra* note 81, Article 6 (4).

<sup>135</sup> E-Money Directive, *supra* note 1, Article 3 (1) (according to Article 3 of the E-Money Directive “Articles 5 and 10 to 15 . . . of Directive 2007/64/EC shall apply to electronic money institutions *mutatis mutandis*.”)

<sup>136</sup> Payment Services Directive, *supra* note 6, Article 20 (1).

electronic money institutions and perform other relevant functions “either public authorities, or bodies recognized by national law or by public authorities expressly empowered for that purpose by national law, including national central banks.”<sup>137</sup> Such competent authorities of the Member States shall have all the necessary powers required to perform their functions<sup>138</sup> and, in particular, shall be authorized to:

- (a) to require the [electronic money] institution to provide any information needed to monitor compliance;
- (b) to carry out on-site inspections at the [electronic money] institution, at any agent or branch ... under the responsibility of the [electronic money] institution, or at any entity to which activities are outsourced;
- (c) to issue recommendations, guidelines and, if applicable, binding administrative provisions; and
- (d) to suspend or withdraw authorisation<sup>139</sup>

In addition, such competent authorities shall have the powers to impose sanctions and other measures for the breach of applicable rules and requirements,<sup>140</sup> as well as to accept and consider complains of the customers, users and other parties as to the violations committed by the electronic money institutions and other payment service providers, such as credit institution.<sup>141</sup>

Currently in the United Kingdom the powers and duties of the competent authorities are performed by the Financial Conduct Authority.<sup>142</sup> In Germany, as in case with credit institutions, such powers are mainly vested with BaFin which performs them in close

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<sup>137</sup> Payment Services Directive, *supra* note 6, Article 20(1).

<sup>138</sup> Payment Services Directive, *supra* note 6, Article 20(2).

<sup>139</sup> Payment Services Directive, *supra* note 6, Article 21(1).

<sup>140</sup> Payment Services Directive, *supra* note 6, Article 22(1).

<sup>141</sup> Payment Services Directive, *supra* note 6, Article 80(1).

<sup>142</sup> The Electronic Money Regulations, 2011 (U.K.), *supra* note 48, §§ 2, 4, 5, 6, 10, 17, 48, 49, 51, 52.

cooperation with Deutsche Bundesbank.<sup>143</sup> In Greece prudential supervision over electronic money institutions is performed by the Bank of Greece.<sup>144</sup>

### **2.1.2. Registration and Authorization Requirements**

As a rule, the first inspection when the competent authorities verify the company's compliance with the legislative requirements and standards occurs at the moment of its registration and/or receipt of authorization for performance of certain business activities. In the course of such inspection, the authorities may verify adherence of the company to the initial capital requirements, check major shareholders and managers of the company, its business plans and prospects in order to ensure its proper operation and the ability to provide relevant services to the customers upon its registration and/or authorization, as applicable. In the European Union such mechanism applies to such types of the electronic money issuers as the credit institutions and the electronic money institutions. In order to understand how these procedures allow the authorities to inspect and verify compliance of the credit institutions and the electronic money institutions with the established requirements, let us further analyze them in more detail.

#### **2.1.2.1. Credit Institutions**

According to the Credit Institutions Directive, credit institutions in the European Union are required to "obtain authorisation before commencing their activities."<sup>145</sup> Requirements for the

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<sup>143</sup>Gesetz über die Beaufsichtigung von Zahlungsdiensten (Zahlungsdiensteaufsichtsgesetz - ZAG), 2009 (Germany) available at: <http://www.gesetze-im-internet.de/bundesrecht/zag/gesamt.pdf> (last visited April 3, 2014). Unofficial translation: Payment Services Supervision Act of 25 June 2009 (Federal Law Gazette I, p. 1506), as amended by Article 2 subsection (74) of the Act of 22 December 2011 (Federal Law Gazette I, p. 3044) available at:

[http://www.bafin.de/SharedDocs/Downloads/EN/Aufsichtsrecht/dl\\_zag\\_en.pdf?\\_\\_blob=publicationFile](http://www.bafin.de/SharedDocs/Downloads/EN/Aufsichtsrecht/dl_zag_en.pdf?__blob=publicationFile) (translation does not include all the latest changes) (last visited April 3, 2014).

<sup>144</sup> CONFORMITY ASSESSMENT OF DIRECTIVE 2009/110/EC GREECE, [http://ec.europa.eu/internal\\_market/payments/docs/emoney/1309-study/greece\\_en.pdf](http://ec.europa.eu/internal_market/payments/docs/emoney/1309-study/greece_en.pdf) (last visited April 2, 2014).

<sup>145</sup> Credit Institutions Directive, *supra* note 27, Article 8(1).



authorization shall be established by the Member States and notified to the European Supervisory Authority (European Banking Authority).<sup>146</sup> In any case, the authorization shall not be granted if the applicant does not meet the capital requirements established by the Credit Institutions Directive (i.e., if “a credit institution does not hold separate own funds or where its initial capital is less than EUR 5 million”<sup>147</sup>, except for in certain specific cases set forth by the Credit Institutions Directive<sup>148</sup>), in case there is less than two persons to “effectively direct the business of the applicant credit institution”<sup>149</sup> or where its management body members do not comply with requirements, for instance, to their reputation and knowledge,<sup>150</sup> introduced by the Credit Institution Directive.<sup>151</sup> The competent authorities will also refuse the authorization in case the applicant credit institution does not inform it about the owners of the qualifying holdings therein and the amounts of such holdings (or, in case no one has a qualifying holding in the credit institution, of its 20 largest shareholders),<sup>152</sup> or in case the competent authorities consider the shareholders of the credit institution unsuitable<sup>153</sup> in terms of their reputation, knowledge, financial status, etc.<sup>154</sup> Therefore, the competent authorities perform a comprehensive check in order to verify that the applicant credit institution meets the requirements established for the commencement of its activities, thus ensuring that the applicant conforms to the established standards and may appropriately operate and provide services at the financial market.

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<sup>146</sup> Credit Institutions Directive, *supra* note 27, Article 8(1).

<sup>147</sup> Credit Institutions Directive, *supra* note 27, Article 12(1).

<sup>148</sup> Credit Institutions Directive, *supra* note 27, Article 12(4).

<sup>149</sup> Credit Institutions Directive, *supra* note 27, Article 13(1).

<sup>150</sup> Credit Institutions Directive, *supra* note 27, Article 91.

<sup>151</sup> Credit Institutions Directive, *supra* note 27, Article 13(2).

<sup>152</sup> Credit Institutions Directive, *supra* note 27, Article 14(1).

<sup>153</sup> Credit Institutions Directive, *supra* note 27, Article 14(2).

<sup>154</sup> Credit Institutions Directive, *supra* note 27, Article 23(1).

After the authorization is granted, the competent authorities will inform the European Supervisory Authority (European Banking Authority) about that.<sup>155</sup> The list of credit institutions which have obtained authorization must be published (and regularly updated) on the website of the European Supervisory Authority (European Banking Authority).<sup>156</sup> Thus, the list of duly authorized credit institutions will be available to other market players and customers.

However, in certain cases the authorization obtained by a credit institution may be withdrawn. The grounds for its withdrawal also reflect the necessity to ensure the proper operation of a credit institution. For example, the authorization shall be withdrawn if the credit institution “does not make use of the authorisation within 12 months, expressly renounces the authorisation or has ceased to engage in business for more than six months...,”<sup>157</sup> or in case the authorization was obtained “through false statements or any other irregular means,”<sup>158</sup> or if the credit institution “no longer fulfils the conditions under which authorisation was granted”<sup>159</sup> or other requirements.<sup>160</sup>

#### **2.1.2.2. Electronic Money Institutions**

As previously discussed in Section 1.1.2. hereof, in order to legitimately issue electronic money, a legal entity must comply with specific requirements of the E-Money Directive, be authorized as an electronic money institution and registered with the register of electronic money institutions. Requirements as to the authorization are established by the Payment

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<sup>155</sup> Credit Institutions Directive, *supra* note 27, Article 20(1).

<sup>156</sup> Credit Institutions Directive, *supra* note 27, Article 20(2).

<sup>157</sup> Credit Institutions Directive, *supra* note 27, Article 18(a).

<sup>158</sup> Credit Institutions Directive, *supra* note 27, Article 18(b).

<sup>159</sup> Credit Institutions Directive, *supra* note 27, Article 18(c).

<sup>160</sup> Credit Institutions Directive, *supra* note 27, Article 18.

Services Directive whose provisions establishing the terms and conditions of the authorization process apply to the electronic money institutions *mutatis mutandis*.<sup>161</sup>

Legal entities intending to provide services as the electronic money institutions must be authorized as such before they start rendering such services.<sup>162</sup> In order to obtain such authorization, a legal entity shall apply to the competent authorities in the relevant (home) Member State and provide them with an extensive set of documents<sup>163</sup> which should permit the relevant authorities to perform the thorough assessment of the applicant. If, based on such assessment, the competent authorities come to a conclusion that the structure, management, risk-control and other internal systems are sufficient and adequate for the services to be provided by the electronic money institution and the owners of the qualifying holdings in it are appropriate, the authorization will be granted.<sup>164</sup> Thus, it appears that the main purpose of such assessment is to ensure that the company which has successfully passed it will be able to properly operate and render its services after the authorization is granted.

In case of changes to the documents and information submitted to the competent authorities during the authorization process, such changes must be promptly communicated to the authorities,<sup>165</sup> which should ensure their capability to permanently control the electronic money institution's compliance with all applicable requirements.

In certain cases the authorization may be withdrawn by the competent authorities. The grounds for its withdrawal are generally similar to those established for the credit institutions and include the failure to use the authorization during a period of 12 months, suspension of engagement in business operations for a period exceeding six months, failure to of the

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<sup>161</sup> E-Money Directive, *supra* note 1, Article 3(1) (according to Article 3 of the E-Money Directive “Articles 5 and 10 to 15 . . . of Directive 2007/64/EC shall apply to electronic money institutions *mutatis mutandis*.”).

<sup>162</sup> Payment Services Directive, *supra* note 6, Article 10(1).

<sup>163</sup> Payment Services Directive, *supra* note 6, Article 5.

<sup>164</sup> Payment Services Directive, *supra* note 6, Article 10.

<sup>165</sup> Payment Services Directive, *supra* note 6, Article 14.

electronic money institution to further comply with the requirements and conditions of authorization, or if the electronic money institutions “would pose a threat to the stability of the payment system,”<sup>166</sup> etc.

The grounds for withdrawal of the authorization appear to have been specifically elaborated in order to additionally protect the market from entities which may pose a threat to it, its players and customers, for instance, in case of inappropriate and unsound operation of the electronic money institution caused by its failure to comply with the authorization requirements. Therefore, necessity to obtain authorization may be generally viewed as a means of protection of the market and control over its participants.

In addition to obtaining an authorization, the electronic money institutions must be included in a public register of the authorized electronic money institutions in the home Member State where it is registered.<sup>167</sup> Obviously, the purpose of introducing such requirement was to provide public (customers) with an opportunity to verify information about the electronic money institution before using its services and prevent the cases of fraud by the unauthorized company issuing instruments similar to electronic money.

### **2.1.3. Control Over Changes in Ownership of the Electronic Money Issuers**

In many cases the shareholders and controllers of a company may influence its operation which, in its turn, may negatively affect its customers. Due to this, the changes in holdings in certain companies are closely monitored by the regulator. In many jurisdictions such companies include banks and other credit and financial institutions. At the European level these requirements were introduced and apply to such categories of the electronic money issuers as credit institutions and electronic money institutions.

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<sup>166</sup> Payment Services Directive, *supra* note 6, Article 11.

<sup>167</sup> Payment Services Directive, *supra* note 6, Article 13.

### 2.1.3.1. Credit Institutions

Currently, the rules permitting the competent authorities of the Member States to monitor changes in holdings in the credit institutions are set forth in the Credit Institutions Directive.

