JUDGMENT OF THE COURT

30 May 2018*

(*Directive 2009/110/EC – Electronic money institutions – Redemption at par value – Safeguarding requirements*)

In Case E-9/17,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Liechtenstein Appeals Board of the Financial Market Authority (*Beschwerdekommission der Finanzmarktaufsicht*), in a case pending before it between

Edmund Falkenhahn AG

and

The Financial Market Authority (*Finanzmarktaufsicht*)

concerning the interpretation of 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,

THE COURT,

composed of: Páll Hreinsson, President, Per Christiansen (Judge-Rapporteur) and Martin Ospelt (ad hoc), Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

* Language of the request: German.

– The Liechtenstein Government, represented by Andrea Entner-Koch, Director, EEA Coordination Unit, and Christoph Büchel, Attorney-at-Law, acting as Agents;

– The Czech Government, represented by Martin Smolek and Jiří Vláčil, acting as Agents; and

– the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler, Ingibjörg Ólöf Vilhjálmsdóttir and Michael Sánchez Rydelski, members of its Department of Legal & Executive Affairs, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Edmund Falkenhahn AG ("Falkenhahn"), represented by Melanie Henkel, Adviser; the Liechtenstein Government, represented by Andrea Entner-Koch and Christoph Büchel; ESA, represented by Ingibjörg Ólöf Vilhjálmsdóttir; and the European Commission ("the Commission"), represented by Audronė Steiblytė, member of its Legal Service, acting as Agent, at the hearing on 8 March 2018,

gives the following

Judgment

I Legal background

EEA law

1 Article 20 of Protocol 5 ("the Statute") to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice reads:

> *The Registrar shall notify the Governments of the EFTA States, the EFTA Surveillance Authority, the Union and the European Commission of any case pending before the Court. Within two months of this notification, the EFTA States, the EFTA Surveillance Authority, the Union and the European Commission shall be entitled to submit statements of case or written observations to the Court.*

2 Article 32 of the Court's Rules of Procedure ("RoP") provides, inter alia, the following:

> *1. The original of every pleading must be signed by the party's agent or lawyer.*
>
> *[…]*

2. All pleadings shall bear a date. In the reckoning of time-limits for taking steps in proceedings, only the date of lodgment at the Registry shall be taken into account.

[…]

5. Without prejudice to the provisions in the preceding paragraphs of this Article, the date on which a copy of the signed original of a pleading, including the schedule of documents referred to in paragraph 3, is received at the Registry by telefax or other technical means of communication available to the Court shall be deemed to be the date of lodgment for the purposes of compliance with the time-limits for taking steps in proceedings, provided that the signed original of the pleading, accompanied by the annexes and copies referred to in the second subparagraph of paragraph 1 above, is lodged at the Registry no later than 10 days thereafter.

Without prejudice to the first subparagraph of paragraph 1 or to paragraphs 2 to 4, the Court may by decision determine the criteria for a procedural document sent to the Registry by electronic means to be deemed to be the original of that document. That decision shall be published in the Official Journal of the European Union.

3 Article 3 of the Decision of the Court of 12 December 2016 on the lodging and service of procedural documents by means of e-EFTACourt (OJ 2017 C 73, p. 18) reads:

A procedural document lodged by means of e-EFTACourt shall be deemed to be the original of that document for the purposes of the first subparagraph of Article 32(1) of the Rules of Procedure where the representative's user identification and password have been used to effect that lodgement. Such identification shall constitute the signature of the document concerned.

4 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 (OJ 2009 L 267, p. 7) ("the Electronic Money Directive" or "the Directive") was inserted as point 15 of Annex IX (Financial services) to the EEA Agreement by Joint Committee Decision No 120/2010 of 10 November 2010 (OJ 2011 L 58, p. 77), which entered into force on 1 November 2012.

5 The provisions of the Electronic Money Directive that are relevant to the present case contain references to two other directives. One of them is 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 (OJ 2007 L 319, p. 1, as corrected by OJ 2009 L 187, p. 5) ("the Payment Services Directive"). That directive was inserted as point 16e of Annex

IX to the EEA Agreement by Joint Committee Decision No 114/2008 of 7 November 2008 (OJ 2008 L 339, p. 103), which entered into force on 1 November 2011.

