E-9/17-17

REPORT FOR THE HEARING

in Case E-9/17

REQUEST to the Court pursuant to 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.

I Introduction

1. By a letter of 12 October 2017, registered at the Court on the same date, the Liechtenstein Appeals Board of the Financial Market Authority (“the Appeals Board”) made a request for an advisory opinion. The case before the Appeals Board concerns a complaint by Edmund Falkenhahn AG against a decision by the Financial Market Authority not to grant an authorisation as an electronic money institution. For the purpose of deciding on the complaint, the Appeal Board seeks guidance from the Court on the interpretation of certain provisions 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 (OJ 2009 L 267, p. 7) (“the Electronic Money Directive” or “the Directive”).

II Legal background

EEA law

2. EEA Joint Committee Decision No 120/2010 of 10 November 2010 (OJ 2011 L 58, p. 77), which entered into force on 1 November 2012, incorporated the Electronic Money Directive in the Agreement on the European Economic Area ("the EEA Agreement") by inserting it as point 15 of Annex IX (Financial services) to the Agreement.

3. Recital 4 in the preamble to the 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.*

4. Recital 13 in the preamble to 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, 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.*

5. Recital 14 in the preamble to 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.

6. Recital 18 in the preamble to the Directive reads:

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. …

7. Article 2(1) and (2) of the Directive contain 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[.]

8. 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).

9. 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.

10. Article 7(1) and (2) of the Directive read:

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.

11. Article 7(1) of the Electronic Money Directive refers, inter alia, to Article 9(1) of 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"). The Payment Services Directive was incorporated in the EEA Agreement by Joint Committee Decision No 114/2008 of 7 November 2008 (OJ 2008 L 339, p. 103), which inserted it as point 16e of Annex IX to the Agreement and entered into force on 1 November 2011.

12. Article 9(1) of the Payment Services Directive 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.

13. Article 7(2) of the Electronic Money Directive refers to 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 (OJ 2006 L 177, p. 201) ("the Capital Adequacy Directive"). The Capital Adequacy Directive was incorporated in the EEA Agreement by Joint Committee Decision No 65/2008 of 6 June 2008 (OJ 2008 L 257, p. 27), which inserted it as point 31 of Annex IX to the Agreement and entered into force on 1 November 2010.

14. Table 1 of point 14 of Annex I to the Capital Adequacy Directive 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	*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)*

quality step 3 under the rules for the risk weighting of exposures under point 28, Part 1 of Annex VI to 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.*	

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

16. 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.

17. 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.

18. 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.

19. 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 in the EEA.

National law

20. 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).

21. 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. In so far as relevant to the present case, 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 has been adopted to date.

22. 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.

III Facts and procedure

23. Edmund Falkenhahn AG ("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 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.

24. On 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, 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.

25. Falkenhahn then lodged a complaint with the Appeals Board, seeking the granting of its application for authorisation as an electronic money institution.

26. 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.

27. 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 does not seem to categorically preclude the redemption at an amount above par value, but 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. Redemption at an amount below par value is precluded in any event.

28. 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.

29. The Appeals Board notes that the questions relating to redemption at par value (Questions I/1 to I/3) are independent from the questions relating to the safeguarding requirements (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.

30. On this basis, the Appeals Board has asked the following questions:

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?

IV Written observations

31. In accordance with Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- 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;
- 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; and
- the European Commission ("the Commission"), represented by Helene Tserepa-Lacombe, Legal Adviser, and Audronė Steiblytė, member of its Legal Service, acting as Agents.

V Summary of the arguments submitted

32. All those who have submitted written observations take the view that Question I/1 should be answered in the negative, in which case Questions I/2 and I/3 do not arise, and that Question II/1 should be answered in the affirmative, in which case Questions II/2 to II/4 do not arise.

The Liechtenstein Government

33. As to the first set of questions referred, the Liechtenstein Government observes that, under Article 11(1) and (2) of the Electronic Money Directive, electronic money must be issued at par value on the receipt of funds, and be redeemable at any moment at par value. That leaves no room for linking the value of electronic money, in the period between payment and redemption of the funds, to any other value than par value of the pre-paid funds. The opposite conclusion could lead to situations where the value of electronic money deviated from the value of the funds originally paid. Redemption at par value cannot be guaranteed if the value of electronic money is allowed to fluctuate after its issuance due to its being linked to another value.