In particular, it requires that:

Member States shall require any natural or legal person or such persons acting in concert (the "proposed acquirer"), who have taken a decision either to acquire, directly or indirectly, a qualifying holding in a credit institution or to further increase, directly or indirectly, such a qualifying holding in a credit institution as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20 %, 30 % or 50 % or so that the credit institution would become its subsidiary (the "proposed acquisition"), to notify the competent authorities of the credit institution in which they are seeking to acquire or increase a qualifying holding in writing in advance of the acquisition, indicating the size of the intended holding and the relevant information...<sup>168</sup>

For the purposes of this rule, the term "qualifying holding" shall mean "a direct or indirect holding in an undertaking which represents 10 % or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of that undertaking".<sup>169</sup> Therefore, the acquisition, whether direct or indirect, of only 10% of capital of a credit institution or voting rights or a holding enabling a person to "exercise a significant influence over [its] management"<sup>170</sup> is monitored and must be notified to the competent authorities. Such notification must be accompanied by information necessary for the competent authorities to decide on appropriateness of the contemplated transaction.<sup>171</sup> The authorities will "assess the suitability of the proposed acquirer and the financial soundness of the proposed acquisition"<sup>172</sup> based on analysis of, *inter alia*, the proposed acquirer's reputation, reputation and qualifications of senior managers to administrate activities of the

<sup>168</sup> Credit Institutions Directive, *supra* note 27, Article 22 (1).

<sup>169</sup> Regulation No 575/2013, *supra* note 26, p.36 of Article 4(1) (for purposes of defining the term "qualifying interest" the Credit Institutions Directive refers to Article 4(1) of Regulation No 575/2013).

<sup>170</sup> Regulation No 575/2013, *supra* note 26, p.36 of Article 4(1).

<sup>171</sup> Credit Institutions Directive, *supra* note 27, Article 22.

<sup>172</sup> Credit Institutions Directive, *supra* note 27, Article 23 (1).

credit institution after the proposed acquisition, sound financial status of the proposed acquirer, the risk that as a result of such acquisition the credit institution will not be able to comply with existing prudential rules and requirements.<sup>173</sup> Based on these criteria competent authorities may decide to oppose the acquisition. In case such acquisition takes place irrespective of the competent authorities' opposition, in addition to certain specific sanctions, the voting rights of the acquirer will be suspended or his votes will be nullified or annulled.<sup>174</sup> Moreover, to ensure a comprehensive control over the changes in holdings in credit institutions, the Credit Institutions Directive requires the intentions to dispose of a qualifying holding in credit institutions to be notified to the competent authorities.<sup>175</sup> In addition, the credit institutions must themselves inform the authorities if they become aware of such transaction.<sup>176</sup>

Therefore, in the European Union credit institutions are subject to a system of measures designed to control the acquisitions and disposals of holdings in them and monitor who influences their operation.

#### **2.1.3.2. Electronic Money Institutions**

The approach to monitoring changes in holdings in electronic money institutions is to a great extent similar to that established for the credit institutions. According to the E-Money Directive:

Any natural or legal person who has taken a decision to acquire or dispose of, directly or indirectly, a qualifying holding in the meaning of . . . Directive 2006/48/EC in an electronic money institution, or to further increase or reduce, directly or indirectly, such qualifying holding as a result of which the proportion of the capital or of the voting rights held would reach, exceed or fall below 20 %,

<sup>173</sup> Credit Institutions Directive, *supra* note 27, Article 23(1).

<sup>174</sup> Credit Institutions Directive, *supra* note 27, Article 26(1).

<sup>175</sup> Credit Institutions Directive, *supra* note 27, Article 25(1).

<sup>176</sup> Credit Institutions Directive, *supra* note 27, Article 26(1).

30 % or 50 %, or so that the electronic money institution would become or cease to be its subsidiary, shall inform the competent authorities of their intention in advance of such acquisition, disposal, increase or reduction.<sup>177</sup>

The E-Money Directive does not itself define what should be considered a “qualifying holding” in an electronic money institution, referring instead to Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (Text with EEA relevance)<sup>178</sup> (“**Directive 2006/48/EC**”). However, it was repealed “with effect from 31 January 2014”<sup>179</sup> and all references thereto shall now refer to (i) the Credit Institutions Directive and (ii) Regulation No 575/2013, while the latter provides the same definition of the term “qualifying holding” as used for the credit institutions<sup>180</sup>. Thus, the approaches to monitoring changes in holdings in credit institutions and the electronic money institutions at the European level are uniform in most significant aspects. Similarly to the credit institutions, the acquisition (increase) and disposal (reduction) of a qualifying holding in an electronic money institution, whether direct or indirect, must be notified, together with all the relevant information, to the competent authorities.<sup>181</sup>

Should the persons acquiring or increasing the qualifying holding in an electronic money institution, negatively affect the institution, such transfers shall be opposed by the competent authorities which may apply a number of measures in this case, such as the “injunctions, sanctions against directors or managers, or the suspension of the exercise of the voting rights

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<sup>177</sup> E-Money Directive, *supra* note 1, Article 3(3).

<sup>178</sup> Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (Text with EEA relevance) 2006 O.J. (L 177) 1, Article 4(11).

<sup>179</sup> Credit Institutions Directive, *supra* note 27, Article 163.

<sup>180</sup> Regulation No 575/2013, *supra* note 26, p.36 of Article 4(1) (according to Article 163 of the Credit Institutions Directive and Annex II thereto, all references to Article 4 of Directive 2006/48/EC containing the definitions of terms, including the term “qualifying holding” should be construed as references to Article 3 of the Credit Institutions Directive. However, in relation to the term “qualifying interest”, the Credit Institutions Directive further refers to Regulation No 575/2013).

<sup>181</sup> E-Money Directive, *supra* note 1, Article 3(3).

attached to the shares held by the shareholders”<sup>182</sup> Furthermore, in case the transaction was carried out irrespective of the opposition of the competent authorities, the acquirer’s voting rights under the shares of an electronic money institution may be suspended and the votes nullified.<sup>183</sup>

In general, such provisions should provide sufficient control over the acquisitions of holdings in the electronic money institutions. However, it should be noted that the E-Money Directive allows Member States to waive such rules with respect to the electronic money institutions which conduct one or more business activities other than issuing electronic money<sup>184</sup>, which obviously may diminish the effect of such requirements and the control powers of the competent authorities.

#### 2.1.4. Anti-Money Laundering Requirements

In some cases electronic money may potentially be used for various speculations, money-laundering and the financing of illegal activities, including terrorism. Due to this, in the European Union the electronic money issuers are subject to a number of rules and requirements aimed at preventing the money laundering and financing terrorism. Such rules and requirements are established by Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (Text with EEA relevance) (“**Anti-Money Laundering Directive**”) which was extended so as to apply to the electronic money issuers by the E-Money Directive.<sup>185</sup>

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<sup>182</sup> E-Money Directive, *supra* note 1, Article 3(3).

<sup>183</sup> E-Money Directive, *supra* note 1, Article 3(3).

<sup>184</sup> E-Money Directive, *supra* note 1, Article 3(3).

<sup>185</sup> E-Money Directive, *supra* note 1, Article 19 (Article 19 of the E-Money Directive amended the definition of a “financial institution” which is set out, and subject to regulation, by the Anti-Money Laundering Directive so as to include “an undertaking, other than the credit institution, which carries out one or more operations included in . . . points 14 and 15 of Annex I to Directive 2006/48/EC.” The E-Money Directive has simultaneously



In order to prevent money laundering and financing terrorism, the Anti-Money Laundering Directive requests credit institutions<sup>186</sup>, which under the E-Money Directive constitute one of the categories of the electronic money issuers, and the financial institutions generally including the undertakings which perform the electronic money issuing activities,<sup>187</sup> *inter alia*, to carry out the “customer due diligence measures”<sup>188</sup> including identification of the customers and verification of their identities, identification of the customer’s beneficial owners, constant monitoring of relations with its counterparties and analysis of the performed transactions, etc.<sup>189</sup> In some cases such customer due diligence may be performed in a simplified manner<sup>190</sup> or, should the Member States so decide, not to be performed at all.<sup>191</sup> For instance, Member States may permit not to perform the customer due diligence in respect of:

electronic money . . . where, if it is not possible to recharge, the maximum amount stored electronically in the device is no more than EUR 250, or where, if it is possible to recharge, a limit of EUR 2 500 is imposed on the total amount transacted in a calendar year, except when an amount of EUR 1 000 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.<sup>192</sup>

Such exemption of the minor transactions, which are unlikely to be used for purposes of the money laundering or financing of terrorism, from the general rules requesting performance of

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amended the said list of operations in Annex I of Directive 2006/48/EC adding such activity as “[i]ssuing electronic money” thereto as point 15 (p. 2 of Article 20 of the E-Money Directive). Directive 2006/48/EC was further repealed and substituted by the Credit Institutions Directive. Thus, Annex I to Directive 2006/48/EC was substituted by Annex I to the Credit Institutions Directive (as directed by Correlation Table in Annex II to the Credit Institutions Directive), which still contains the same point 15 referring to “[i]ssuing electronic money”).

<sup>186</sup> Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (Text with EEA relevance) 2005 O.J. (L 309) 15, Article 2(1)(1) [hereinafter *Anti-Money Laundering Directive*].

<sup>187</sup> *Id.* at Article 3(2) (as amended by the E-Money Directive).

<sup>188</sup> Anti-Money Laundering Directive, *supra* note 186, Articles 7 and 8.

<sup>189</sup> Anti-Money Laundering Directive, *supra* note 186, Article 8.

<sup>190</sup> Anti-Money Laundering Directive, *supra* note 186, Section 2 of Chapter II.

<sup>191</sup> Anti-Money Laundering Directive, *supra* note 186, Article 11(5).

<sup>192</sup> Anti-Money Laundering Directive, *supra* note 186, Article 11(5)(d) (as amended by the E-Money Directive).

the customer due diligence may significantly reduce the workload of the electronic money issuers and, thus, facilitate their operation.

Further, in addition to the customer due diligence requirements, where a person subject to the Anti-Money Laundering Directive, such as the electronic money issuer, “knows, suspects or has reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted,”<sup>193</sup> such person must notify this to the relevant financial intelligence unit.

The Anti-Money Laundering Directive also establishes rules prohibiting the credit institutions and financial institutions (in particular, the electronic money issuers) to keep “anonymous accounts or anonymous passbooks.”<sup>194</sup> Thus, the operation of electronic wallets or other similar technological schemes involving anonymous accounts is not permitted and may not be carried out by the electronic money issuers.

## **2.2. United States**

### **2.2.1. Control and Supervision Bodies**

In the United States the activities of the electronic money issuers are controlled and supervised by a number of different authorities. For instance, bank issuers of electronic money are subject to supervision by the Office of the Comptroller of the Currency (“OCC”) and the Federal Deposit Insurance Corporation.<sup>195</sup> The OCC performs a wide range of regulatory and supervisory functions in the U.S. banking sector, such as, for example, approval or disapproval of changes in control of the national banks.<sup>196</sup> The Federal Deposit

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<sup>193</sup> Anti-Money Laundering Directive, *supra* note 186, p.1 (a) of Article 22 (1)(a).

<sup>194</sup> Anti-Money Laundering Directive, *supra* note 186, Article 6.

<sup>195</sup> Ramasastry, *supra* note 51, at 686.

<sup>196</sup> 12 CFR § 5.50.

Insurance Corporation is in charge of insuring the deposits of banks and saving associations<sup>197</sup> and their examination.<sup>198</sup>

Furthermore, the UMSA establishes a number of functions to be performed by the state competent regulator, referred to as a “superintendent,”<sup>199</sup> for the purposes of supervision and regulation of persons performing money transmission activities. Under the UMSA, the superintendent shall perform such functions and tasks as, in particular, licensing<sup>200</sup> or approval of a person’s engagement in the money transmission activities<sup>201</sup>, suspension of the license<sup>202</sup>, “annual examination[s] of a licensee or of any of its authorized delegates,”<sup>203</sup> as well as other examinations, in particular, in case of their alleged violation of the applicable legislative requirements<sup>204</sup>, approve the changes of control in entities performing money transmission.<sup>205</sup> In addition, under the UMSA, the superintendent can issue orders “requiring the licensee or authorized delegate to cease and desist from the violation”<sup>206</sup> if their actions are expected to cause harm or impose civil penalties for violation of the applicable norms.<sup>207</sup>

Since the UMSA, in order to be effective, must be enacted by the states, in each state enacting it the functions of the superintendent will be performed by a competent regulator of that particular state. For instance, in Texas the functions of such “superintendent” are generally vested with the “the Banking Commissioner of Texas or a person designated by the banking commissioner and acting under the banking commissioner's direction and

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<sup>197</sup> 12 U.S. Code § 1811.