6 The other directive referred to is Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (OJ 2006 L 177, p. 201) ("the Capital Adequacy Directive"). That directive was inserted as point 31 of Annex IX to the EEA Agreement by Joint Committee Decision No 65/2008 of 6 June 2008 (OJ 2008 L 257, p. 27), which entered into force on 1 November 2010.

7 In the European Union, the Capital Adequacy Directive has been repealed, with effect from 1 January 2014, by 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 (OJ 2013 L 176, p. 338). Moreover, with effect from 13 January 2018, the Payment Services Directive has been repealed by Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ 2015 L 337, p. 35). However, neither Directive 2013/36/EU nor Directive (EU) 2015/2366 has been incorporated in the EEA Agreement. Consequently, the Capital Adequacy Directive and the Payment Services Directive remain in force as EEA law.

8 Recital 4 of the Electronic Money Directive reads:

> *With the objective of removing barriers to market entry and facilitating the taking up and pursuit of the business of electronic money issuance, the rules to which electronic money institutions are subject need to be reviewed so as to ensure a level playing field for all payment services providers.*

9 Recital 13 of the Directive reads:

> *The issuance of electronic money does not constitute a deposit-taking activity pursuant 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 [(OJ 2006 L 177, p. 1)], in view of its specific character as an electronic surrogate for coins and banknotes, which is to be used for making payments, usually of limited amount and not as means of saving. Electronic money institutions should not be allowed to grant credit from the funds received or held for the purpose of issuing electronic money. Electronic money issuers should not, moreover, be allowed to grant interest or any other benefit unless those benefits are not related to the length of time during which the electronic money holder holds electronic money. The conditions for granting and maintaining authorisation as electronic money institutions should include prudential requirements that are proportionate to*

the operational and financial risks faced by such bodies in the course of their business related to the issuance of electronic money, independently of any other commercial activities carried out by the electronic money institution.

10 Recital 14 of the Directive reads:

It is necessary, however, to preserve a level playing field between electronic money institutions and credit institutions with regard to the issuance of electronic money to ensure fair competition for the same service among a wider range of institutions for the benefit of electronic money holders. This should be achieved by balancing the less cumbersome features of the prudential supervisory regime applying to electronic money institutions against provisions that are more stringent than those applying to credit institutions, notably as regards the safeguarding of the funds of an electronic money holder. Given the crucial importance of safeguarding, it is necessary that the competent authorities be informed in advance of any material change, such as a change in the safeguarding method, a change in the credit institution where safeguarded funds are deposited, or a change in the insurance undertaking or credit institution which insured or guaranteed the safeguarded funds.

11 Recital 18 of the Directive reads, inter alia:

Electronic money needs to be redeemable to preserve the confidence of the electronic money holder. Redeemability does not imply that the funds received in exchange for electronic money should be regarded as deposits or other repayable funds for the purpose of Directive 2006/48/EC. Redemption should be possible at any time, at par value without any possibility to agree a minimum threshold for redemption. Redemption should, in general, be granted free of charge. …

12 Article 2(1) and (2) of the Directive contains the following definitions:

1. *'electronic money institution' means a legal person that has been granted authorisation under Title II to issue electronic money;*

2. *'electronic money' means 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[.]*

13 Furthermore, Article 2(3) of the Directive defines "electronic money issuer", inter alia, as entities referred to in Article 1(1), which includes electronic money institutions as defined in Article 2(1).

14 Title II of the Directive contains requirements for the taking up, pursuit and prudential supervision of the business of electronic money institutions, and encompasses Articles 3 to 9.

15 Article 7(1) and (2) of the Directive reads:

> *1. Member States shall require an electronic money institution to safeguard funds that have been received in exchange for electronic money that has been issued, in accordance with Article 9(1) … of Directive 2007/64/EC. …*
>
> *2. For the purposes of paragraph 1, secure, low-risk assets are asset items falling into one of the categories set out in Table 1 of point 14 of Annex I to [Directive 2006/49/EC] for which the specific risk capital charge is no higher than 1,6 %, but excluding other qualifying items as defined in point 15 of that Annex.*
>
> *For the purposes of paragraph 1, secure, low-risk assets are also units in an undertaking for collective investment in transferable securities (UCITS) which invests solely in assets as specified in the first subparagraph.*
>
> *In exceptional circumstances and with adequate justification, the competent authorities may, based on an evaluation of security, maturity, value or other risk element of the assets as specified in the first and second subparagraphs, determine which of those assets do not constitute secure, low-risk assets for the purposes of paragraph 1.*

