PRINCIPALITY OF LIECHTENSTEIN

APPEALS BOARD OF THE FINANCIAL MARKET AUTHORITY

FMA-BK 2017/12

Document number 7

Order

The Appeals Board of the Financial Market Authority (*Beschwerdekommission der Finanzmarktaufsicht*), composed of

Board members: Dr Wilhelm Ungerank LL.M., President
Ralf Jehle, Vice-President
Andrea Kaiser-Kreuzer, Substitute Member

in the appeal brought by

Appellant: [redacted] AG, [redacted] [redacted]

challenging the: order of the Financial Market Authority of 23 August 2017, Ref. No 7423/17/05

concerning: granting of an authorisation to conduct business as an electronic money institution

at the hearing in camera on 12 October 2017 ruled as follows:

The appeal proceedings are stayed and the following questions are referred to the EFTA Court in Luxembourg pursuant to Article 34 SCA with a request for an Advisory Opinion:

I/1 Is it compatible with 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 (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 Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market (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?

Grounds:

1. Facts:

1.1. ██████ ████████ AG is a public limited company under Liechtenstein law, registered in the commercial register under No FL-0002.453.872-9. It has its registered office in Vaduz. By letter of 1 March 2017, it applied to the Financial Market Authority (*Finanzmarktaufsicht*; FMA) 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.

1.2. The FMA rejected the application by the contested order of 23 August 2017 on the grounds that (1) it is not possible to link electronic money 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 and 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 or another financial instrument, other than the par value of the underlying legal currency (on which the electronic money contract is historically based), and, (2) as the law stands at present, gold does not constitute a secure, liquid low-risk asset and therefore an appropriate means of security.

1.3. ████████ AG lodged an appeal against that order in a timely manner to the Appeals Board of the Financial Market Authority, by which it seeks the granting of its application.

1.4. ████████ AG and the Financial Market Authority were given an opportunity to comment on the intended request for an Advisory Opinion from the EFTA Court.

2. European law:

2.1. 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) was incorporated into the EEA Agreement by EEA Joint Committee Decision No 120/2010 of 10 November 2010.

According to Article 11 (Issuance and redeemability), Member States must ensure that electronic money issuers issue electronic money at par value on the receipt of funds (paragraph 1) and, 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 (paragraph 2).

Article 12 (Prohibition of interest) provides that Member States must 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.

Finally, Article 7 (Safeguarding requirements) prescribes – in so far as it is relevant here – that Member States must 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 Directive 2007/64/EC (paragraph 1); 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 (first subparagraph of paragraph 2), but also units in an undertaking for collective investment in transferable securities (UCITS) which invests solely in assets as specified in the first subparagraph (second subparagraph of paragraph 2).

2.2. The relevant provision in this context, Article 9(1)(a) of Directive 2007/64/EC (Directive 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), incorporated into the EEA Agreement by EEA Joint Committee Decision No 114/2008 of 7 November 2008), provides that funds which have been received from the payment service users or through another payment service provider for the execution of payment transactions are to be safeguarded inter alia by being invested in secure, liquid low-risk assets as defined by the competent authorities of the home Member State.

For the sake of completeness, it should be mentioned that 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) is not applicable to the present case, as it has not yet been incorporated into the EEA Agreement (http://www.efta.int/eea-lex/32015L2366).

3. National law:

3.1. The abovementioned directives were transposed into national law almost verbatim by the Law on electronic money (*E-Geldgesetz*, EGG; LR 950.3), the Regulation on electronic money (*E-Geldverordnung*, EGV; LR 950.31) and the Regulation on payment services (*Zahlungsdiensteverordnung*, ZDV; LR 950.11). All legislation is available at www.gesetze.li (LR (*Liechtensteinische Rechtsvorschriften*) indicates the systematic collection of Liechtenstein legislation).