<sup>198</sup> See 12 U.S. CODE § 1820 (b), 12 U.S. CODE § 1817.

<sup>199</sup> UMSA, *supra* note 65, § 102 (22).

<sup>200</sup> UMSA, *supra* note 65, § 205.

<sup>201</sup> UMSA, *supra* note 65, § 203 (a).

<sup>202</sup> UMSA, *supra* note 65, § 801.

<sup>203</sup> UMSA, *supra* note 65, § 601 (a).

<sup>204</sup> UMSA, *supra* note 65, § 601 (b).

<sup>205</sup> UMSA, *supra* note 65, § 604.

<sup>206</sup> UMSA, *supra* note 65, § 803(a).

<sup>207</sup> UMSA, *supra* note 65, § 805.

authority.”<sup>208</sup> In addition, the Finance Commission of Texas is vested with powers to adopt relevant rules necessary for enforcement of the Texas Money Services Act and for “preserv[ation] and protect[i]on [of] the safety and soundness of money services businesses.”<sup>209</sup>

In states which have not enacted the UMSA the money transmitters are supervised by the competent local regulators in accordance with the relevant state laws. For instance, in Florida the Regulation of Trade, Commerce, Investments, and Solicitations provides the Office of Financial Regulation of the Financial Services Commission with powers to supervise the activities of the money transmitters and other money services businesses.<sup>210</sup>

Furthermore, at the federal level, the U.S. money services businesses, including the sellers and providers of prepaid access whose activities may be deemed similar to those of the European electronic money issuers, are regulated and monitored by the Financial Crimes Enforcement Network (“**FinCEN**”)<sup>211</sup>. In particular, it performs the registration of the money services businesses, except for the agents and sellers of prepaid access,<sup>212</sup> which is discussed in more detail in Section 2.2.2. below.

Thus, in the United States there is no single authority to centrally and uniformly regulate and supervise all matters related to the issuance and circulation of the electronic money (its U.S. equivalents). Its issuers are regulated and supervised by, and thus need to interact with, various authorities making the whole regulation and supervision system to a certain extent complicated.

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<sup>208</sup> TEX. MONEY SERVICES ACT, FIN. CODE, *supra* note 60, § 151.002 (b)(5).

<sup>209</sup> TEX. MONEY SERVICES ACT, FIN. CODE, *supra* note 60, § 151.102 (a).

<sup>210</sup> FLA. STAT. ANN. § 560.105(1)(a) (West)

<sup>211</sup> VIRTUAL CURRENCY REGULATION, <http://www.dfi.wa.gov/cs/pdf/virtual-currency-regulation.pdf> (last visited April 2, 2014).

<sup>212</sup> 31 CFR § 1022.380(a)(1).

### 2.2.2. Registration and Authorization Requirements

Similarly to the authorization requirements established for the credit institutions and the electronic money institutions in the European Union, the U.S. federal and state laws introduce a number of analogous procedures to allow the competent regulators to conduct the initial examination of a person intending to engage in certain business activities, such as, for instance, the money transmission business, so as to determine if it is able to appropriately operate in compliance with the applicable legal requirements. For purposes of the analysis of such procedures in the United States, I will concentrate on the non-banking issuers of the electronic money (the U.S. equivalents thereof), starting with the relevant provisions set forth by the UMSA.

The UMSA requires a person intending to engage in the money transmission activities to obtain the relevant license. For this purpose the applicant must provide the competent regulator of the relevant state with a large set of documents and information, including the data on the money services previously rendered by the applicant, services which he now intends to provide, information on the states where the applicant holds money transmission licenses, as well as on the possible revocations or suspensions of such licenses.<sup>213</sup> In addition, the applicant must disclose “a list of any criminal convictions of the applicant and any material litigation in which the applicant has been involved . . . preceding the submission of the application.”<sup>214</sup> For this purpose, the UMSA specifically defines the “material litigation” as the “litigation that . . . is significant to an applicant’s or a licensee’s financial health and would be required to be disclosed in the applicant’s or licensee’s annual audited financial statements, report to shareholders, or similar records.”<sup>215</sup> In case the applicant is a legal entity, the above-mentioned data as to the criminal convictions and material litigation must be

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<sup>213</sup> UMSA, *supra* note 65, § 202 (b).

<sup>214</sup> UMSA, *supra* note 65, § 202 (b).

<sup>215</sup> UMSA, *supra* note 65, § 202 (a).

provided with respect to “any [its] executive officer, manager, director, or person in control of, the applicant has been involved . . . .”<sup>216</sup>

Additionally, it should be emphasized that the UMSA requires the applicant to provide, together with the license application, “a surety bond, letter of credit, or other similar security acceptable to the [regulator]”<sup>217</sup> for a specific amount or otherwise pay certain amount as security “for the benefit of any claimant against the licensee to secure the faithful performance of the obligations of the licensee with respect to money transmission.”<sup>218</sup> Such instrument shall secure the claims to the licensee not less than for five years after the licensee terminates rendering services in the relevant state.<sup>219</sup> However, the terms of such instruments may be changed by the regulators.<sup>220</sup>

Furthermore, in addition to licensing, the UMSA introduces a special approval procedure. In case a person already holds the money transmission license in another state, such person may, in the state where such person now intends to engage in money transmission, obtain approval of the regulator to perform such activities instead of going through another licensing procedure.<sup>221</sup> However, the applicant may choose such option only if certain conditions are satisfied, in particular, if “the state in which the person is licensed has enacted the Uniform Money Services Act or the [competent regulator] determines that the money transmission laws of that state are substantially similar to those imposed by the law of this state.”<sup>222</sup> Generally, such procedure should enable a money transmitter duly licensed in one state to perform money transmission in other states based on the same license and subject only to the

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<sup>216</sup> UMSA, *supra* note 65, § 202(c).

<sup>217</sup> UMSA, *supra* note 65, § 204(a).

<sup>218</sup> UMSA, *supra* note 65, § 204(b).

<sup>219</sup> UMSA, *supra* note 65, § 204(d).

<sup>220</sup> UMSA, *supra* note 65, § 204(d).

<sup>221</sup> UMSA, *supra* note 65, § 203(a).

<sup>222</sup> UMSA, *supra* note 65, § 203(a)(1).

approval in such other states, thus simplifying its access to other jurisdictions.<sup>223</sup> However, it appears that some of the states enacting the UMSA (e.g., Texas,<sup>224</sup> Washington<sup>225</sup>) did not transpose such provisions into their state laws which, thus, do not foresee the possibility of applying such approval procedure.

Under the UMSA, the license is subject to annual renewal which requires the payment of a specific sum of the renewal fee and submission of the licensee's renewal report, including the audited financial statements of the licensee and other information as to its operations, investments, changes to the previously submitted data, to the competent regulator.<sup>226</sup> In some states the regulator may annually inspect the licensee instead of requesting submission of such reports.<sup>227</sup>

In some cases the license may also be revoked. Such cases generally include various violations committed by the licensee, "engag[ing] in an unsafe or unsound practice,"<sup>228</sup> other actions showing that the licensee does not operate properly and may potentially negatively affect the market and, particularly, the customers.<sup>229</sup>

The states which have enacted the UMSA generally have similar procedures established by their state laws.<sup>230</sup> However, in certain cases they either go further in regulating certain aspects of the licensing procedures in more detail, or omit certain provisions set forth by the UMSA (e.g. the approval procedure mentioned above).

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<sup>223</sup> UMSA, *supra* note 65, comments to Section 203.

<sup>224</sup> See TEX. MONEY SERVICES ACT, FIN. CODE, *supra* note 60.

<sup>225</sup> See Wash. Rev. Code Ann. §§ 19.230.005 – 19.230.905 (West, 2013).

<sup>226</sup> UMSA, *supra* note 65, § 206.

<sup>227</sup> UMSA, *supra* note 65, comments to Section 203.

<sup>228</sup> UMSA, *supra* note 65, § 801(a)(6).

<sup>229</sup> UMSA, *supra* note 65, § 801.

<sup>230</sup> See TEX. MONEY SERVICES ACT, FIN. CODE, *supra* note 60, Subchapter C, Subchapter D.

Similar licensing procedures may be found in the state legislation of other states which have not enacted the UMSA. In Florida, according to Section 560.204 of the Regulation of Trade, Commerce, Investments, and Solicitations, “unless exempted<sup>231</sup>, a person may not engage in ... the selling or issuing of payment instruments<sup>232</sup> or in the activity of a money transmitter, for compensation, without first obtaining a license under this part.”<sup>233</sup>

Furthermore, additional registration requirements applicable to the money services businesses exist at the federal level. According to 31 CFR § 1022.380, “each money services business (whether or not licensed as a money services business by any State) must register with FinCEN,”<sup>234</sup> except for the sellers of prepaid access<sup>235</sup> and persons involved in the money services business solely as an agent of other money services businesses.<sup>236</sup> The application for such registration must be filed within the period of 180 days from the day “following the date the business is established.”<sup>237</sup> Further, the registration must be renewed every two calendar years.<sup>238</sup> In some cases the money services businesses must be re-registered.<sup>239</sup> Thus, constant supervision is exercised over the money services businesses at the federal level.

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<sup>231</sup> FLA. STAT. ANN. § 560.104 (West) (under § 560.104, the exempted persons include, *inter alia*, “banks, credit institutions, trust companies,” etc.)

<sup>232</sup> FLA. STAT. ANN. § 560.103 (West) (under § 560.103, the term “payment instrument” includes electronic instrument which, in its term, is defined as “a card, tangible object, or other form of electronic payment for the transmission or payment of money or the exchange of monetary value, including a stored value card or device that contains a microprocessor chip, magnetic stripe, or other means for storing information; that is prefunded; and for which the value is decremented upon each use” which thus includes stored value and may be interpreted so as to include electronic money).

<sup>233</sup> FLA. STAT. ANN. § 560.204 (West).

<sup>234</sup> 31 CFR § 1022.380 (a)(1).

<sup>235</sup> 31 CFR § 1022.380 (a)(1).

<sup>236</sup> 31 CFR § 1022.380 (a)(1).

<sup>237</sup> 31 CFR § 1022.380 (b)(3).

<sup>238</sup> 31 CFR § 1022.380 (b)(2).

<sup>239</sup> 31 CFR § 1022.380 (b)(4) (according to 31 CFR § 1022.380 (b)(4), the re-registration must be performed in the following cases: “if there is a transfer of more than 10 percent of the voting power or equity interests of a money services business (other than a money services business that must report such transfer to the Securities and Exchange Commission)”, “a change in ownership or control that requires the business to be re-registered under State law” or “than 50-per cent increase in the number of [the money services business’s] agents.”).



### 2.2.3. Control Over Changes in Ownership of the Electronic Money Issuers

Similarly to the European approach, the UMSA introduces rules to control the changes of shareholders and persons who control the licensed money transmitters. First of all, the UMSA introduces the term control, which shall mean

- (A) ownership of, or the power to vote, directly or indirectly, at least 25 percent of a class of voting securities or voting interests of a licensee or person in control of a licensee;
- (B) power to elect a majority of executive officers, managers, directors, trustees, or other persons exercising managerial authority of a licensee or person in control of a licensee; or
- (C) the power to exercise directly or indirectly, a controlling influence over the management or policies of a licensee or person in control of a licensee.<sup>240</sup>

The UMSA requires the licensed money transmitters to notify the competent regulator on the intended change of control shortly after it becomes aware of it and obtain the regulator's approval of the transaction resulting in the change of control.<sup>241</sup> In case, upon the examination of information and documents regarding such transaction, the regulator comes to the conclusion that the persons intending to acquire control possess "the competence, experience, character, and general fitness to operate the licensee . . . in a lawful and proper manner and that the public interest will not be jeopardized by the change of control"<sup>242</sup> the regulator will approve such acquisition.