16 Article 7(1) of the Electronic Money Directive refers, inter alia, to Article 9(1) of the Payment Services Directive. That provision reads:

> *The Member States or competent authorities shall require a payment institution … to safeguard funds which have been received from the payment service users or through another payment service provider for the execution of payment transactions, as follows:*
>
> *either:*
>
> *(a) they shall not be commingled at any time with the funds of any natural or legal person other than payment service users on whose behalf the funds are held and, where they are still held by the payment institution and not yet delivered to the payee or transferred to another payment service provider by the end of the business day following the day when the funds have been received, they shall be deposited in a separate account in a credit institution or invested in secure, liquid low-risk assets as defined by the competent authorities of the home Member State; and*

(b) they shall be insulated in accordance with national law in the interest of the payment service users against the claims of other creditors of the payment institution, in particular in the event of insolvency;

or

(c) they shall be covered by an insurance policy or some other comparable guarantee from an insurance company or a credit institution, which does not belong to the same group as the payment institution itself, for an amount equivalent to that which would have been segregated in the absence of the insurance policy or other comparable guarantee, payable in the event that the payment institution is unable to meet its financial obligations.

17 Article 7(2) of the Electronic Money Directive refers to Table 1 of point 14 of Annex I to the Capital Adequacy Directive. That table reads, as far as relevant:

Categories	***Specific risk capital charge***
Debt securities issued or guaranteed by central governments, issued by central banks, international organisations, multilateral development banks or Member States' regional government or local authorities which would qualify for credit quality step 1 or which would receive a 0 % risk weight under the rules for the risk weighting of exposures under Articles 78 to 83 of Directive 2006/48/EC.	*0 %*
Debt securities issued or guaranteed by central governments, issued by central banks, international organisations, multilateral development banks or Member States' regional governments or local authorities which would qualify for credit quality step 2 or 3 under the rules for the risk weighting of exposures under Articles 78 to 83 of Directive 2006/48/EC, and debt securities issued or guaranteed by institutions which would qualify for credit quality step 1 or 2 under the rules for the risk weighting of exposures under Articles 78 to 83 of Directive 2006/48/EC, and debt securities issued or guaranteed by institutions which would qualify for credit quality step 3 under the rules for the risk weighting of exposures under point 28, Part 1 of Annex VI to	*0,25 % (residual term to final maturity six months or less)* *1,00 % (residual term to final maturity greater than six months and up to and including 24 months)* *1,60 % (residual term to maturity exceeding 24 months)*

Directive 2006/48/EC, and debt securities issued or guaranteed by corporates which would qualify for credit quality step 1, 2 or 3 under the rules for the risk weighting of exposures under Articles 78 to 83 of Directive 2006/48/EC. *Other qualifying items as defined in point 15.*	

18 Title III of the Electronic Money Directive governs the issuance and redeemability of electronic money and comprises Articles 10 to 13.

19 Article 10 of the Directive reads:

> *Without prejudice to Article 18 [transitional provisions], Member States shall prohibit natural or legal persons who are not electronic money issuers from issuing electronic money.*

20 Article 11(1) and (2) of the Directive read:

> *1. Member States shall ensure that electronic money issuers issue electronic money at par value on the receipt of funds.*
>
> *2. 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.*

21 Article 12 of the Directive reads:

> *Member States shall prohibit the granting of interest or any other benefit related to the length of time during which an electronic money holder holds the electronic money.*

National law

22 The Electronic Money Directive and the Payment Services Directive have been implemented in the Liechtenstein legal order by the Act on Electronic Money (*E-Geldgesetz*, LR 950.3), the Regulation on Electronic Money (*E-Geldverordnung*, LR 950.31) and the Regulation on Payment Services (*Zahlungsdiensteverordnung*, LR 950.11).

23 Under Article 11 of the Act on Electronic Money, electronic money institutions must duly safeguard funds received by customers. Safeguarding requirements are set out in Article 5 of the Regulation on Electronic Money, which refers to Article 5 of the Regulation on

Payment Services. Article 5(1)(a) of the Regulation on Payment Services requires the funds to be invested in secure, liquid low-risk assets, which are to be defined by the Financial Market Authority in a directive. However, no directive within the meaning of that provision had been adopted at the relevant time.