34. The Liechtenstein Government contends that electronic money is simply money in electronic form. As stated in recital 13 in the preamble to the Directive, electronic money is a surrogate for coins and banknotes. Its issuance is not a deposit-taking activity and there is a prohibition on interest pursuant to Article 12 of the Directive. Electronic money only represents the money paid for it. Money is not tied to any variable value, such as gold. Therefore, electronic money may also not be linked to any variable value.

35. 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 in its preamble. 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.

36. The Liechtenstein Government contends that already the predecessor to the Electronic Money Directive[1] clearly prohibited linking the value of electronic money to any variable value. Only a direct link between the electronic money value and the par value of the monetary funds paid was allowed. Moreover, whereas the former directive only aimed at a partial harmonisation of the business of electronic money institutions, the Electronic Money Directive provides for full harmonisation, with only a few exceptions as set out in Article 16.

37. As regards the second set of questions referred, the Liechtenstein Government submits that Article 7 of the Electronic Money Directive provides for full harmonisation. By referring to Article 9(1) and (2) of the Payment Services Directive, Article 7 of the Electronic Money Directive requires that funds received from an electronic money holder shall be deposited in a separate account in a credit institution or invested in secure, liquid low-risk assets. Moreover, Article 7(2) of the Electronic Money Directive contains its own definition of secure, low-risk assets. That definition must be regarded as exhaustive. In exceptional circumstances as provided for in the third subparagraph of Article 7(2), EEA States may further narrow down the category of secure, low-risk assets, but they may never include additional assets in that category.

38. The reason for the very strict and limited definition of secure, low-risk assets is that the funds that were exchanged for electronic money should be safeguarded to the best extent possible. Only the safest assets should be used as safeguarding instruments. Gold or gold price-linked instruments, which do not appear in the definition of the category of secure, low-risk assets, cannot therefore qualify as safeguarding assets.

39. The Liechtenstein Government proposes that the Court should give the following answers to the questions referred:

> *[The Electronic Money Directive] requires that e-money at any moment, i.e. from the receipt of the funds until the funds' redemption to the e-money holder, is valued at par monetary value of the funds paid to the e-money issuer.*

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[1] 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 (OJ 2000 L 275, p. 39).

> *Article 7 of [the Electronic Money Directive] contains an exhaustive list of assets that qualify for the safeguarding of funds that have been received in exchange for e-money that has been issued under the provisions of the [Electronic Money Directive]. Article 7(2) subparagraph 3 of the [Electronic Money Directive] allows for the application of the competent EEA States' discretion under the conditions contained in that provision and to the effect that they may determine which of the assets defined in Article 7(2) subparagraphs 1 and 2 of the [Electronic Money Directive] do not constitute secure, low-risk assets for the purposes of Article 7(1) [of the Electronic Money Directive].*

The Czech Government

40. As regards the first set of questions referred, the Czech Government submits that the value of electronic money cannot be linked to a variable value, such as the price of gold. It is clear from Article 11(1) and (2) of the Directive as well as recital 18 in its preamble that electronic money shall always be issued at par value on the receipt of funds and be redeemable at the same value at any given moment. The value of electronic money is therefore inseparably linked to the value of the specific fiat currency that was provided as payment for it. Consequently, it cannot be dependent on any other factor, such as the price of gold.

41. Moreover, as supported by several recitals in the preamble to the Electronic Money Directive, the fundamental purpose of electronic money is to serve as a surrogate for regular coins and banknotes, as an instrument for payment. Should the value of electronic money be linked to other factors than par value on the receipt of funds, the electronic money would not fulfil the role of an electronic surrogate for cash, but rather the role of an investment instrument. That is precisely what Article 12 of the Directive aims to prevent by prohibiting the granting of interest or any other benefit related to the length of time during which an electronic money holder holds electronic money.

