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 (Text with EEA relevance)

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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular the first and third sentences of Article 47(2) and Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee[(1)],

Having regard to the opinion of the European Central Bank[(2)],

Acting in accordance with the procedure laid down in Article 251 of the Treaty[(3)],

Whereas:

(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[(4)] was adopted in response to the emergence of new pre-paid electronic payment products and was intended to create a clear legal framework designed to strengthen the internal market while ensuring an adequate level of prudential supervision.

(2) In its review of Directive 2000/46/EC the Commission highlighted the need to revise that Directive since some of its provisions were considered to have hindered the emergence of a true single market for electronic money services and the development of such user-friendly services.

(3) Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market[(5)] has established a modern and coherent legal framework for payment services, including the coordination of national provisions on prudential requirements for a new category of payment service providers, namely payment institutions.

(4) 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.

(5) It is appropriate to limit the application of this Directive to payment service providers that issue electronic money. This Directive should not apply to monetary value stored on specific pre-paid instruments, designed to address precise needs that can be used only in a limited way, because they allow the electronic money holder to purchase goods or services only in the premises of the electronic money issuer or within a limited network of service providers under direct commercial agreement with a professional issuer, or because they can be used only to acquire a limited range of goods or services. An instrument should be considered to be used within such a limited network if it can be used only either for the purchase of goods and services in a specific store or chain of stores, or for a limited range of goods or services, regardless of the geographical location of the point of sale. Such instruments could include store cards, petrol cards, membership cards, public transport cards, meal vouchers or vouchers for services (such as vouchers for childcare, or vouchers for social or services schemes which subsidise the employment of staff to carry out household tasks such as cleaning, ironing or gardening), which are sometimes subject to a specific tax or labour legal framework designed to promote the use of such instruments to meet the objectives laid down in social legislation. Where such a specific-purpose instrument develops into a general-purpose instrument, the exemption from the scope of this Directive should no longer apply. Instruments which can be used for purchases in stores of listed merchants should not be exempted from the scope of this Directive as such instruments are typically designed for a network of service providers which is continuously growing.

(6) It is also appropriate that this Directive not apply to monetary value that is used to purchase digital goods or services, where, by virtue of the nature of the good or service, the operator adds intrinsic value to it, e.g. in the form of access, search or distribution facilities, provided that the good or service in question can be used only through a digital device, such as a mobile phone or a computer, and provided that the telecommunication, digital or information technology operator does not act only as an intermediary between the payment service user and the supplier of the goods and services. This is a situation where a mobile phone or other digital network subscriber pays the network operator directly and there is neither a direct payment relationship nor a direct debtor-creditor relationship between the network subscriber and any third-party supplier of goods or services delivered as part of the transaction.

(7) It is appropriate to introduce a clear definition of electronic money in order to make it technically neutral. That definition should cover all situations where the payment service provider issues a pre-paid stored value in exchange for funds, which can be used for payment purposes because it is accepted by third persons as a payment.

(8) The definition of electronic money should cover electronic money whether it is held on a payment device in the electronic money holder’s possession or stored remotely at a server and managed by the electronic money holder through a specific account for electronic money. That definition should be wide enough to avoid hampering technological innovation and to cover not only all the electronic money products

available today in the market but also those products which could be developed in the future.