24 According to Article 44 of the Act on Electronic Money, electronic money issuers must issue electronic money at par value on the receipt of funds and, upon request, redeem to their customers, at any moment and at par value, the monetary value of the electronic money held by them. Pursuant to Article 45 of the Act on Electronic Money, the granting of interest or any other benefit related to the length of time during which a customer holds the electronic money is prohibited.

II Facts and procedure

25 Falkenhahn is a public limited liability company under Liechtenstein law. On 1 March 2017, it applied to the Financial Market Authority for the granting of an authorisation as an electronic money institution, according to the request for an advisory opinion, as follows:

> *Against payment of legal currency, units of account, called 'World' or 'Money', are to be issued. The value of those units of account shall be dependent on the market value of gold. One unit of 'World' shall correspond to the value of one ounce of gold, while one unit of 'Money' shall correspond to the value of one thousandth of an ounce of gold. Subsequently, the unit of account will be stored electronically in a 'safe-deposit box' or a 'wallet'. The wallet is intended for daily use, meaning it may be used for carrying out transactions in 'World' or 'Money'. The wallet shall take the form of an electronic application called 'Money Transfer System' (App). The unit of account can then be used for payments of any kind. The funds of customers shall be safeguarded through investment in gold.*

26 At the oral hearing, Falkenhahn's adviser stated that, under this business model, the client would bear the financial risk of fluctuations in the price of gold and would be informed of that risk before having access to Falkenhahn's system.

27 By an order of 23 August 2017, the Financial Market Authority rejected the application. It held that electronic money may not be linked to the price of gold, as the price of the electronic money issued and held must be equivalent in each case to the par value of the currency received. An electronic money issuer is therefore prohibited from making the value of a unit of electronic money dependent on a reference value, such as an ounce of gold, that is other than the par value of the underlying legal currency. An additional reason for the rejection was that gold does not at present constitute a secure, liquid low-risk asset and therefore is not an appropriate means of security.

28 Falkenhahn then lodged a complaint with the Appeals Board of the Financial Market Authority ("the Appeals Board"), seeking to have its application for authorisation as an electronic money institution granted.

29 On 12 October 2017, the Appeals Board decided to request an advisory opinion from the Court. The request was registered at the Court on the same date.

30 In the order for reference, the Appeals Board observes that Article 11(1) and (2) of the Electronic Money Directive appear to require only that electronic money is issued at par value on the receipt of funds and that the monetary value of the electronic money held can be redeemed at any point in time at par value. Thus, it may not be excluded that the value of electronic money in the period from issuance to redemption may be linked to, for example, the price of gold. Article 12 of the Directive, read in conjunction with recital 13 of the Directive, seem to preclude the redemption at an amount above par value only if it is related to the length of time during which the electronic money is held. This would not be the situation in this case, where the value is linked to the price of gold. According to the request for an advisory opinion, redemption at an amount below par value is precluded in any event.

31 As regards the safeguarding requirements, the Appeals Board observes that gold is not included among the asset items that are regarded as secure, low-risk assets under Article 7(2) of the Electronic Money Directive. If that definition is exhaustive, investment in gold does not constitute suitable safeguarding. If the definition is not exhaustive, the question arises as to whether, in order for investment in gold to constitute a suitable safeguarding asset, a decision to that effect must have been taken by the competent authority (such as the Financial Market Authority) in the form of a general, abstract rule, or whether the decision may be taken as part of an individual authorisation procedure. In the former situation, the application for authorisation must be rejected since no rule has been adopted to the effect that investment in gold constitutes a suitable safeguarding asset. In the latter situation, it will be necessary to review the assessment of the Financial Market Authority in the context of the application for authorisation that investment in gold does not constitute a suitable safeguarding asset.

32 On this basis, the Appeals Board has referred the following questions to the Court:

> *I/1 Is it compatible with [the Electronic Money Directive] if electronic money has a value different from par value on the receipt of funds in the period between issuance (Article 11(1)) and redemption (Article 11(2)), provided that redemption (Article 11(2)) is at least at par value?*
>
> *I/2 If Question I/1 is answered in the affirmative: Can the different value referred to in Question I/1 be linked to a variable value (such as the price of gold)?*

I/3 If Question I/2 is answered in the affirmative: In the case of a link to a variable value (such as the price of gold), is it compatible with Article 12 of the Electronic Money Directive for redemption (Article 11(2)) to be realised at an amount above par value?