42. Finally, the Czech Government argues 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.

43. As to the second set of questions referred, the Czech Government submits that gold is not included in the list of secure, low-risk assets provided for in Article 7(2) of the Electronic Money Directive, read in conjunction with Article 9(1)(a) of the Payment Services Directive. In the view of the Czech Government, that list must be considered exhaustive. First, nothing in the wording of those provisions suggests that the list should be considered non-exhaustive. Second, the third subparagraph of Article 7(2) of the Electronic Money Directive allows the competent authority, under strict conditions, to depart from the list of low-risk assets, but only by narrowing the list. Third, the purpose of

Article 7(2) of the Directive is to protect the client by prohibiting the electronic money institution from investing the client's money in higher risk assets, which could result in the electronic money institution not being able to redeem the electronic money under Article 11(2) of the Directive. This purpose would be undermined if the competent authority could freely expand the category of low-risk assets.

44. The Czech Government proposes that the Court should give the following answers to the questions referred:

> *[The Electronic Money Directive] precludes the value of electronic money to be determined not at par value on the receipt of funds, but by the price of gold instead.*
>
> *Gold cannot be considered a low risk asset in accordance with Art. 7(2) of [the Electronic Money Directive].*

ESA

45. As regards the first set of questions referred, ESA refers to recital 13 in the preamble to the Directive, which describes electronic money as an electronic surrogate for coins and banknotes. According to Article 2(2) of the Directive, electronic money is a monetary value issued for the purpose of making payment transactions, and accepted for that purpose by third parties.

46. ESA submits that the unit of account of electronic money may not be linked to a variable value, such as the price of gold. First, coins and banknotes, for which electronic money serves as a surrogate, are characterised by the fact that their value is clearly determined by reference to their face value. Second, gold is a commodity and not a monetary value as required by Article 2(2) of the Directive. Third, units of account called "World" or generically "Money", such as envisaged under the scheme proposed by the applicant in the national proceedings, cannot be used for payment purposes and are not accepted by third parties as payment. Moreover, 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.[2]

47. ESA stresses that, according to Article 11(2) of the Directive, redemption should be possible at any time and at par value. In effect, this prevents the value from dropping below par value. Moreover, the unit of account function of (electronic) money would be undermined if the value were capable of deviating upwards from par value. This would also circumvent the prohibition of interest enunciated in Article 12 of the Directive.

[2] Reference is made to pages 14, 26 and 27 of the European Central Bank's Report on Electronic Money, August 1998, which was referred to by the European Central Bank in the legislative procedure leading up to the adoption of Directive 2000/46/EC.

Furthermore, the Directive provides that the issuance of electronic money does not constitute a deposit-taking activity. Hence, electronic money is not a means of saving or credit granting. This implies that electronic money has to remain at the same value as at the receipt of the funds by the electronic money institution.

48. ESA therefore submits that there is no scope for electronic money having a value different from par value, be that on the receipt of funds, on redemption, or in the period between receipt and redemption. It is therefore not possible to link the unit of account of electronic money to the price of gold.

49. Turning to the second set of questions referred, and in particular Question II/1, ESA submits that the first and second subparagraphs of Article 7(2) 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 its Article 7(1), read in conjunction with Article 9(1)(a) of the Payment Services Directive. The list of secure, low-risk assets may be narrowed down by the competent authorities of the home state following an assessment under the third subparagraph of Article 7(2) of the Electronic Money Directive, but it may not be expanded.

50. In ESA's view, it is in principle not necessary to consider Questions II/2 to II/4, since their premise is that the definition in Article 7(2) of the Directive is not exhaustive. For the sake of completeness, ESA nevertheless makes some submissions in relation to these questions.

51. ESA notes that the safeguarding requirements for electronic money institutions are intentionally more stringent than those applying to traditional credit institutions. As explained in recital 14 in the preamble to the Directive, this is the counterpart of the less cumbersome features of the prudential supervisory regime applying to electronic money institutions. It is therefore only natural that Article 7(2) of the Electronic Money Directive is more restrictive as regards the acceptable asset types than the Payment Services Directive.

52. As to the liquidity of the safeguarding assets, ESA submits that the redeemability requirement in Article 11 of the Directive entails that the assets need to be available for the electronic money issuer at any time. The assets therefore need to be not only secure and low-risk, but also liquid, for the electronic money issuer to be able to access them in a timely manner to redeem upon a request.

