

Regulation of E-Money and E-Money Tokens under MiCAR

Written by Dr Eugenijus Miliukas

According to the Lithuanian Law on Electronic Money and Electronic Money Institutions implementing the EU E-Money Directive 2009/110/EC, digital money is regulated if it is electronic money. Accordingly, the following criteria characterize e-money: (1) It is an electronically stored monetary value as represented by a claim on the issuer. (2) It can be acquired against payment of a monetary amount. (3) Its purpose is making payment transactions, i.e., primarily to transmit sums of money to others. (4) Third parties, i.e., not just the issuer, accept these assets as payment.

What becomes clear when looking at this definition but may be surprising given the attention that crypto currencies have received in recent years: Bitcoin, Ethereum and the likes are generally not e-money. It is true that these tokens are used, among other thing, for payment purposes and are accepted as means of payment. However, the well-known crypto currencies, especially Bitcoin and Ethereum, do not provide a claim against an issuer (or any other debtor). A typical and widespread example of e-money, on the other hand, can be found at PayPal: With a PayPal payment one does – technically - not transfer currency, but rather PayPal users acquire e-money, which PayPal transmits to the recipients, and which can be exchanged back into currency by the recipients.

With MiCAR, the EU legislator reacts to the developments in recent years and seeks to regulate transactions with crypto assets, at least for many forms of these crypto assets, in order to protect consumers.

In contrast, MiCAR explicitly includes e-money tokens in the regulation of crypto assets. According to the MiCAR, as it stands as the result of the trilogue, crypto-assets that purport to maintain a stable in value by referencing to the value of one official currency are covered by the regulation as e-money tokens. In this respect, e-money tokens are similar to e-money, which, as a monetary value, can only be issued at the par value of an official currency and must be redeemed at par value by the issuer. Consequently MiCAR stipulates that e-money tokens are deemed to be e-money within the meaning of the EU Electronic Money Directive 2009/110/EC and are covered by this regulation unless MiCAR provides for special rules. E-money tokens are thus subject to two regulatory regimes, as a form of e-money to the E-Money Directive 2009/110/EC and as crypto assets to MiCAR; an exception to the rule that MiCAR should in principle conclusively provide the regulatory framework for crypto assets.

If every e-money token is therefore also e-money, the same does not apply vice versa: not every e-money is also an e-money token. MiCAR only covers crypto-assets, and this also applies to digital money: it is only an e-money token if it is a crypto-asset. Crypto-assets are only those digital representations of a value or a right that can be transmitted and stored electronically using distributed ledger technology (DLT) or similar technology. The characteristic feature of e-money tokens is thus the use of DLT, of which the blockchain is probably the best-known example.

Thus, for the sake of simplicity, the following principle will apply to the demarcation and interaction of regulations in the future: All e-money tokens are also e-money and, unless MiCAR provides otherwise, will be regulated as e-money. Conversely, not every e-money is at the same time an e-money token regulated by MiCAR, but only if it is a crypto-asset, i.e., if the e-money is transferred and stored using DLT.

Thus, the rules for digital money envisioned by MiCAR can be summarized thus:

- E-money tokens define a new class of digital money.
- E-money tokens are characterized by two features: They purport to maintain a stable value by referencing to the value of one official currency, and they use distributed ledger (or similar) technology.
- E-money tokens are e-money within the meaning of the EU E-Money Directive 2009/110/EC and the Lithuanian Law on Electronic Money and Electronic Money Institutions, and the current regulation of e-money also covers, in principle, e-money tokens.
- In addition, however, special rules apply to e-money tokens, in particular the obligation to publish a prospectus in the form of a white paper prior to the offer and to update this prospectus on an ongoing basis.