II/1 Does Article 7(2) first and second subparagraph of the Electronic Money Directive define exhaustively what are to be regarded as secure, low-risk assets within the meaning of the first sentence of Article 7(1) of the Electronic Money Directive read in conjunction with Article 9(1)(a) of [the Payment Services Directive]?

II/2 If Question II/1 is answered in the negative: Does Article 9(1)(a) of the Payment Services Directive preclude the competent authority from defining what constitutes secure, (liquid) low-risk assets only as part of the decision on the granting of an authorisation in accordance with Article 10 of the Electronic Money Directive?

II/3 If Question II/2 is answered in the negative: Is the reference to Article 9(1) and (2) of the Payment Services Directive contained in the first sentence of Article 7(1) of the Electronic Money Directive to be interpreted as meaning 'secure, low-risk assets' within the meaning of the first subparagraph of Article 7(2) of the Electronic Money Directive or as meaning 'secure, liquid low-risk assets'?

II/4: Depending on the answer to Question II/3: Is gold a secure, (liquid) low-risk asset?

33 The Appeals Board notes that Questions I/1 to I/3 are independent from Questions II/1 to II/4. A negative answer to one set of questions therefore does not affect the relevance of answering the other set of questions.

34 In accordance with Article 20 of the Statute of the Court, the deadline for submitting written observations expired on 3 January 2018. The Court notes that the Czech Government and ESA submitted their observations through e-EFTACourt on 21 December 2017 and 3 January 2018, respectively. The Liechtenstein Government and the Commission submitted their observations electronically on 22 December 2017. The originals of those observations were lodged at the Registry on 27 December 2017 and 5 January 2018, respectively. Falkenhahn's observations dated 26 January 2018 were registered at the Court on 31 January 2018. As Falkenhahn submitted observations after the expiry of the deadline for submitting observations, that document was rejected.

35 Pursuant to Article 32(5) RoP, the date of an electronic submission of a pleading is deemed to be the date of lodgement for the purposes of compliance with the time-limits for taking steps in proceedings, provided that the signed original is lodged at the Registry no later than 10 days thereafter. The observations of the Commission do not satisfy that

requirement, as the time between 22 December 2017 and 5 January 2018 is more than 10 days. The Commission's written observations must therefore be rejected as out of time.

36 It should be added that in accordance with the Court's decision of 12 December 2016 on the e-EFTACourt application, procedural documents may be lodged via this application. The application enables the exchange of procedural documents with the Court's Registry. A procedural document lodged by means of e-EFTACourt shall be deemed to be the original of that document where the representative's user identification and password have been used to effect that lodgement.

III Answers of the Court

A preliminary remark

37 At the oral hearing, Falkenhahn's adviser did not specifically address the Appeals Board's questions. However, the adviser stated that it had been in contact with the Financial Market Authority regarding an authorisation for Falkenhahn's business. According to Falkenhahn's adviser, the Financial Market Authority had stated that the most promising approach for Falkenhahn to gain access to the market with its business model would be to obtain a licence as an electronic money institution. Nevertheless, the Financial Market Authority in its order of 23 August 2017 refused to grant such a licence. Falkenhahn explained at the hearing that it seeks legal certainty for its business model and the definition of the appropriate regulatory framework.

Questions I/1 to I/3

Observations submitted to the Court

38 All those who have submitted observations, with the exception of Falkenhahn, suggest that Question I/1 should be answered in the negative. In their view, the requirements concerning issuance and redemption at par value under Article 11(1) and (2) and the prohibition of interest under Article 12 of the Directive cannot be understood as permitting the value of electronic money to be linked, in the period between payment and redemption of the funds, to any other value than par value of the funds provided in exchange. They point out that, according to recital 13 of the Directive, electronic money is an electronic surrogate for coins and banknotes, which is to be used for making payments, and not as means of saving. The value of electronic money is therefore inseparably linked to the value of the funds that were provided in exchange. Consequently, it cannot be dependent on any other value, such as the price of gold.