In general, approach of the UMSA (and, thus, the states enacting it, unless their state legislation deviates from its provisions) is similar to the rules existing in the European Union. However, there are certain differences. In particular, the notification and approval requirements in case of changes in holdings in the electronic money issuer are triggered by the fact of reaching or exceeding of threshold comprising "10 % or more of the capital or of

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<sup>240</sup> UMSA, supra note 56, § 102 (5).

<sup>241</sup> UMSA, supra note 56, § 604 (a).

<sup>242</sup> UMSA, supra note 56, § 604 (c).

the voting rights,”<sup>243</sup> while the UMSA sets the threshold at 25 %. On the one hand, lower threshold of 10% established in the European Union may seem more beneficial for the purposes of controlling changes in the shareholdings, but, on the other hand, the decision as to such threshold should be adopted based on the legislation existing in each particular jurisdictions and taking into account the rights and powers to influence the company the shareholders may exercise holding certain per cent of the company’s shares or votes. In some jurisdictions the threshold of 25 per cent may constitute a reasonable decision.

Furthermore, the European rules expressly require obtaining approval of the competent authorities in case of acquisition of a qualified holding (i.e., starting from 10 per cent, as mentioned above) and its further increase so that it reaches or exceeds 20, 30 or 50 per cent respectively. The UMSA appears not to clearly regulate the issue of increase of control. Its provisions may be interpreted as requesting any change of control over the established 25% threshold to be subject to the approval, even if the actual change is minor (i.e., +/- 1%). The language of the UMSA leaves a level of uncertainty as to this matter.

In addition, as regards the federal regulation of the money services businesses registered with the FinCEN, it should be noted that in case the “money services business registered as such under the laws of any State experiences a change in ownership or control that requires the business to be re-registered under State law”<sup>244</sup> and “if there is a transfer of more than 10 percent of the voting power or equity interests of a money services business (other than a money services business that must report such transfer to the Securities and Exchange Commission),”<sup>245</sup> such money business service is required to re-register with the FinCEN. Thus, the FinCEN will keep the track of owners and controllers of the money services businesses.

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<sup>243</sup> Regulation No 575/2013, *supra* note 26, p.36 of Article 4(1).

<sup>244</sup> 31 CFR § 1022.380 (b)(4)

<sup>245</sup> 31 CFR § 1022.380 (b)(4)

### 2.2.4. Anti-Money Laundering Requirements

In the United States the rules aimed at preventing the money laundering by money services businesses, including the sellers and providers of prepaid access, are established by the Code of Federal Regulation (“**CFR**”). Such rules may be divided into several categories.

The first category of such rules requires the money services businesses to maintain certain internal anti-money laundering documents. They are required to “implement, and maintain an effective anti-money laundering program”<sup>246</sup> specifying various policies and procedures relating, in particular, to the customer identification, keeping records, and reporting.<sup>247</sup>

The second category consists of various reporting requirements. In particular, the money services businesses (except for the check cashers) must provide the competent regulator with the “report[s] of any suspicious transaction relevant to a possible violation of law or regulation.”<sup>248</sup> Such reporting requirements apply in case a transaction “involves or aggregates funds or other assets of at least \$2,000 . . . [except in cases specified by CFR], and the money services business knows, suspects, or has reason to suspect that the transaction”<sup>249</sup> involves or is related to funds received from criminal or other illegal activities.<sup>250</sup>

Another category of rules refers to the obligations of the money services businesses to verify the identities of their customers and record certain specific data about their customers.<sup>251</sup>

Furthermore, the CFR obliges money services businesses to maintain a number of various records, in particular, with respect to their transactions. For instance, the sellers and providers

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<sup>246</sup> 31 CFR §1022.210(a).

<sup>247</sup> 31 CFR §1022.210(d)(1).

<sup>248</sup> 31 CFR §1022.320(a)(1)

<sup>249</sup> 31 CFR §1022.320(a)(2)

<sup>250</sup> *Id.*

<sup>251</sup> 31 CFR § 1010.312, as referred by 31 CFR § 1022.312.

of prepaid access are required to “maintain access to transactional records for a period of five years”<sup>252</sup> which may be necessary to examine their past transactions.

## **2.3. Ukraine**

### **2.3.1. Control and Supervision Bodies**

As discussed in Section 1.3.2. above, in Ukraine electronic money can be issued only by banks.<sup>253</sup> The main regulator supervising the operation of banks and monitoring their compliance with the effective legislation of Ukraine is the NBU. Its functions generally include “licensing of the banking activity,”<sup>254</sup> “approval of the banks’ charters and amendments thereto,”<sup>255</sup> approval of the acquisition or increase of a qualifying holding<sup>256</sup> in a bank<sup>257</sup>, “regulat[ing] the operation of the payment systems and the systems of settlements in Ukraine,”<sup>258</sup> individual and consolidated supervision of the banks,<sup>259</sup> etc.

As to the role of the NBU in regulation of the electronic money in Ukraine, it should be noted that the Ukrainian E-Money Regulation adopted by the Board of the NBU itself constitutes a complication of the NBU requirements to the persons involved in issuance and circulation of the electronic money in Ukraine.<sup>260</sup>

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<sup>252</sup> 31 CFR §1022.420.

<sup>253</sup> E-Money Regulation, *supra* note 95, p. 1.4. of Chapter 1.

<sup>254</sup> Zakon Ukraïny “Pro Natsionalnyi Bank Ukraïny” vid 20 travnia 1999, No. 679-XIV (zi zminamy ta dopovnenniamy), p. 9 Stati 7 [p. 9 of Article 7 of the Law of Ukraine “On the National Bank of Ukraine” dated 20 May 1999 No. 679-XIV (as amended) (in author’s translation)], initially published at Holos Ukraïny on 22 June 1999, current version available at: <http://zakon4.rada.gov.ua/laws/show/679-14> (last visited on April 2, 2014) [hereinafter *Law of Ukraine “On the National Bank of Ukraine”*]

<sup>255</sup> *Id.* (in author’s translation)

<sup>256</sup> QUALIFYING HOLDING IN A BANK, [http://www.bank.gov.ua/control/uk/publish/article?art\\_id=123354](http://www.bank.gov.ua/control/uk/publish/article?art_id=123354) (last visited on April 2, 2014) (translation of the term “qualifying holding” (*istotna uchast*) was made by the NBU and is available at the official website of the NBU. In some cases it may also be referred to as substantial participation or significant interest) (in author’s translation).

<sup>257</sup> Law of Ukraine “On Banks and Banking Activity,” *supra* note 103, Article 34 (in author’s translation).

<sup>258</sup> Law of Ukraine “On the National Bank of Ukraine,” *supra* note 254, p. 6 of Article 7 (in author’s translation).

<sup>259</sup> Law of Ukraine “On the National Bank of Ukraine,” *supra* note 254, p. 8 of Article 7 (in author’s translation).

<sup>260</sup> E-Money Regulation, *supra* note 95, p. 1.2. of Chapter 1.

### 2.3.2. Registration and Authorization Requirements

The commencement of banking activities in Ukraine is strictly regulated by law introducing a long list of requirements to be met by the persons intending to establish a bank in Ukraine. First of all, the bank must be generally registered as a legal entity by the state registrar and included in the Uniform State Register of Legal Entities and Individual Entrepreneurs<sup>261</sup>. However, such registration must be preceded by the NBU approval of the charter of a legal entity which plans to perform the banking activity.<sup>262</sup> In order to obtain such approval a representative of the bank's founders must submit to the NBU a large set of documents and information on formation of the bank, identification of its founders, the persons who will indirectly (through others) hold qualifying holding in the bank and their reputation, members of the management body and the supervisory board of the bank's founders which are legal entities, financial condition of the bank's founders, documents confirming that the initial capital of the bank is paid up in full, and a number of other documents and data required by Ukrainian law.<sup>263</sup> The NBU examines such documents and decides on approval of the prospective bank's charter.

Under Ukrainian law, the NBU may refuse in approval of the charter, in particular, if “the business reputation of the founder, and for a founder – legal entity also of the members of its management body and/or the supervisory board . . . does not correspond to the requirements established by the National Bank of Ukraine,”<sup>264</sup> if the financial condition of the prospective bank's founders does not meet the NBU requirements,<sup>265</sup> “if the founder does not have own

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<sup>261</sup> Zakon Ukrainy “Pro derzhavnu reiestratsiiu iurydychnykh osib ta fizychnykh osib - pidryiemtsiv” vid 15 travnia 2003, No. 755-IV (zi zminamy ta dopovnenniamy), Statiia 25 [Article 25 of Law of Ukraine “On State Registration of Legal Entities and Individual Entrepreneurs” dated 15 May 2003, No. 755-IV (as amended) (in author's translation)], initially published at Holos Ukraïny on 24 June 2003, under No. 115, current version available at: <http://zakon4.rada.gov.ua/laws/show/755-15> (last visited April 2, 2014) (in author's translation).

<sup>262</sup> Law of Ukraine “On Banks and Banking Activity”, *supra* note 103, Article 34 (in author's translation).

<sup>263</sup> Law of Ukraine “On Banks and Banking Activity”, *supra* note 103, Article 17 (in author's translation).

<sup>264</sup> Law of Ukraine “On Banks and Banking Activity”, *supra* note 103, Article 18 (p. 4) (in author's translation).

<sup>265</sup> Law of Ukraine “On Banks and Banking Activity”, *supra* note 103, Article 18 (p. 5) (in author's translation).

funds to make the declared contribution to the charter capital [of the bank],”<sup>266</sup> or, for instance, if the ownership structure of the prospective bank and/or its founders that will have a qualifying holding therein do not meet the NBU requirements as to their transparency.<sup>267</sup>

Therefore, the first examination of the prospective bank’s (and, thus, the prospective electronic money issuer’s) compliance with the requirements of Ukrainian law is performed by the NBU even prior to its state registration as a legal entity.

Furthermore, another substantial examination of the bank is performed shortly after its state registration. During the period of 12 months after its state registration, a newly-registered bank must apply for issuance of the banking license by the NBU<sup>268</sup> which again requires the filing of an extensive set of documents with the NBU. This time the bank has to provide the NBU with its business-plan for the next three years, the documents evidencing the appointment and business reputation of the bank’s highest managers, availability of the organizational structure, premises, equipment, software and experts and their compliance with requirements of Ukrainian law, etc.<sup>269</sup> In case the NBU comes to a conclusion that the bank’s premises, equipment, etc. do not meet the set requirements, or the qualifications and business reputation of its senior managers do not correspond to the standards established by the NBU, the banking license will not be issued.<sup>270</sup>

Thus, the charter approval and licensing processes introduced by Ukrainian law make all prospective and newly-established banks subject to the repeated thorough examinations by the NBU. On the one hand, some of the relevant requirements established by Ukrainian law may appear complex and somewhat onerous, but, on the other hand, their main purpose is to

<sup>266</sup> Law of Ukraine “On Banks and Banking Activity”, *supra* note 103, Article 18 (p. 6) (in author’s translation).

<sup>267</sup> Law of Ukraine “On Banks and Banking Activity”, *supra* note 103, Article 18 (p. 7) (in author’s translation).

<sup>268</sup> Law of Ukraine “On Banks and Banking Activity”, *supra* note 103, Article 19 (in author’s translation).

<sup>269</sup> Law of Ukraine “On Banks and Banking Activity”, *supra* note 103, Article 19 (in author’s translation).

<sup>270</sup> Law of Ukraine “On Banks and Banking Activity”, *supra* note 103, Article 19-1 (in author’s translation).

ensure the viability of the bank, its proper management and operation, thus reducing the risks for its future partners and customers.