53. As to whether gold could qualify for safeguarding purposes, ESA observes that, according to point 2 of Annex IV to the Capital Adequacy Directive, relating to commodities risk, positions in gold are to be considered as being subject to foreign-exchange risk. On the other hand, Article 19 of the Capital Adequacy Directive provides that it is only for debt securities denominated and funded in domestic currency which, for the purposes of point 14 of Annex I, can be assigned a 0 % weighting. Like foreign

currency, the price of gold is liable to undergo fluctuation as compared to the monetary value of the electronic money intended to be safeguarded. Thus, there seem to be good reasons not to permit gold to be used as an asset for these purposes.

54. ESA proposes that the Court should give the following answers to the questions referred:

1. *[The Electronic Money Directive] must be interpreted as precluding that the unit of account of electronic money be linked to a variable value, such as the price of gold.*

2. *Article 7(2) first and second subparagraphs 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 its Article 7(1), read in conjunction with Article 9(1)(a) of [the Payment Services Directive].*

The Commission

55. As regards the first set of questions referred, the Commission observes that, as expressed in recital 13 in the preamble to the Directive, electronic money has a specific character as an electronic surrogate for coins and banknotes, which is to be used for making payments, and not as a means of saving. As a consequence, Article 12 of the Directive prohibits electronic money issuers from granting interest or any other benefit related to the length of time during which the electronic money holder holds electronic money. Moreover, in order to preserve the confidence of the electronic money holder, electronic money should be redeemable at any time at par value.

56. In the Commission's view, the pre-paid nature of electronic money and the fact that it is considered to be a digital equivalent of cash entails that electronic money must at all times be of a known value, which must be equivalent to the value of funds provided in exchange. The value of electronic money is ensured by imposing safeguarding requirements upon electronic money institutions that are more stringent than those applicable to credit institutions. If the value of funds received in exchange for issuing electronic money fluctuates, for example because it depends on the market value of gold, the issuance of electronic money becomes an investment activity rather than being primarily a means for payment. That would be incompatible with the definition of "electronic money" in Article 2(2) of the Directive.

57. The Commission contends that there are several reasons why it would be incompatible with the Directive to use electronic money as an investment. Article 7(2) of the Directive states that electronic money issuers must safeguard the funds received in a separate account and may only invest them in the low-risk assets referred to in that provision. Furthermore, if the value of electronic money changes during the period between issuance and redemption, it will be difficult to ensure compliance at all times with the

safeguarding and redemption requirements in Article 7(1) and Article 11(2) of the Directive.

58. The Commission argues further that even if the issuer has invested the funds in gold, it would still be obliged to redeem the value of unspent electronic money compared to the original value at the moment of issuance, regardless of whether the price of gold has decreased since the issuance. In such a situation the issuer will bear a risk that is higher than is permitted by the Directive. As regards a possible increase in the price of gold since the issuance, the Commission submits that, pursuant to Article 12, the electronic money holder may not be offered any benefit.

59. Turning to the second set of questions referred, the Commission submits that the first two subparagraphs of Article 7(2) of the Electronic Money Directive sets out the assets that are considered secure, low-risk assets. The third subparagraph goes on to allow the competent authorities to restrict on certain conditions the list of secure, low-risk assets. However, the Directive does not grant the competent authorities a possibility to extend the list of secure, low-risk assets referred to in Article 7(2). The absence of such a possibility is compatible with the need to reduce the risks faced by electronic money institutions.

60. Consequently, the Commission submits that Article 7(2) of the Electronic Money Directive contains an exhaustive list of what may be considered secure, low-risk assets. Gold is not on that list and cannot be included by a decision of the competent authority supervising electronic money institutions.

61. The Commission proposes that the Court should give the following answers to the questions referred:

> *I/1. Article 2(2) read in conjunction with Article 7(1) and Article 11(2) of [the Electronic Money Directive] should be interpreted as preventing electronic money to have a value different from par value on the receipt of funds in the period between issuance and redemption even if the redemption is carried out at par value.*
>
> *II/1. Article 7(2) of [the Electronic Money Directive] contains an exhaustive list of what may be considered as secure, low-risk assets for the purposes of Article 7(1) of that Directive.*

Per Christiansen
Judge-Rapporteur