39 In further support of the view that electronic money should only serve a payment purpose and not an investment purpose, the Liechtenstein Government observes that the Electronic Money Directive distinguishes between the activity of issuing electronic money and other

financial market activities, as expressed in recital 14 of the Directive. On the one hand, electronic money institutions are treated favourably in comparison to credit institutions regarding certain regulatory requirements. On the other hand, electronic money institutions must comply with more stringent requirements with regard to safeguarding the funds of electronic money holders.

40 The Czech Government submits further that the linking of electronic money to other factors than par value on the receipt of funds would lead to difficulties in determining precisely the value of electronic money in circulation or assessing the capital requirements laid down in the Directive.

41 ESA adds that gold is a commodity and not a monetary value as required by Article 2(2) of the Directive. Moreover, units of account called "World" or generically "Money", such as envisaged under the scheme proposed by Falkenhahn, cannot be used for payment purposes and are not accepted by third parties as payment. Finally, permitting electronic money to be denominated in a unit of account separate from national currencies would be liable to pose a threat to the unit of account function of national currencies in providing a common financial denominator for the whole economy.

Findings of the Court

42 By its Question I/1, the Appeals Board asks whether it is compatible with the Directive that electronic money has a value different from par value on the receipt of funds in the period between issuance and redemption, provided that redemption is at least at par value.

43 As stated in recital 13 of the Directive, the issuance of electronic money does not constitute a deposit-taking activity pursuant to Directive 2006/48/EC. It has a specific character as an electronic surrogate for coins and banknotes, that is to be used for making payments, usually of limited amounts, and not as a means of saving. Accordingly, Article 2(2) of the Directive defines electronic money as electronically 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, and which is accepted by a natural or legal person other than the electronic money issuer.

44 Electronic money may be issued by, inter alia, electronic money institutions and credit institutions, according to the definition of electronic money issuer in Article 2(3) of the Directive. However, electronic money institutions are subject to a specific regulatory regime, in particular the Electronic Money Directive. According to recital 14 of the Electronic Money Directive, ensuring fair competition for the same service should be achieved by balancing the less cumbersome features of the prudential supervisory regime applying to electronic money institutions against provisions that are more stringent than those applying to credit institutions, notably as regards the safeguarding of the funds of an electronic money holder. The safeguarding requirements for electronic money institutions are set out in Article 7 of the Directive.

45 Article 11(1) of the Directive requires EEA States to ensure that electronic money issuers issue electronic money at par value on the receipt of funds. Moreover, according to Article 11(2), upon an electronic money holder's request, electronic money issuers shall redeem, at any moment and at par value, the monetary value of the electronic money held. As stated in recital 18 of the Directive, redeemability is necessary in order to preserve the confidence of the electronic money holder.

46 In order to fulfil its function as an electronic surrogate for coins and banknotes, which may be redeemed at any moment and at par value, the electronic money stored must at all times hold a value equivalent to the monetary value of the funds provided in exchange. Therefore, electronic money may not be a means of saving or investment. This excludes from the scope of the Electronic Money Directive a business model where the electronic money would be linked to the price of gold at the electronic money holder's risk. If electronic money could have been linked to the price of gold, any actual redemption at par value based on the price of gold would be purely coincidental. Accordingly, electronic money cannot be linked to a value other than the monetary value.

47 Several of the parties have also invoked Article 12 of the Directive, which requires EEA States to prohibit the granting of interest or any other benefit related to the length of time during which an electronic money holder holds the electronic money. However, the Court notes that fluctuations in the price of gold are unrelated, in principle, to the length of time during which an electronic money holder held the electronic money.

48 The answer to Question I/1 must therefore be that it is incompatible with Article 11(1) and (2) of the Electronic Money Directive if electronic money has a value different from par value on the receipt of funds at any time, including during the period between issuance and redemption.

49 In light of this response to Question I/1, there is no need to address Questions I/2 and I/3.

Questions II/1 to II/4

Observations submitted to the Court

50 All those who have submitted observations, with the exception of Falkenhahn, argue that Question II/1 should be answered in the affirmative, in which case Questions II/2 to II/4 do not need to be addressed. They all submit that the definition of secure, low-risk assets set out in the first and second subparagraphs of Article 7(2) of the Directive is exhaustive. Reference is made, in particular, to the third subparagraph of Article 7(2) which allows the competent authorities to narrow down the list of qualifying assets, but not to expand it.

