

Alternative Currencies and Bonus Point Schemes as Financial Services requiring a Licence

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Nowadays there are a large number of systems performing a similar function to money, such as regional currencies, customer loyalty and bonus point schemes, cards for branch networks or groups of companies, store cards, online coins for gaming, or virtual currencies like Bitcoin. Some alternative currency and bonus point schemes may constitute financial services that require a licence issued by the Financial Market Authority (FMA). They may:

- require a banking licence for the **issuance and administration of payment instruments** pursuant to Article 1 para. 1 no. 6 of the Austrian Banking Act (BWG; Bankwesengesetz);
- require a licence as an electronic money institution for the **issuance of electronic money** pursuant to Article 1 para. 1 and Article 3 para. 1 of the E-Money Act (EGeldG; E-Geldgesetz).
- require a licence as a payment institution for **payment transactions** via the accounts of third parties or for the operation of payment accounts, including such that are based on or in conjunction with cards and other **payment instruments** pursuant to Article 1 para. 2 of the Payment Services Act (ZaDiG; Zahlungsdienstegesetz).

Whether a requirement to hold a licence actually exists, and therefore whether the provided financial services is subject to supervision by the Austrian Financial Market Authority (FMA), shall generally be checked on the basis of two criteria:

1. **Whether the instrument fulfils a payment function.**
2. **How large the network is, within which the payment function is fulfilled.**

To whom does the obligation to hold a licence apply?

If a payment instrument is concerned that is accepted by third parties for payment purposes, than the issuing body is subject to the requirement to hold a licence.

If in connection with currency and card systems someone operates accounts, through which payments are conducted for billing purposes, the entity holding the accounts may be obliged to hold a licence as a payment service provider pursuant to ZaDiG.

Frequently both circumstances apply, with the issuing body also settling the payments and clearing them with the accepting parties.

The accepting parties or purely technical service providers who are not involved in the flow of money are not subject to the obligation to hold a licence.

Exemptions from the obligation to hold a licence

There is no obligation to hold a licence, if the alternative currency, the card or bonus points system constitutes a **limited network**. This is explicitly defined for payment services and electronic money in Article 2 para. 3 no. 11 ZaDiG and Article 2 para. 3 E-Geldgesetz 2010 and is also applicable for the general activity of issuance and administration of payment instruments pursuant to Article 1 para. 1 no. 6 BWG.

What is to be understood by a limited network can be found in the explanatory remarks about ZaDiG and the E-Geldgesetz 2010, which can be accessed in German on the website www.parlament.gv.at. The legislator explains the considerations about the scope and content of the regulations in the legislative materials. They contain a range of examples:

- Store cards, which may only be used in a specific store or a specific chain of stores, e.g. by collecting points by making purchases in these stores; (...)
- Transportation cards, which may only be used for purchasing tickets (e.g. for an underground railway network);
- Membership cards, provided that they only have a payment function for goods or services offered by the organisation issuing the card (e.g. a football club card)
- In the case of cards that may be used in a specific store or chain of stores, e.g. by collecting points by making purchases in these stores; whereby the range both in geographical terms and in product terms is decisive, as well as the possibility that other stores may join the scheme (so-called gift or city cards).

- Fuel cards for using in specific petrol stations, even in the case where they may also be used at the forecourt shops to pay for certain small items or supplies for the car.
- Club-Med cards or similar cards, which may only be used for payments in a specific holiday club.
- Gift cards that are accepted at a large number of retailers or city cards with payment function shall not fall within the scope of "limited" networks, as a constant growth in the number of services/retailers is to be assumed.
- For the same reasons prepaid cards for mobile phone network operators are generally not covered.
- The same principles apply for internet websites. If it is only possible to pay on a specific website, or only for a specific type of goods/services, then the criterion of the "limited network" is satisfied.
- If however it may be assumed that the network will be expanded, then in that case this constitutes an open network, and a licence is therefore required.