3.2. According to Article 44 of the EGG ('Issuance and redeemability'), electronic money issuers must issue electronic money at par value on the receipt of funds (paragraph 1) and, upon request, redeem to their customers, at any moment and at par value, the monetary value of the electronic money held by them (paragraph 2). Article 45 of the EGG ('Prohibition of interest') provides that the granting of interest or any other benefit related to the length of time during which a customer holds the electronic money is prohibited.

3.3. Under Article 11 of the EGG ('Safeguarding requirements'), electronic money institutions must duly safeguard funds received directly or indirectly by customers (paragraph 1) and the Government shall lay down by regulation the more detailed provisions regarding safeguarding requirements, in particular the permissible safeguarding measures. That regulation (the EGV) states in Article 5 ('Safeguarding requirements') that Article 5 of the ZDV is applicable by analogy. Article 5(1)(a) of the ZDV ('Safeguarding requirements') provides that payment institutions must safeguard the funds received inter alia on the basis of variant A, which is of relevance here, as follows: 'The funds

shall be invested in secure, liquid low-risk assets, which are to be defined by the FMA in a directive.'

3.4. According to Article 12(1)(i) and Article 25(1) of the Law on the Financial Market Authority (*Finanzmarktaufsichtsgesetz*, FMAG; LR 952.3), the Financial Market Authority is furnished, inter alia, with the task of adopting directives. No directive within the meaning of the abovementioned Article 5(1)(a) of the ZDV has been adopted to-date.

4. The questions referred for a preliminary ruling:

4.1. Link to the price of gold: Article 11(1) and (2) of the Electronic Money Directive appears 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. In addition, Article 12 of that directive does not seem to preclude categorically 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 (see recital 13 of the Electronic Money Directive). 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.

4.2. Safeguarding requirements: If Article 7(2) of the Electronic Money Directive defines exhaustively what are to be regarded as secure, low-risk assets, then the investment of customers' funds in gold does not constitute suitable safeguarding, as gold is not included in that

definition (II/1). If, however, Article 7(2) of the Electronic Money Directive is not to be construed as exhaustive, the question arises of how to proceed in cases in which the competent authority within the meaning of Article 9(1)(a) of the Payment Services Directive has not yet defined what constitute secure, (liquid) low-risk assets. This provision of the directive appears to leave open whether the competent authority is required to establish the definition in the form of a general, abstract rule (before authorisation is granted) or whether it may establish the definition as part of the authorisation procedure. If this has to be established in the form of a general, abstract rule before the authorisation procedure is conducted, investment in gold as a means of safeguarding would also be precluded, since no rule (in the language of the FMAG: directive) to that effect has been adopted by the Financial Market Authority to-date and, accordingly, it has not yet been defined (in positive terms) that gold constitutes a secure, (liquid) asset (II/2). If, however, the definition may also be established as part of the authorisation procedure (in the form of an individual specific act), it would be necessary to review the validity of the assessment made by the Financial Market Authority in the contested decision that investment in gold does not satisfy the safeguarding requirements in the appeal proceedings, and, the further questions (II/3 and II/4) will arise.

5. The EFTA Court has already recognised that the Appeals Board of the Financial Market Authority is a court or tribunal which is entitled to make a request for an Advisory Opinion for the purposes of Article 34 SCA (E-04/09 *Inconsult*; E-27/15 *B* v *Finanzmarktaufsicht*). The answers to the questions are preliminary issues for the appeal proceedings pending, and are independent of one another (Questions I and Questions II): This means that

even if, for example, one of the questions asked regarding the proposed link to the price of gold (I/1, I/2, I/3) would be answered in the negative, the questions referred on the safeguarding requirements (II) would still have to be answered, and vice versa, as the Appeals Board is also able, under national procedural law, to grant an authorisation subject to conditions or requirements. The main proceedings had to be stayed pursuant to Article 74(1) of the Law on State administration (Landesverwaltungspflegegesetz, LVG; LR 172.020) pending the receipt of the Advisory Opinion from the EFTA Court.

Appeals Board of the Financial Market Authority
Vaduz, 12 October 2017

Dr Wilhelm Ungerank LL.M.
(President)

Rights of appeal:

No appeal may be lodged against this order.