Findings of the Court

51 By its Question II/1, the Appeals Board asks whether the first and second subparagraphs of Article 7(2) of the Electronic Money Directive define exhaustively what assets are to be regarded as secure, low-risk assets within the meaning of the first sentence of Article 7(1) of the Electronic Money Directive read in conjunction with Article 9(1)(a) of the Payment Services Directive.

52 Pursuant to Article 7(1) of the Electronic Money Directive, EEA States shall require an electronic money institution to safeguard funds that have been received in exchange for electronic money that has been issued, in accordance with Article 9(1) and (2) of the Payment Services Directive.

53 Article 9(1) of the Payment Services Directive sets out two alternative ways of safeguarding funds received for payment transactions. According to the first alternative, set out in points (a) and (b), the funds shall be deposited in a separate account in a credit institution or invested in secure, liquid low-risk assets as defined by the competent authorities of the home EEA State, and they shall be insulated against the claims of other creditors of the institution. According to the second alternative, set out in point (c), the funds shall be covered by an insurance policy or some other comparable guarantee, payable in the event that the payment institution is unable to meet its financial obligations.

54 The first and second subparagraphs of Article 7(2) of the Electronic Money Directive set out a definition of secure, low-risk assets for the purpose of Article 7(1) of that directive. The term secure, low-risk assets, as defined in Article 7(2) of the Electronic Money Directive, therefore replaces the term secure, liquid low-risk assets as used in Article 9(1)(a) of the Payment Services Directive.

55 The first subparagraph of Article 7(2) of the Electronic Money Directive defines secure, low-risk assets as asset items falling into one of the categories set out in Table 1 of point 14 of Annex I to the Capital Adequacy Directive for which the specific risk capital charge is no higher than 1.6 per cent but excluding other qualifying items as defined in point 15 of that annex. Under the second subparagraph of Article 7(2) of the Electronic Money Directive, units in an undertaking for collective investment in transferable securities which invests solely in the assets specified in first subparagraph are also deemed to be secure, low-risk assets.

56 The third subparagraph of Article 7(2) of the Electronic Money Directive allows competent authorities, in exceptional circumstances and with adequate justification, and based on an evaluation of security, maturity, value or other risk element, to determine which of the assets mentioned in the first and second subparagraphs do not constitute secure, low-risk assets for the purposes of Article 7(1).

57 Whereas the first and second subparagraphs of Article 7(2) of the Electronic Money Directive set out a definition of what may be regarded as secure, low-risk assets for the purposes of Article 7(1) of the Directive, it follows from the third subparagraph that the competent authorities may under strict conditions narrow down this list. Conversely, the competent authorities may not expand the list. These strict safeguarding requirements serve to ensure that electronic money institutions are at all times able to fulfil their obligation to redeem electronic money at par value. It follows that the list of secure, low-risk assets pursuant to Article 7(2) of the Directive is exhaustive.

58 The answer to Question II/1 must therefore be that the first and second subparagraphs of Article 7(2) of the Electronic Money Directive, read in conjunction with Table 1 of point 14 of Annex I to the Capital Adequacy Directive, define exhaustively what assets constitute secure, low-risk assets for the purposes of Article 7(1) of the Electronic Money Directive.

59 In light of the answer given to Question II/1, there is no need to address Questions II/2 to II/4.

IV Costs

60 The costs incurred by the Czech Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Appeals Board, any decision on costs for the parties to those proceedings is a matter for the Appeals Board.

On those grounds,

THE COURT

in answer to the questions referred to it by the Appeals Board of the Financial Market Authority hereby gives the following Advisory Opinion:

1. **It is incompatible with Article 11(1) and (2) of 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 if electronic money has a value different from par value on the receipt of funds at any time, including during the period between issuance and redemption.**

2. **The first and second subparagraphs of Article 7(2) of Directive 2009/110/EC, read in conjunction with Table 1 of point 14 of Annex I to Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions, define exhaustively what assets constitute secure, low-risk assets for the purposes of Article 7(1) of Directive 2009/110/EC.**

Páll Hreinsson Per Christiansen Martin Ospelt

Delivered in open court in Luxembourg on 30 May 2018.

Birgir Hrafn Búason
Acting Registrar

Páll Hreinsson
President