(9) The prudential supervisory regime for electronic money institutions should be reviewed and aligned more closely with the risks faced by those institutions. That regime should also be made coherent with the prudential supervisory regime applying to payment institutions under Directive 2007/64/EC. In this respect, the relevant provisions of Directive 2007/64/EC should apply *mutatis mutandis* to electronic money institutions without prejudice to the provisions of this Directive. A reference to 'payment institution' in Directive 2007/64/EC therefore needs to be read as a reference to electronic money institution; a reference to 'payment service' needs to be read as a reference to the activity of payment services and issuing electronic money; a reference to 'payment service user' needs to be read as a reference to payment service user and electronic money holder; a reference to 'this Directive' needs to be read as a reference to both Directive 2007/64/EC and this Directive; a reference to Title II of Directive 2007/64/EC needs to be read as a reference to Title II of Directive 2007/64/EC and Title II of this Directive; a reference to Article 6 of Directive 2007/64/EC needs to be read as a reference to Article 4 of this Directive; a reference to Article 7(1) of Directive 2007/64/EC needs to be read as a reference to Article 5(1) of this Directive; a reference to Article 7(2) of Directive 2007/64/EC needs to be read as a reference to Article 5(6) of this Directive; a reference to Article 8 of Directive 2007/64/EC needs to be read as a reference to Article 5(2) to (5) of this Directive; a reference to Article 9 of Directive 2007/64/EC needs to be read as a reference to Article 7 of this Directive; a reference to Article 16(1) of Directive 2007/64/EC needs to be read as a reference to Article 6(1)(c) to (e) of this Directive; and a reference to Article 26 of Directive 2007/64/EC needs to be read as a reference to Article 9 of this Directive.

(10) It is recognised that electronic money institutions distribute electronic money, including by selling or reselling electronic money products to the public, providing a means of distributing electronic money to customers, or of redeeming electronic money on the request of customers or of topping up customers' electronic money products, through natural or legal persons on their behalf, according to the requirements of their respective business models. While electronic money institutions should not be permitted to issue electronic money through agents, they should none the less be permitted to provide the payment services listed in the Annex to Directive 2007/64/EC through agents, where the conditions in Article 17 of that Directive are met.

(11) There is a need for a regime for initial capital combined with one for ongoing capital to ensure an appropriate level of consumer protection and the sound and prudent operation of electronic money institutions. Given the specificity of electronic money, an additional method for calculating ongoing capital should be provided for. Full supervisory discretion to ensure that the same risks are treated in the same way for all payment service providers and that the method of calculation encompasses the specific business situation of a given electronic money institution should be preserved. In addition, provision should be made for electronic money institutions to be required to keep the funds of electronic money holders separate from the funds of the electronic

money institution for other business activities. Electronic money institutions should also be subject to effective anti-money laundering and anti-terrorist financing rules.

(12) The operation of payment systems is an activity which is not reserved to specific categories of institution. It is important to recognise, however, that, as is the case for payment institutions, it is also possible for the operation of payment systems to be carried out by electronic money institutions.

(13) 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[6], 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.

(14) 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.

(15) The rules governing branches of electronic money institutions which have their head office outside the Community should be analogous in all Member States. It is important to provide that such rules not be more favourable than those for branches of electronic money institutions which have their head office in another Member State. The Community should be able to conclude agreements with third countries providing for the application of rules which accord branches of electronic money institutions which have their head office outside the Community the same treatment throughout the Community. The branches of electronic money institutions which have their head office outside the Community should benefit from neither the freedom of establishment under Article 43 of the Treaty in Member States other than those in which they are

established nor the freedom to provide services under the second paragraph of Article 49 of the Treaty.

(16) It is appropriate to allow Member States to waive the application of certain provisions of this Directive as regards institutions issuing only a limited amount of electronic money. institutions benefiting from such a waiver should not have the right under this Directive to exercise the freedom of establishment or the freedom to provide services and they should not indirectly exercise those rights as members of a payment system. It is desirable, however, to register the details of all entities providing electronic money services, including those benefiting from a waiver. For that purpose, Member States should enter such entities in a register of electronic money institutions.

(17) For prudential reasons, Member States should ensure that only electronic money institutions duly authorised or benefiting from a waiver in accordance with this Directive, credit institutions authorised in accordance with Directive 2006/48/EC, post office giro institutions entitled under national law to issue electronic money, institutions referred to in Article 2 of Directive 2006/48/EC, the European Central Bank, national central banks when not acting in their capacity as monetary authority or other public authorities and Member States or their regional or local authorities when acting in their capacity as public authorities may issue electronic money.

