

## **Section 25i of the Banking Act**

### Due diligence and organisational duties for electronic money business

(1) In the issuance of electronic money within the meaning of the Payment Services Supervision Act, the institution must fulfil the duties in section 3 subsection (1) numbers 1 and 4, section 4 subsections (1) to (4), section 7 subsections (1) and (2) and section 8 of the Money Laundering Act.

(2) These duties do not have to be fulfilled insofar as the amount of electronic money issued to the electronic money holder and stored on an electronic money storage medium is 100 euros or less per calendar month and it is guaranteed that

1. the electronic money issued cannot be linked by means of technology to the electronic money of another electronic money holder or with the electronic money of another issuer,
2. in redeeming the issued electronic money in exchange for cash, the duties in subsection (1) above are fulfilled, unless the redemption of the electronic money is for a value of 20 euros or less or the redemption is made by crediting the account of the electronic money holder at a deposit-taking institution under section 1a subsection (1) number 1a or an electronic money institution under section 1 subsection 2a of the Payment Services Supervision Act, and
3. insofar as the electronic money is issued on a rechargeable electronic money storage medium, the maximum amount stated in the first sentence above of 100 euros per calendar cannot be exceeded. In the case of the threshold value in the first sentence above, it is immaterial whether the electronic money holder acquires the electronic money through one or several transactions insofar as there are indications that they are linked.

(3) Insofar as electronic money is issued via a rechargeable electronic money storage medium, the electronic money issuer must keep files in which all of the electronic money amounts issued to and redeemed by a previously identified electronic money holder are listed along with the time and the issuing and redeeming body. Section 8 subsections (2) to (4) of the Money Laundering Act is to be applied accordingly.

(4) If there are facts which warrant the assumption that, in using an electronic money storage medium, the issued electronic money may be linked with the electronic money of another electronic money holder or with the electronic money of another issuer, or if facts warrant the assumption that, in connection with the other technological use of this electronic money storage device, its distribution and the involvement of certain acceptance points, there is an increased risk of money laundering, terrorist financing or other criminal offences in accordance with section 25c subsection (1), BaFin may, in order to counter these risks with appropriate measures,

1. issue instructions to the management of the institution;

2. prohibit the institution from using this electronic money storage medium or order other appropriate and necessary technical changes to this electronic money storage medium,

3. require the institution to fulfil duties commensurate with the risk in accordance with sections 3 to 9 of the Money Laundering Act.

(5) Insofar as there is a low risk of money laundering, terrorist financing or other criminal offences in accordance with section 25c subsection (1) in using an electronic money storage medium, BaFin may, subject to revocation at any time, give permission to the effect that an institution has to fulfil the simplified due diligence duties under section 5 of the Money Laundering Act or need not fulfil other duties.

The legislature justified the need to introduce section 25i of the Banking Act and to include e-money agents for reasons including the following (from the explanatory memorandum contained in a parliamentary printed document (*Drucksache*) numbered 17/8043):

*“...section 25i, inserted by number 4, creates special due diligence and organisational duties for deposit-taking credit institutions that issue electronic money. The duties are based on the specific risks of money laundering associated with this product. BaFin’s competencies in terms of examination and supervision are also expanded, with the aim of going beyond supervision of individual institutions to enable product-based supervision, under AML law, of the electronic money storage media in use in the market. Section 25i is intended to have the same regulatory content as section 22 subsections (2) and (3) of the Payment Services Supervision Act, which applies to electronic money institutions if they issue electronic money in the same manner as deposit-taking credit institutions. For the cases in which these two groups of issuers distribute via electronic money agents, who issue electronic money for and on behalf of an issuer as independent commercial agents and are not integrated into the issuer’s business organisation, these provisions are also adapted to apply to the electronic money agents, in order to create AML rules that apply equally wherever there is the same risk of money laundering in the electronic money industry...*

*...In this context, two business types have proved to be particularly high-risk: anonymous issuance of electronic money in return for cash payment, and distribution via an independent electronic money agent (e.g. a kiosk or petrol station). Unlike branches or subsidiaries, electronic money agents are independent business operators and are thus not integrated in the business organisation of the electronic money issuers (electronic money institutions or deposit-taking credit institutions), most of which are based in another country. Further areas of heightened risk are the pooling by an electronic money holder of electronic money generated by different issuers and via different distribution channels, as well as the trade in electronic money among independent individuals and companies dealing in electronic money on the secondary market in a way similar to financial instruments.*

*“...Apart from cases in which electronic money is issued by way of non-cash payment, for example using a credit card or a payment card for an identified bank account or card account, it has been demonstrated that an effective instrument for minimising risks of money laundering – besides the safeguards that the issuer must operate (monitoring of shadow accounts for electronic money, monitoring the acceptance points and identifying the*

electronic money holder when electronic money is redeemed for cash) – is to identify the electronic money holder at the point of sale, if the electronic money holder has not already been identified by the issuer at an earlier point in time. The Act bears out this approach to prevention. The know-your-customer principle, the central element of which is the identification of the customer, also applies in principle to the electronic money business. The purpose of this is to enable the flow of payments to be traced fully for the purposes of AML and solvency law in the case of electronic money products, as is possible for any other product used in payment processing (credit transfer, direct debit). The same purpose is served by the duty established in subsection (3). This consolidates, in a monitoring system for the relevant shadow accounts, the amounts of electronic money issued to a single, identified electronic money holder and transferred by the latter to an acceptance point or other recipient. If the credit institution or electronic money institution that issues the electronic money ensures by technological means within the system, for example, by appropriate barriers, that an electronic money storage medium cannot be used for an amount exceeding €100, no such monitoring system is required.

Minimum thresholds for electronic money amounts of €100 or less per calendar month are provided with respect to compliance with due diligence requirements under AML law – specifically, the identification requirement in respect of rechargeable and non-rechargeable electronic money products. For these thresholds to apply, it must not be possible to pool and thus link the electronic money issued with the electronic money of another holder or with electronic money from another issuer by technological means. Furthermore, the threshold value in the case of redemption for cash is only €20. If the electronic money is issued on a rechargeable electronic money storage medium, it must be ensured by some technological means – for example, by a barrier built into the system that takes effect automatically when the maximum amount is reached – that the stated amount of €100 per calendar month cannot be exceeded.

The final sentence of section 25i subsection (2) is intended to combat avoidance of the €100 threshold set out in the subsection, where such avoidance involves artificially splitting up the amount of electronic money purchased over several electronic money storage media (smurfing). As a rule, it can be assumed that such a link exists if the link is clearly apparent, and if the link must be obvious to the employee engaged in distribution at the point of sale. In such a case, that employee is not obliged to record additional information; nevertheless, any infringement of section 25i subsection (2) is punishable by an administrative fine under section 17 subsection (1).

Subsection (4) gives BaFin the competence, as part of its ongoing supervision and particularly by means of on-site examinations, to check individual obliged parties' compliance with these technical measures for the purpose of minimising the risks of money laundering, and to take appropriate measures to combat the risks it finds. This applies not only when there are risks of money laundering associated with the use of a particular electronic money storage medium, but also in connection with other criminal offences. If the technological steps demanded by the Act have not been taken or the use of an electronic money storage medium is risky, BaFin can take appropriate countermeasures. Subsection (4) contains a graded catalogue of measures designed for this purpose in line with the principle of proportionality.

Conversely, if the risk involved is low, BaFin can grant its permission for individual duties not to be fulfilled...”