### **2.3.3. Control Over Changes in Ownership of the Electronic Money Issuers**

Similarly to the European Union and the United States, Ukraine has introduced a specific mechanism of control over changes in holdings in, and control over, the Ukrainian banks. First of all, the Law of Ukraine “On Banks and Banking Activity” sets forth a concept of the “qualifying holding” meaning

a direct and/or indirect ownership by one person individually, or together with other persons, of 10 and more per cent of the charter capital and/or voting rights of the shares, participation interests in the legal entity, or, independent from the formal ownership, possibility [to exert] significant influence on the management or operation of a legal entity<sup>271</sup>

which is very similar to the definition of “qualifying holding” established by the Regulation No 575/2013. Furthermore, it requires the acquirers of the qualifying holdings to notify the NBU before the acquisition, in case certain thresholds set forth by Ukrainian law are met or exceeded:

[a] legal person or an individual intending to acquire the qualified holding in a bank or increase it in such a way that such person will directly and/or indirectly, individually or together with other persons own 10, 25, 50 and 75 and more per cent of the charter capital of the bank or the voting right of shares (participation interests) in the charter capital of the bank and/or, independently of the formal ownership, exert significant influence on the management or the operation of the bank, must notify on his intention . . . the National Bank of Ukraine three months prior to acquisition of the qualifying holding or its increase.<sup>272</sup>

In addition to such notice, the prospective acquirer of a qualifying holding must provide the NBU with an extremely extensive set of documents necessary to identify the acquirer (i.e., documents confirming registration of the legal entity, the charters/articles of association of a

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<sup>271</sup> Law of Ukraine “On Banks and Banking Activity”, *supra* note 103, Article 2 (in author’s translation).

<sup>272</sup> Law of Ukraine “On Banks and Banking Activity”, *supra* note 103, Article 34 (in author’s translation).

legal entity – acquirer, etc.)<sup>273</sup>, assess its financial status (i.e., for legal entities – audited financial statements, reports from the auditors confirming the due financial status of a legal entity and the availability of own funds in the amount sufficient to acquire or increase the qualifying holding, which must be specifically calculated according to the formulas set forth by the NBU)<sup>274</sup> and business reputation (i.e., numerous questionnaires completed by the acquirer, members of its management body and the supervisory board, individuals who own qualifying holdings therein, various certificates from banks on the status of repayment of loans, certificate of good standing from the tax authorities, etc.)<sup>275</sup>.

The NBU may refuse in granting the approval if the business reputation of the acquirer (or, for legal entities, of members of its management body and supervisory board) and his financial condition does not comply with requirements established by the NBU, or in case the “acquisition or increase . . . of the qualifying holding will pose a threat to the interests of depositors and other creditors of the bank . . .”<sup>276</sup>

In case the qualifying holding is acquired or increased without obtaining the necessary NBU approval, it may prohibit the acquirer to use the voting rights attached to the acquired shares

<sup>273</sup> Polozhennia pro poriadok reiestratsii ta litsenzuvannia bankiv, vidkryttia vidokremlyenykh pidrozdiliv, zatverdzhene Postanovoiu Pravlinnia Natsionalnoho Banku Ukraïny “Pro zatverdzhennia deiakykh normatyvno-pravovykh aktiv Natsionalnoho Banku Ukraïny” vid 8 veresnia 2011, No. 306 (zi zminamy ta dopovnenniamy), pidpunkt “g” punktu 4.7. Hlavy 4 Rozdilu II, pidpunkt “v” punktu 4.9. Hlavy 4 Rozdilu II, pidpunkt “a” punktu 1.6. Hlavy 1 Rozdilu II [sub-paragraph “g” of paragraph 4.7 of Chapter 4 of Section II, sub-paragraph “v” of paragraph 4.9 of Chapter 4 of Section II, sub-paragraph “a” of paragraph 1.6. of Chapter 1 of Section II of the Regulation on the Procedure of Registration and Licensing of Banks, Opening of Detached Departments, approved by the Resolution of the Board of the National Bank of Ukraine “On Approval of Certain Regulatory Acts of the National Bank of Ukraine” dated 8 September 2011, No. 306 (as amended) (in author’s translation)], registered with the Ministry of Justice of Ukraine on 18 October 2011, No. 1203/19941, current version available at: <http://zakon2.rada.gov.ua/laws/show/z1203-11> (visited last on April 2, 2014) [hereinafter *Regulation 306*] (in author’s translation).

<sup>274</sup> *Id.* at sub-paragraph “v” of paragraph 4.7 of Chapter 4 of Section II, sub-paragraphs “a” and “b” of paragraph 1.8. of Chapter 1 of Section II (in author’s translation).

<sup>275</sup> Regulation 306, *supra* note 273, sub-paragraph “b” of paragraph 4.7 of Chapter 4 of Section II (in author’s translation).

<sup>276</sup> Law of Ukraine “On Banks and Banking Activity”, *supra* note 103, Article 34 (in author’s translation).



of the bank for the period until the breach is cured<sup>277</sup> and impose a fine on the acquirer “in the amount of up to 10 per cent of the acquired (increased) interest.”<sup>278</sup>

Thus, the approach of the Ukrainian legislators to monitoring and controlling the changes in shareholding in the Ukrainian banks is very similar to the way such changes in various categories of the electronic money issuers are controlled in the European Union and under the UMMA in the United States. However, in some cases Ukrainian requirements as to providing the NBU with certain specific documents regarding the acquirer of a qualifying holding in a bank appear to be much more onerous than those imposed in the European Union and the United States.

#### **2.3.4. Anti-Money Laundering Requirements**

The E-Money Regulation governing the issuance and circulation of electronic money in Ukraine does not itself establish any anti-money laundering rules. However, the banks, being the only electronic money issuers in Ukraine, are deemed to “the subjects of primary financial monitoring”<sup>279</sup> and are subject to a large number of anti-money laundering requirements and obligations established both by banking and the anti-money laundering laws of Ukraine. Such requirements and obligations imposed on banks may be divided into several groups:

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<sup>277</sup> Law of Ukraine “On Banks and Banking Activity”, *supra* note 103, Article 73(10) (in author’s translation).

<sup>278</sup> Law of Ukraine “On Banks and Banking Activity”, *supra* note 103, Article 73(9) (in author’s translation).

<sup>279</sup> Zakon Ukraïny “Pro zapobihannia ta protydiiu lehalizatsii (vidmyvanniu) dohodiv, oderzhanyh zlochynnym shlyakhom, abo finansuvanniu teroryzmu” vid 28 lystopada 2002, No. 249-IV (zi zminamy ta dopovnenniamy), Stattia 5(2) [Article 5(2) of the Law of Ukraine “On Preventing and Combating Legalization (Laundering) of Illegally Gained Profits or the Financing of Terrorism” (as amended) (in author’s translation)], initially published at Holos Ukraïny on 10 December 2002, No. 233, current version available at: <http://zakon4.rada.gov.ua/laws/show/249-15> (last visited on April 2, 2014) [hereinafter *Anti-Money Laundering Law*] (in author’s translation).

- requirements to develop and maintain appropriate internal financial monitoring rules and policies;<sup>280</sup>
- requirements as to appointment of a person responsible for performance of the financial monitoring measures. Such person must be approved by the NBU;<sup>281</sup>
- clients and partners identification requirements. In particular, the banks are obliged to identify its clients that perform transactions in the amount of UAH 150,000 (which constitutes approximately EUR 10,000) or more, or its equivalent in other currencies, without opening of a bank account;<sup>282</sup>
- requirements to perform the monitoring of certain types of transactions (i.e., financial transactions for the amounts of UAH 150,000 (i.e., approximately EUR 10,000) or more, or its equivalent in foreign currency, if it involves, for instance, transfer of funds to/from the anonymous accounts, sale and purchase of checks or similar payment instruments for cash, etc.)<sup>283</sup> and suspend them in cases set forth by law;<sup>284</sup>
- notification and disclosure requirements. The banks are required to notify the competent regulator, inter alia, on suspicious transactions likely to be related to money-laundering or the financing or terrorism;<sup>285</sup>
- documents storage requirements. The banks are obliged to store all documents related to financial transactions subject to financial monitoring, during the period of not less than five years after performance of such transactions.<sup>286</sup>

In addition, Ukrainian law prohibits the banks to “open and maintain anonymous . . . accounts.”<sup>287</sup>

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<sup>280</sup> Law of Ukraine “On Banks and Banking Activity”, *supra* note 103, Article 63 (in author’s translation).

<sup>281</sup> Anti-Money Laundering Law, *supra* note 279, Article 7(1) (in author’s translation).

<sup>282</sup> Law of Ukraine “On Banks and Banking Activity”, *supra* note 103, Article 64 (in author’s translation).

<sup>283</sup> Anti-Money Laundering Law, *supra* note 279, Article 15 (in author’s translation).

<sup>284</sup> Anti-Money Laundering Law, *supra* note 279, Article 17 (in author’s translation).

<sup>285</sup> Anti-Money Laundering Law, *supra* note 279, Article 6(2)(6) (in author’s translation).

<sup>286</sup> Law of Ukraine “On Banks and Banking Activity”, *supra* note 103, Article 65 (in author’s translation).

Thus, the Ukrainian anti-money laundering regulations are in many aspects similar to those established in the European Union and the United States.

## **2.4. Conclusion**

The analysis of control and supervision over the electronic money institutions, as well as the anti-money laundering requirements applicable to them, in the European Union, the United States and Ukraine reveal certain similarity of the approaches used in these jurisdictions. Each of them requires certain types of authorization prior to commencement of the electronic money issuing business which is necessary to identify and examine the prospective electronic money issuer. Similarly, each of them introduced certain procedures to control changes in shareholders of the electronic money issuers which appear necessary to ensure that such changes will not be detrimental to the business and customers of such electronic money issuer. However, in the United States such procedures set forth by 31 CFR § 1022.380 appear to be somewhat lighter than those proposed by the UMSA or introduced in the European Union or Ukraine. In this case the European and Ukrainian approaches envisaging rather complex examinations of the prospective electronic money issuer or its prospective shareholders appear to be more beneficial for the purpose of ensuring the safety of the market as a whole. At the same time, the requirements regarding such examinations set forth by Ukrainian law in some cases appear too onerous. However, if the Ukrainian legislators resolve to allow other persons, except for banks, to issue electronic money, such authorization and the prospective shareholders examination should definitely be established for them as well, although potentially in a slightly lighter version.

As to the rules aimed at preventing money laundering and terrorism financing, they appear to a certain extent similar in the European Union, the United States and Ukraine, meaning a relative uniformity of approach to such issues in these jurisdictions.

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<sup>287</sup> Law of Ukraine “On Banks and Banking Activity”, *supra* note 103, Article 64 (in author’s translation).

### 3. Regulation of Transactions with Electronic Money

In order to fully assess the regulatory framework governing the circulation of electronic money in the European Union, the United States and Ukraine, it is necessary to discuss the rules regulating the transactions with electronic money, although in some cases such rules appear to be rather scarce compared to the general regulation of the electronic money issuers and requirements they must comply with. This Charter will focus on the general rules applicable to transactions with electronic money in the above jurisdictions. In addition, it will separately describe the regulation of transactions on the redemption of electronic money by its issuer. The redemption transactions may be justly considered one of the most important types of transactions with electronic money since they allow the users to dispose of the electronic money they hold in exchange for money and terminate their cooperation with the issuer.

#### 3.1. *European Union*

##### 3.1.1. General Rules on Transactions with Electronic Money

The E-Money Directive does not provide for a detailed regulation of transactions with electronic money, establishing only the general rules for performance of such activities. For instance, from the E-Money Directive we can conclude that the electronic money issuer must enter into a contract with the electronic money holder, which must include certain mandatory information, such as provisions on the redemption of the electronic money and fees in connection therewith.<sup>288</sup>

Furthermore, the E-Money Directive establishes certain specific rules on the operation of the electronic money institutions. For example, the “electronic money institutions shall not issue

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<sup>288</sup> E-Money Directive, *supra* note 1, Article 11 (3).

electronic money through agents.”<sup>289</sup> At the same time, they may “distribute and redeem electronic money through natural and legal persons which act on their behalf.”<sup>290</sup> In order to engage such persons for the distribution of electronic money in other Member States, they should comply with procedural requirements set forth by the Payment Services Directive.<sup>291</sup> In particular, before the agent of the electronic money institution commences the distribution of electronic money in another Member State, the authorities of the electronic money institution’s home Member State together with the authorities of the Member State where the distribution of electronic money is planned will cooperate in order to inspect the agent to be engaged by the electronic money institution in such other Member State and verify its compliance with the established requirements.<sup>292</sup> Generally, such procedures are designed to ensure compliance of the agent with the applicable rules and requirements thus ensuring the proper and safe functioning of the market.