(18) 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. However, in cases duly specified in this Directive it should be possible to request a proportionate and cost-based fee without prejudice to national legislation on tax or social matters or any obligations on the electronic money issuer under other relevant Community or national legislation, such as anti-money laundering and anti-terrorist financing rules, any action targeting the freezing of funds or any specific measure linked to the prevention and investigation of crimes.

(19) Out-of-court complaint and redress procedures for the settlement of disputes should be at the disposal of electronic money holders. Chapter 5 of Title IV of Directive 2007/64/EC should therefore apply *mutatis mutandis* in the context of this Directive, without prejudice to the provisions of this Directive. A reference to 'payment service provider' in Directive 2007/64/EC therefore needs to be read as a reference to electronic money issuer; a reference to 'payment service user' needs to be read as a reference to electronic money holder; and a reference to Titles III and IV of Directive 2007/64/EC needs to be read as a reference to Title III of this Directive.

(20) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission[(7)].

(21) In particular, the Commission should be empowered to adopt implementing provisions in order to take account of inflation or technological and market developments and

to ensure a convergent application of the exemptions under this Directive. Since such measures are of general scope and are designed to amend non-essential elements of this Directive they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.

(22) The efficient functioning of this Directive will need to be reviewed. The Commission should therefore be required to produce a report three years after the deadline for transposition of this Directive. Member States should provide to the Commission information regarding the application of some of the provisions of this Directive.

(23) In the interests of legal certainty, transitional arrangements should be made to ensure that electronic money institutions which have taken up their activities in accordance with the national laws transposing Directive 2000/46/EC are able to continue those activities within the Member State concerned for a specified period. That period should be longer for electronic money institutions that have benefited from the waiver provided for in Article 8 of Directive 2000/46/EC.

(24) This Directive introduces a new definition of electronic money, the issuance of which can benefit from the derogations in Articles 34 and 53 of Directive 2007/64/EC. Therefore, the simplified customer due diligence regime for electronic money institutions under Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing[8] should be amended accordingly.

(25) Pursuant to Directive 2006/48/EC, electronic money institutions are considered to be credit institutions, although they can neither receive deposits from the public nor grant credit from funds received from the public. Given the regime introduced by this Directive, it is appropriate to amend the definition of credit institution in Directive 2006/48/EC in order to ensure that electronic money institutions are not considered to be credit institutions. However, credit institutions should continue to be allowed to issue electronic money and to carry on such activity Community-wide, subject to mutual recognition and to the comprehensive prudential supervisory regime applying to them in accordance with the Community legislation in the field of banking. In the interests of maintaining a level playing field, however, credit institutions should, alternatively, be able to carry out that activity through a subsidiary under the prudential supervisory regime of this Directive, rather than under Directive 2006/48/EC.

(26) The provisions of this Directive replace all corresponding provisions of Directive 2000/46/EC. Directive 2000/46/EC should therefore be repealed.

(27) Since the objective of this Directive cannot be sufficiently achieved by the Member States because it requires the harmonisation of many different rules currently existing in the legal systems of the various Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(28) In accordance with point 34 of the Interinstitutional Agreement on better law-making[9], Member States are encouraged to draw up, for themselves and in the interest of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

(**1**) Opinion of 26 February 2009 (not yet published in the Official Journal).

(**2**) OJ C 30, 6.2.2009, p. 1.

(**3**) Opinion of the European Parliament of 24 April 2009 (not yet published in the Official Journal) and Council Decision of 27 July 2009.

(**4**) OJ L 275, 27.10.2000, p. 39.

(**5**) OJ L 319, 5.12.2007, p. 1.

(**6**) OJ L 177, 30.6.2006, p. 1.

(**7**) OJ L 184, 17.7.1999, p. 23.

(**8**) OJ L 309, 25.11.2005, p. 15.

(**9**) OJ C 321, 31.12.2003, p. 1.