Small and specific systems are not intended to fall under the strict supervisory laws, but once the system enables a broad range of applications, then it should be regulated. **Open networks** therefore generally do not tend to be exempted from the obligation to hold a licence, since there are conceived as a general rule for a constantly growing network of service providers.

Due to the different natures of the respective types of systems the legislator does not prescribe any precise parameters to delineate between open and limited systems, but instead has a flexible system of different "limits" both of a quantitative as well as of a qualitative nature. In particular the limits address:

- the geographical range of the system
- the number of accepting parties
- the type of products and services
- the duration of validity of the payment instrument
- any applicable limits on amounts.

There is no absolute lower and upper limit for any of these parameters, their interplay within the system proves to be far more decisive: the greater the group of retailers accepting the instrument (and/or the geographical radius), the narrower the group of products and services that can be purchased must be, and vice versa:

System 1	System 2	System 3	System 4
<p>Smaller municipalities within a region</p> <p>All products of local retailers</p> <p>Amount limited to EUR 150/month</p> <p>Validity: 1 year</p> <p>Example: An association of municipalities joins together to establish a "regional dollar" for promoting regional providers. The "regional dollar" can be purchased at certain places in order to be able to make cheaper purchases at the bookshop in place A and at the organic grocer in place B.</p>	<p>Town/city (population 50,000)</p> <p>Slightly restricted group of products or retailers (e.g. restaurants)</p> <p>Amount limited to EUR 150/month</p> <p>Validity: open-ended</p> <p>Example: A small town issues a card, which when presented allows payment at all 100 public leisure facilities (swimming pools, libraries, theatres etc.). The amounts are then debited from the customer's bank account after payment.</p>	<p>All of Austria</p> <p>A very restricted group of products or retailers (e.g. a franchise-based chain, with a pre-determined number of businesses)</p> <p>No explicit limit on the amount</p> <p>Validity: 2 years</p> <p>Example: Several online music services start a joint bonus point system. When making purchases, the customer is rewarded with bonus points, which can then be "spent" at other retailers. At the end of the month, the retailers settle up with one another.</p>	<p>All of Austria</p> <p>Only a related product category</p> <p>Amount limited to EUR 400/month</p> <p>Validity: 3 years</p> <p>Example: An oil company issues a fuel card, which can be used to pay for a range of services, however only for motor vehicle-related goods and services.</p>

All of these systems are of a limited nature. The examples serve as guidance for orientation purposes, but do not constitute a legal or supervisory stipulation. The system is a flexible one, in which it is possible that individual parameters may be changed or even omitted.

It is however significant that the limits are defined in **contracts and/or terms and conditions**. It is not sufficient for a network to be of a "de facto" limited nature, by virtue of the fact that there are not enough accepting parties, or simply because it is "meant to be".

If an alternative currency or a bonus points system is of a sufficiently restricted nature, there is no obligation to hold a licence. This however also means that the system is not subject to any form of regulation or supervision by the FMA, that there are considerably fewer rules to be observed and that users are afforded less protection.

If, on the other hand, the payment system is set up in such a way that the financial service is intended to develop into an instrument for general usage, then the obligation to hold a licence is to be assumed, and therefore the necessary application to be submitted to the Austrian Financial Market Authority (FMA).

When setting up alternative payment systems, the following questions are relevant:

- Is the instrument/the system intended for payment at third parties?
- Who issues the instrument/system?
- Are amounts managed via separate accounts, can credit balances arise, are pay-outs possible?
- How large is the network?

It is therefore advisable, in order to avoid unauthorised business operations in accordance with the BWG, ZaDiG or E-Geldgesetz 2010, to make an enquiry to the FMA prior to commencing operations for a specific model. Such an enquiry should be made to the FMA's postal address or is also possible electronically by sending a mail to fma@fma.gv.at. An enquiry about whether a licence obligation exists may address a specific business case, and therefore does not replace a general consultation with a lawyer in advance.