In addition, other specific rules on transactions with electronic money may be found in the Payment Services Directive. In particular, it establishes the prior information rules requesting provision of certain information to the users prior to their entry into a binding contract or becoming bound by an offer.<sup>293</sup> In case of a framework contract, such information must include the data on the payment service provider<sup>294</sup>, payment services, applicable charges and fees, the means of communication, the term, amendment and termination of the contract, etc.<sup>295</sup>

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<sup>289</sup> E-Money Directive, *supra* note 1, Article 3(5).

<sup>290</sup> E-Money Directive, *supra* note 1, Article 3(4).

<sup>291</sup> E-Money Directive, *supra* note 1, Article 3(4).

<sup>292</sup> Payment Services Directive, *supra* note 6, Article 25 (procedures set forth in Article 25 to be followed as required by Article 3(4) of the E-Money Directive).

<sup>293</sup> Payment Services Directive, *supra* note 6, Articles 36, 41.

<sup>294</sup> According to Article 1(1) of the Payment Services Directive, this term includes the credit institutions, electronic money institutions, etc.

<sup>295</sup> Payment Services Directive, *supra* note 6, Articles 42.

The Payment Services Directive also establishes the rules on introducing amendments to the contracts<sup>296</sup> and their termination,<sup>297</sup> performance of the payment transactions<sup>298</sup>. However, in setting such rules it distinguishes the so-called low value transactions and the transactions with electronic money for small amounts, i.e. “payment instruments which, according to the framework contract, concern only individual payment transactions that do not exceed EUR 30 or that either have a spending limit of EUR 150 or store funds that do not exceed EUR 150 at any time.”<sup>299</sup> For such transactions the obligations of the payment service providers are less stringent than in case of other transactions.<sup>300</sup>

### 3.1.2. Redemption of Electronic Money

One of the most important transactions with electronic money is its redemption by the issuer upon the request of the user. According to the E-Money Directive, the “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.”<sup>301</sup> Such requirements are specifically aimed at “preserv[ing] the confidence of the electronic money holder[s]”<sup>302</sup> and their protection against financial losses. The E-Money Directive specifically introduces a number of rules applicable to such redemption.

First of all, the contracts entered into by the electronic money issuers with the electronic money holders must set out the “conditions of redemption, including the fees relating

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<sup>296</sup> Payment Services Directive, *supra* note 6, Article 44.

<sup>297</sup> Payment Services Directive, *supra* note 6, Article 45.

<sup>298</sup> Payment Services Directive, *supra* note 6, Chapters 1-3 of TITLE IV.

<sup>299</sup> Payment Services Directive 2007/64/EC, *supra* note 6, Article 34 (it should be noted that for the national payment transactions the amounts may be changed, reduced or doubled at the national level; “[f]or the prepaid instruments, Member States may increase those amounts up to EUR 500”).

<sup>300</sup> Payment Services Directive 2007/64/EC, *supra* note 6, Article 34.

<sup>301</sup> E-Money Directive, *supra* note 1, Article 11(2).

<sup>302</sup> E-Money Directive, *supra* note 1, preamble, p.18.

thereto.”<sup>303</sup> Moreover, such conditions must be notified to the electronic money holder before he enters into any binding contract with the electronic money issuer or accepts a binding offer.<sup>304</sup>

Second, in general the redemption must be provided free of charge. It may be subject to a fee only in a limited number of cases expressly established by the E-Money Directive and only if the provisions on such fee are set forth by the contract.<sup>305</sup>

Furthermore, the E-Money Directive permits the electronic money holder to request the issuer to redeem all the electronic money he holds or any part thereof.<sup>306</sup> However, in certain cases set forth in the E-Money Directive all electronic money must be redeemed from such holder.<sup>307</sup>

By these provisions the E-Money Directive is additionally protecting the electronic money holders. However, simultaneously with establishing the redemption requirements, it provides for a reservation as to their application indicating that “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.”<sup>308</sup> Therefore, the protection of the electronic money holders under the E-Money Directive is not absolute. Persons, other than customers, need to individually agree on the relevant redemption provisions with the electronic money issuer. Otherwise, they may appear unable to request the redemption of the electronic money they hold in the amount and on conditions they intend.

### **3.2. United States of America**

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<sup>303</sup> E-Money Directive, *supra* note 1, Article 11(3).

<sup>304</sup> E-Money Directive, *supra* note 1, Article 11(3).

<sup>305</sup> E-Money Directive, *supra* note 1, Article 11(3).

<sup>306</sup> E-Money Directive, *supra* note 1, Article 11(5).

<sup>307</sup> E-Money Directive, *supra* note 1, Article 11(5).

<sup>308</sup> E-Money Directive, *supra* note 1, Article 11(7).

### 3.2.1. General Rules on Transactions with Electronic Money

The UMSA does not provide for a detailed regulation of transactions with stored value. However, it sets out certain general rules relating to conducting the money transmission business. For instance, the UMSA foresees that the licensed money transmitters may engage authorized delegates for provision of the money services, including money transmission, on their behalf.<sup>309</sup> Such authorized delegates shall operate based on, and as may be permitted, by a contract with the licensee.<sup>310</sup> In particular, the UMSA specifies that the “the authorized delegate may not provide money services outside the scope of activity permissible under the contract between the authorized delegate and the licensee, except activity in which the authorized delegate is authorized to engage under ...[the UMSA].”<sup>311</sup> Thus, in absence of other authorizations, the contract with the licensee will mainly determine the scope of powers of its authorized delegates.

Some of the states enacting the UMSA, for instance, Texas, in its legislation significantly developed the UMSA provisions regulating performance of the money transmission activities through an authorized delegate. In particular, the Texas Money Services Act specifies the steps to be taken by the licensee before he allows a person to become his authorized delegate (e.g., adoption of specific policies to be followed by the delegate to ensure its compliance with applicable laws, signing the contract with the delegate, examination of the delegate)<sup>312</sup>, certain minimum provisions which must be included in contract with the authorized delegate

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<sup>309</sup> See UMSA, *supra* note 65, §102(2).

<sup>310</sup> UMSA, *supra* note 65, § 501.

<sup>311</sup> UMSA, *supra* note 65, §501 (e).

<sup>312</sup> TEX. MONEY SERVICES ACT, FIN. CODE, *supra* note 60, § 151.402 (b).



(e.g., regarding his conduct with money, etc.)<sup>313</sup>, as well as a number of other rules the authorized delegate must comply with.<sup>314</sup>

In addition, as regards the federal regulation of the money services businesses, 31 CFR § 1022.380 (d) requires them to “prepare and maintain the list of its agents”<sup>315</sup> which must may be provided to FinCEN upon its request.<sup>316</sup>

Furthermore, where the acquisition or use of the U.S. equivalents of electronic money involves the electronic fund transfers under the Electronic Fund Transfer Act, such transfers shall be performed in compliance with its provisions. In particular, it contains specific rules relating to such stored value instruments as the gift certificates, store gift cards, general-use prepaid cards.<sup>317</sup> For instance, it establishes the requirements as to the disclosure of certain data to customers before the purchase of such instruments, conditions under which certain fees (e.g., the inactivity and dormancy fees) may be imposed in relation to such instruments, etc.<sup>318</sup> Such provisions appear to be designated mainly to protect the customers purchasing and using such instruments.

In addition, further rules on the conduct of the money services businesses may be additionally regulated at the level of states, which creates another level of regulation.<sup>319</sup>

Thus, the regulation of transactions with electronic money and the conduct of money transmitters and other money services businesses in the United States is multi-layered and includes both, regulations at the federal and state levels, turning the U.S. regulation of the electronic money circulation into a rather complex system.

<sup>313</sup> TEX. MONEY SERVICES ACT, FIN. CODE, *supra* note 60, § 151.402 (c).

<sup>314</sup> TEX. MONEY SERVICES ACT, FIN. CODE, *supra* note 60, § 151.403.

<sup>315</sup> 31 CFR § 1022.380 (d)

<sup>316</sup> 31 CFR § 1022.380 (d)

<sup>317</sup> 12 CFR § 1005.20.

<sup>318</sup> 12 CFR § 1005.20.

<sup>319</sup> See FLA. STAT. ANN. §§ 560.208, 560.309 (West) (for instance, the rules of conducting money services businesses are set forth in §§ 560.208, 560.309)

### 3.2.2. Redemption of Electronic Money

The question of how, and whether, the U.S. equivalents of electronic money (for instance, the stored value, as defined by the UMSA) may be redeemed by its issuer for money in the way similar to redemption of the electronic money in the European Union remains rather ambiguous. The UMSA does not itself answer this question.

The analysis of terms and definitions used therein also leaves the question of the stored value redemption unanswered. As previously discussed in Section 1.2.1., the “stored value,” one of the main terms used by the UMSA, is defined by it as “monetary value that is evidenced by an electronic record.”<sup>320</sup> The term “monetary value,” to which such definition refers, means “a medium of exchange, whether or not redeemable in money.”<sup>321</sup> Thus, given the language of these definitions, although the money value should be generally exchangeable for goods and services (which seems to be its main purpose), it remains uncertain if it may be redeemed in money by its issuer in the way the electronic money is redeemed by its issuers in the European Union.

This questions appears even more ambiguous due to the fact that Anita Ramasastry in her article “Nonbank Issuers of Electronic Money: Prudential Regulation in Comparative Perspective,” specifically discussed such category of electronic money as “electronic scrip”<sup>322</sup> which may be used for settlements in the Internet transactions, but which may not be exchanged for real money.<sup>323</sup>

However, the absence of clear regulation of this issue in the UMSA and the ambiguous definitions of terms used therein, should not be viewed as automatically precluding the redemption of stored value by its issuer for money. Moreover, they may be viewed as giving

<sup>320</sup> UMSA, *supra* note 65, § 102(21).

<sup>321</sup> UMSA, *supra* note 65, § 102(11).

<sup>322</sup> Ramasastry, *supra* note 51, at 683-684.

<sup>323</sup> Ramasastry, *supra* note 51, at 683-684.

more freedom to the issuers and more options for cooperation the issuers and customers may agree about.

In addition, no clear rules on the redemption of the stored value by the issuer were established by the statutes provisions regulating the instruments which may be viewed as close to the stored value (i.e., store gift cards, general-use prepaid cards<sup>324</sup>), such as 12 CFR § 1005.20 (Regulation E) and 15 U.S. Code § 1693l-1, except for a brief reference that the general-use prepaid cards may be used at the automated teller machines.<sup>325</sup> Although for customers the effect of use of the general-use prepaid card in the automated teller machines to withdraw funds may to a certain extent resemble its redemption by the issuer, such rules may not be viewed as clearly establishing and regulating the stored value redemption process, thus, also giving more freedom to the issuers in regulating the terms of issuance of their products, but leaving some uncertainty for the users.

### **3.3. Ukraine**

#### **3.3.1. General Rules on Transactions with Electronic Money**

Similarly to the European Union and the United States, the regulation of transactions with electronic money in Ukraine appear to be rather scarce. However, Ukrainian law establishes a number of other rules to regulate the conduct of business by the electronic money issuers.

In particular, Ukrainian law allows the electronic money issuers to engage agents on a contractual basis. These may be:

- the “distribution agent”<sup>326</sup> performing the “distribution of electronic money”<sup>327</sup>. Only legal entities (and not individuals) may become the distribution agents;<sup>328</sup>

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<sup>324</sup> 12 CFR § 1005.20

<sup>325</sup> 12 CFR § 1005.20 (a)(3)(ii), 15 U.S. Code § 1693l-1(a)(2)(A)(iv).

<sup>326</sup> E-Money Regulation, *supra* note 95, p. 1.3 of Chapter 1 (in author’s translation).

<sup>327</sup> E-Money Regulation, *supra* note 95, p. 1.3 of Chapter 1 (in author’s translation).

<sup>328</sup> E-Money Regulation, *supra* note 95, p. 3.1 of Chapter 3 (in author’s translation).

- the “replenishment agent”<sup>329</sup> that provides “the means for replenishment electronic devices with electronic money;”<sup>330</sup>
- the “exchange operations agent”<sup>331</sup> performing “exchange operations with electronic money,”<sup>332</sup> such as the exchange of electronic money issued by one issuer to electronic money issued by another issuer;<sup>333</sup>
- the “settlement agent”<sup>334</sup> which “accept[s] electronic money in exchange to cash/non-cash funds.”<sup>335</sup> Specific requirements are also set forth for the settlement agents. According to the E-Money Regulation, only “bank and non-banking financial institution which holds the license of the [National Commission Performing State Regulation in the Sphere of the Financial Services Markets]”<sup>336</sup> may become a settlement agent.<sup>337</sup>

Furthermore, in Ukraine the E-Money Regulation foresees a possibility to create an “electronic money system” which constitutes “an aggregate of relations among the issuer, operator, agents, traders and users in relation to the issuance, circulation and redemption of electronic money.”<sup>338</sup> In general, it is an aggregate of elements cooperating for the purposes of issuance, distribution, circulation and use of electronic money. As mentioned above, elements of an electronic money payment system include the issuer, the operator performing

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<sup>329</sup> E-Money Regulation, *supra* note 95, p. 3.1 of Chapter 3 (in author’s translation).

<sup>330</sup> E-Money Regulation, *supra* note 95, p. 3.1 of Chapter 3 (in author’s translation).

<sup>331</sup> E-Money Regulation, *supra* note 95, p. 1.3 of Chapter 1 (in author’s translation).

<sup>332</sup> E-Money Regulation, *supra* note 95, p. 1.3 of Chapter 1 (in author’s translation).

<sup>333</sup> E-Money Regulation, *supra* note 95, p. 3.7. of Chapter 3 (in author’s translation).

<sup>334</sup> E-Money Regulation, *supra* note 95, p. 1.3 of Chapter 1 (in author’s translation).

<sup>335</sup> E-Money Regulation, *supra* note 95, p. 1.3 of Chapter 1 (in author’s translation).

<sup>336</sup> E-Money Regulation, *supra* note 95, p. 3.6. of Chapter 3 (in author’s translation).

<sup>337</sup> E-Money Regulation, *supra* note 95, p. 3.6. of Chapter 3 (in author’s translation).

<sup>338</sup> E-Money Regulation, *supra* note 95, p. 1.3 of Chapter 1 (in author’s translation).

operational and technical functions under agreement with the issuer<sup>339</sup>, the agents also acting based on the agreement with the issuer<sup>340</sup>, traders which are business entities and individual entrepreneurs accepting electronic money as a means of payment based on an agreement with the issuer or a distribution agent,<sup>341</sup> and users of electronic money. In order to create such system and issue electronic money, a person intending to do so must get the rules of the electronic money system approved by the NBU.<sup>342</sup>

However, it should be noted that although the operation of the electronic money systems should be generally beneficial for the issuers of electronic money and other participants of such systems in terms of business, the practitioners point out the number of electronic money systems whose rules were duly approved by the NBU is minimal.<sup>343</sup>

### 3.3.2. Redemption of Electronic Money

Similarly to the European Union and in contrast to the United States, in Ukraine the redemption of electronic money is clearly regulated by the E-Money Regulation which directly and explicitly states that the “issuer is obliged to perform redemption of electronic money issued by him upon the request of the holder.”<sup>344</sup> The electronic money may be redeemed directly from the customers in cash or non-cash funds, or in case of its redemption from business entities, payment shall be made the wire transfer of funds to their bank accounts.<sup>345</sup> Under Ukrainian law, the electronic money will be considered redeemed from

<sup>339</sup> E-Money Regulation, *supra* note 95, p. 1.3 of Chapter 1 (in author’s translation).

<sup>340</sup> E-Money Regulation, *supra* note 95, p. 1.3 of Chapter 1 (in author’s translation).

<sup>341</sup> E-Money Regulation, *supra* note 95, p. 1.3 of Chapter 1 (in author’s translation).

<sup>342</sup> E-Money Regulation, *supra* note 95, p. 6.1. of Chapter 6 (in author’s translation).

<sup>343</sup> Iryna Marushko & Anna Pushkaryova, *E-commerce in Ukraine*, <http://ukrainianlawfirms.com/areas.php?id=015> (last visited April 2, 2014).

<sup>344</sup> E-Money Regulation, *supra* note 95, p. 4.1. of Chapter 4 (in author’s translation).

<sup>345</sup> E-Money Regulation, *supra* note 95, p. 4.2. of Chapter 4 (in author’s translation).

the moment the holder of electronic money requesting its redemption receives funds in payment thereof.<sup>346</sup>

The fact that Ukrainian law makes the redemption of electronic money upon the holder's request binding for the issuer is an obvious and undeniable advantage of the Ukrainian approach to regulation of the electronic money. It should be noted that that in some cases Ukrainian issuers of instruments similar to electronic money (such other instruments are not regulated by Ukrainian law, so it does not impose any redemption obligations on their issuers) in contracts with users of such instruments agree that they may have rights, and not the obligations, to redeem such instruments.<sup>347</sup> In view of such practice, the issuers' obligation to redeem electronic money upon request of their holder directly prescribed by the E-Money Regulation provides additional protection to the users of electronic money in order to enhance the safety of the whole Ukrainian electronic money market.

### **3.4. Conclusion**

After analysis of the regulation of transactions with electronic money in the European Union, the United States and Ukraine made in this Chapter, it is possible to trace certain differences in approaches of legislators to these issues. However, there are many similarities as well. First of all, it should be noted that in each of these jurisdictions the legislators pay specific attention to the cooperation of the electronic money issuers with agents and conduction a part of their business through them. In each jurisdiction the legislation establishes certain requirements as to the agents and cooperation with them. Particular attention should be paid

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<sup>346</sup> E-Money Regulation, *supra* note 95, p. 4.2. of Chapter 4 (in author's translation).

<sup>347</sup> Dohovir vidstuplennia prav vymohu ta ihniogo obliku z Tovarystvom z obmezhenou vidpovidalnistu "Ukrainska Harantiina Ahentsiia" (Agreement on Assignment of Claims and Their Recording with the Limited Liability Company "Ukrainska Harantiina Ahentsiia" (in author's translation)), Article 2 (p. 2.3), [http://webmoney.ua/files/ugoda\\_yur.pdf](http://webmoney.ua/files/ugoda_yur.pdf) (last visited April 3, 2014).

The system WebMoney Ukraine operating with such equivalent of electronic money as claims to a third person and proposing their sale to the customers which use them for settlements in the Internet transactions, in its standard contract to be concluded with legal entities and individual entrepreneurs states that the claims may (but not must) be redeemed from the user according to the terms and conditions thereof.

to the European rules on engaging agents in other Member States and the examinations to be held by competent authorities prior to commencement of the agent's activities which appear to be very important for ensuring the safety of the electronic money market in the European Union through ensuring the proper operation of all its players.

As to the differences in legislative regulation of transactions with electronic money in the European Union, the United States and Ukraine, the main difference is the absence of clear regulation of the redemption of electronic money by the issuer in the United States. Although it may be viewed as providing more freedom to the issuers in their business and, especially negotiating their relations with the customers, the absence of requirements on the mandatory redemption of electronic money may be viewed as depriving the customers of one of the main safeguards, the possibility to terminate its relations with the electronic money issuer at any point of time and receive cash or non-cash funds in exchange to the redeemed electronic money. In this particular matter, the approach taken by the European Union and Ukraine (although having certain disadvantages, as discussed in the Chapter) seems to be much more beneficial for the customers.

## 4. Protection of Users in Transactions with Electronic Money

This Chapter will provide a brief overview of the applicable rules protecting the users of the electronic money in the European Union, the United States and Ukraine. In addition, it will discuss the complaint procedures available in the above jurisdictions.

### 4.1. *European Union*

#### 4.1.1. Rules on Protection of Users of Electronic Money

In the European Union it is possible to distinguish several main groups of norms designed to protect the users of the electronic money. The first group of such norms includes various requirements on providing the users with information prior to entering into a binding contract relationship with the electronic money issuer. Such requirements are not contained in a single legal act, but are established by a number of different documents. For instance, such requirements are contained in the E-Money Directive (i.e., information on the conditions of the electronic money redemption and applicable fees must be provided to the users<sup>348</sup>) and in the Payment Services Directive applicable to the credit institutions and the electronic money institutions (i.e., in case of conclusion of a framework contract the users must be provided with information on the service provider, description of the services provided, various charges and fees which may apply, etc.<sup>349</sup>), etc.

The second group of norms refers to the contents of contracts between the electronic money issuers and the holders of electronic money. On the one hand, such contracts have to contain certain mandatory provisions, but, on the other hand, the contracts with the consumers<sup>350</sup>

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<sup>348</sup> E-Money Directive, *supra* note 1, Article 11(3).

<sup>349</sup> Payment Services Directive, *supra* note 6, Article 42.

<sup>350</sup> According to Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, 1993 O.J. (L 095) 29, Article 2(b), a “consumer” is “any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession.”



must not include any unfair terms, i.e. terms that are not “individually negotiated”<sup>351</sup> (i.e., drafted by the electronic money issuer and proposed to all its customers as a part of a standard contract) and “contrary to the requirement of good faith ...caus[ing] a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”<sup>352</sup> These are the terms limiting the consumers’ rights, imposing disproportionate penalties on the consumers, enabling the service providers to unilaterally modify the contract, etc.<sup>353</sup> However, there is no exhaustive list of the unfair contract terms. The unfair terms of the contracts will not be binding for the consumers.<sup>354</sup>

Further, in addition to the unfair terms, the consumers are also protected against various types of misleading and aggressive commercial practices,<sup>355</sup> such as, for example, “[c]reating the impression that the consumer cannot leave the premises until a contract is formed”<sup>356</sup> which is a manifestly aggressive commercial practice.<sup>357</sup>

In addition, the rights of the consumers under those contracts payments under which were made by the electronic money will also be further protected in the European Union.<sup>358</sup>

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<sup>351</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, 1993 O.J. (L 095) 29, Article 3(1).

<sup>352</sup> *Id.*

<sup>353</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *supra* note 351, Annex.

<sup>354</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *supra* note 351, Article 6(1).

<sup>355</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’) (Text with EEA relevance) 2005 O.J. (L 149) 22, Article 5.

<sup>356</sup> *Id.* at Annex I (p. 24)

<sup>357</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’) (Text with EEA relevance), *supra* note 355, Annex I (p. 24).

<sup>358</sup> Such protection shall be afforded by, in particular, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (Text with EEA relevance).

#### 4.1.2. Complaint Procedures

The E-Money Directive does not itself specifically set forth the complaint and redress procedures to be used by the electronic money holders. However, it refers to the relevant procedures of the Payment Services Directive indicating that the rules set forth therein “shall apply *mutatis mutandis* to electronic money issuers.”<sup>359</sup>

According to the Payment Services Directive, the Member States are required to establish procedures to “allow . . . users and other interested parties, including consumer associations, to submit complaints to the competent authorities with regard to . . . alleged infringements”<sup>360</sup> of the applicable national law provisions.

In addition, the Member States are required to foresee by their national law the penalties applicable in case of infringements<sup>361</sup>, as well as ensure the “adequate and effective out-of-court complaint and redress procedures for the settlement of disputes”<sup>362</sup> in case of disputes.

Thus, the complaint and redress procedures, as well as the penalties to be imposed in case of infringement of the applicable regulations, must be set forth by the national laws of the Member States. For instance, in the United Kingdom such issues are addressed, in particular, by the Electronic Money Regulations 2011, which, inter alia, sets forth the penalties for various types of infringements,<sup>363</sup> arrangements for complaints,<sup>364</sup> and powers of the Financial Services Authority (now – the Financial Conduct Authority) in cases of violations of the Electronic Money Regulations 2011 (for instance, to give warning notices and turn to court).<sup>365</sup> Notably, the Electronic Money Regulations 2011 vests the Financial Conduct

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<sup>359</sup> E-Money Directive, *supra* note 1, Article 13.

<sup>360</sup> Payment Services Directive, *supra* note 6, Article 80.

<sup>361</sup> Payment Services Directive, *supra* note 6, Article 81.

<sup>362</sup> Payment Services Directive, *supra* note 6, Article 83 (1).

<sup>363</sup> Electronic Money Regulations, 2011, *supra* note 48, §§ 51, 63, 64, 66.

<sup>364</sup> Electronic Money Regulations, 2011, *supra* note 48, §§ 58.

<sup>365</sup> Electronic Money Regulations, 2011, *supra* note 48, §§ 53, 54.

Authority with the power “to require restitution.”<sup>366</sup> In case the electronic money issuer has breached the requirements of the Electronic Money Regulations 2011, or “been knowingly concerned in the contravention of such a requirement”<sup>367</sup> and has gained a profit due to this or it resulted in one or “one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention,”<sup>368</sup> the Financial Conduct Authority may request such electronic money issuer to pay to such persons or distribute among them the relevant amounts gained by the electronic money issuer or necessary to cover the losses or other adverse effects suffered by such persons.<sup>369</sup>

## **4.2. United States of America**

### **4.2.1. Rules on Protection of Users of Electronic Money**

Many issues with respect to the consumer rights protection in the United States are addressed at the federal level by Regulation E. The experts point out, however, that “the areas to which Regulation E applies often remain open to dispute”<sup>370</sup> which in the context of the electronic money regulation may be interpreted as stating that Regulation E is not directly applicable to cases of issuance of, and transactions with, electronic money. This view is supported by its provisions establishing that it applies to the electronic funds transfers involving “authorizing a financial institution to debit or credit a consumer’s account.”<sup>371</sup> Thus, it will be more applicable to transfers from the consumer’s accounts made, for instance, in order to transfer funds in payment for the acquisition of electronic money (stored value) by the consumer, and such transfers shall be made in compliance with rules established by Regulation E. However, it contains a number of rules applicable to, in particular, general-use prepaid cards<sup>372</sup> which

<sup>366</sup> Electronic Money Regulations, 2011, *supra* note 48, § 55.

<sup>367</sup> Electronic Money Regulations, 2011, *supra* note 48, § 55.

<sup>368</sup> Electronic Money Regulations, 2011, *supra* note 48, § 55.

<sup>369</sup> Electronic Money Regulations, 2011, *supra* note 48, § 55.

<sup>370</sup> Kruger, *supra* note 23.

<sup>371</sup> Regulation E, 12 CFR § 1005.3

<sup>372</sup> Regulation E, 12 CFR § 1005.20.

may be deemed to be one of the U.S. types of electronic money. With respect to such cards Regulation E establishes rules on disclosure of certain information to the consumers prior to the purchase of the card<sup>373</sup> which is similar to the European approach to disclosing specific data to consumers prior to entering by them into a binding contract. Such disclosures must include the information on applicable fees which “may not be changed after purchase.”<sup>374</sup> Certain information must be clearly stated on such cards or “in an accompanying terms and conditions document, on packaging surrounding a certificate or card”<sup>375</sup> or, for electronic cards and certificates, “disclosures must be provided electronically on the certificate or card provided to the consumer.”<sup>376</sup> Furthermore, Regulation E establishes a number of rules with respect to establishing the fees in relation to such instruments<sup>377</sup> and limiting their term of validity (setting the expiration date)<sup>378</sup>.

#### 4.2.2. Complaint Procedures

It appears that in the United States in most cases the protection of the consumers’ rights is performed in courts. However, there are agencies dealing with the issues of the consumer rights protection, for example, the Consumer Financial Protection Bureau protecting the consumers’ rights in the financial sphere.<sup>379</sup> The consumer protection functions in the United States are also performed by the Federal Trade Commission. According to the information provided on its official website, it “protects consumers by stopping unfair, deceptive or

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<sup>373</sup> Regulation E, § 205.20 (c)(3).

<sup>374</sup> *Id.* at f(1)

<sup>375</sup> Regulation E, § 205.20 (c)(4).

<sup>376</sup> *Id.*

<sup>377</sup> Regulation E, 12 CFR § 1005.20.

<sup>378</sup> Regulation E, 12 CFR § 1005.20.

<sup>379</sup> CONSUMER FINANCIAL PROTECTION BUREAU, ABOUT US <http://www.consumerfinance.gov/the-bureau/> (last visited April 2, 2014).

fraudulent practices in the marketplace.”<sup>380</sup> In particular, it receives complaints and carries out investigations of the committed violations.<sup>381</sup>

### **4.3. Ukraine**

#### **4.3.1. Rules on Protection of Users of Electronic Money**

In Ukraine the legislation protecting the users of electronic money consists of multiple layers of regulation. First of all, since the banks are the only electronic money issuers, the rules set forth by the Law of Ukraine “On Banks and Banking Activity” will apply. First of all, this law provides for the obligations of the banks to provide their clients, upon their request, with information on the bank and its services, including their cost.<sup>382</sup> Furthermore, it prohibits such unfair practices as (i) requesting its clients to acquire additional goods and/or services from the bank itself or its related entities as a precondition to rendering banking services to the client, or (ii) unilateral amendment by the bank of the terms and conditions of agreements with the clients.<sup>383</sup>

The Law of Ukraine “On Protection of Consumer Rights” constitutes another layer in regulation of protection of the electronic money users in Ukraine. The law may not be fully adjusted to the needs of the electronic money users. However, it establishes a number of important provisions to protect them against the potential abusive actions of the issuers. In addition, it provides a list (which is not exhaustive) of the terms and conditions of agreements which are unfair and may be recognized invalid. Such conditions include, in particular, the provision strictly regulating the customers’ obligations, while the service provider may act in

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<sup>380</sup>FEDERAL TRADE COMMISSION, WHAT WE DO, <http://www.ftc.gov/about-ftc/what-we-do> (last visited April 2, 2014)

<sup>381</sup> *Id.*

<sup>382</sup> The Law of Ukraine “On Banks and Banking Activity,” supra note 103, Article 56 (in author’s translation).

<sup>383</sup> The Law of Ukraine “On Banks and Banking Activity,” supra note 103, Article 55 (in author’s translation).

rendering services on its discretion,<sup>384</sup> imposing inappropriately (disproportionally) large amounts of penalties for the customers in case of a failure to perform,<sup>385</sup> etc.

The consumer rights during the acquisition of goods and services for electronic money from traders, in particular, the right to return the goods acquired, will also be regulated by the Law of Ukraine “On Protection of Consumer Rights.”

Furthermore, the E-Money Regulation provides for the obligations of the issuer, the operator and agents to provide traders and users with “information on tariffs and the rules on performing transactions with electronic money before concluding contracts with respect to electronic money with them”<sup>386</sup>

#### 4.3.2. Complaint Procedures

According to the Law of Ukraine “On Protection of Consumer Rights”, “protection of the consumers’ rights set forth by law shall be made by court,”<sup>387</sup> which will also decide on compensation of the moral damages of the customer if the case is resolved in his favor.<sup>388</sup> In addition, the above law provides for a broad range of powers of the consumer protection authorities (State Inspection of Ukraine in Questions of Consumers’ Rights Protection), including the rights to initiate court proceedings for the protection of the customers’ rights.<sup>389</sup> In addition, the customers may generally address their complaints regarding the actions of the banks to the NBU or, in case of complaints as to the actions of other financial institutions

<sup>384</sup> Zakon Ukraïny “Pro zahyst prav spozhyvachiv” vid 12 travnia 1991, No. 1023-XII (zi zminamy ta dopovnenniamy), Statia 18(3)(3) [Article 18(3)(3) of the Law of Ukraine “On Protection of Consumer Rights” dated 12 May 1991, No. 1023-XII (as amended) (in author’s translation)], initially published at Holos Ukraïny on 8 June 1991, current version available at: <http://zakon2.rada.gov.ua/laws/show/1023-12> (last visited on April 2, 2014) [hereinafter *Law of Ukraine “On Protection of Consumer Rights”*] (in author’s translation).

<sup>385</sup> *Id.* at Article 18 (3)(5) (in author’s translation).

<sup>386</sup> E-Money Regulation, *supra* note 95, p. 2.5 of Chapter 2 (in author’s translation).

<sup>387</sup> Law of Ukraine “On Protection of Consumer Rights”, *supra* note 384, Article 22 (1) (in author’s translation).

<sup>388</sup> Law of Ukraine “On Protection of Consumer Rights”, *supra* note 384, Article 22 (1) (in author’s translation).

<sup>389</sup> Law of Ukraine “On Protection of Consumer Rights”, *supra* note 384, Article 26 (in author’s translation).

within the electronic money system, to National Commission Performing State Regulation in the Sphere of the Financial Services Markets.

#### **4.4. Conclusion**

The performed analysis shows that in each of the European Union, the United States (where the regulation appears more vague) and Ukraine the legislation addressed the issues of protection of users of electronic money and, particularly, such category of users as customers. In addition, the rules and requirements established by Ukrainian laws appear to be rather similar to those established in the European Union.

## Conclusion

In this work I performed the comparative analysis of regulation of various aspects of issuance and circulation of electronic money in the European Union, the United States and Ukraine, based on which I can make the following conclusions.

First of all, the wide-spread opinion that the matters related to electronic money are insufficiently regulated in the United States appears to be untrue. The United States have developed a complex and multi-layered legal framework for regulation of electronic money (the U.S. equivalents of electronic money) and its issuers, which includes regulation both at the federal level and at the level of the states.

The approaches of the European Union and the United States to regulation of electronic money are slightly different as to the definitions and main concepts. In the European Union the E-Money Directive introduced the uniform concept and definition of “electronic money” and established a list of persons which may be the electronic money issuers. Further, the regulation specifically addresses such electronic money issuers and, in particular, establishes a number of requirements they must comply with.

The United States operate several terms, such as “the stored value,” “money transmitters,” “prepaid access,” “money services business” to refer to the instruments equivalent to the European electronic money and the persons issuing it. In case a person issues the stored value or provides the prepaid access, as they are defined by the relevant legislation, they shall be subject to certain specific requirements, including the registration and/or licensing requirements, as may be appropriate depending on the state. In general, it makes the U.S. regulation more complicated, but, on the other hand, it ensures that the relevant regulation will reach all persons involved in issuance of the instruments similar to the European electronic money.



The Ukrainian regulation of electronic money is very similar in many aspects to the regulation of electronic money in the European Union. However, one of the main differences is that in Ukraine only banks can issue electronic money. No other person can become the electronic money issuer under Ukrainian law, although it seems that Ukrainian market would benefit from it. Currently, the access of other players which are not interested in providing purely banking services to the electronic money market is restricted, while the banks may be more interested in developing other banking products. This hinders further development of the electronic money market in Ukraine. Thus, the main recommendation for Ukraine is to change the existing legislation so as to allow other persons, which would be subject to a number of capital and organizational requirements, similarly to the electronic money institutions in the European Union, to become the electronic money issuers. Although they should be subject to specific licensing or authorization, as well as the control over changes in their shareholders, the requirements applicable to them should generally be less stringent than those applicable to the Ukrainian banks. This may attract new players to the market and contribute to its further development.

In many other aspects, the regulation of the electronic money seems to address similar issues in the European Union, the United States and Ukraine. In each of these jurisdictions, the electronic money issuers are subject to a number of control and supervision requirements, including the control over changes in their shareholders, anti-money laundering and consumer protection requirements (except for the absence of clear regulation of the electronic money redemption rules in the U.S.), specific requirements as to engagement of agents, the compliance with which is necessary to ensure the safe operation of the electronic money market. Both the European and the U.S. systems are elaborated enough and, generally, establish the rules which are necessary to properly regulate the electronic money markets in these jurisdictions. Ukrainian legislation in the sphere of electronic money is also rather

developed. However, as discussed above, certain amendments may benefit further development of the electronic money market in Ukraine.

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