Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

16 January 2019*

(Reference for a preliminary ruling — Taking up of the business of electronic money institutions — Directive 2009/110/EC — Article 5(2) and (3) — Rules on own funds — Own funds required for the pursuit of activities linked to the issuance of electronic money — Definition of 'activity linked to the issuance of electronic money' — Issuance, for the benefit of the seller, of electronic money at par value of the funds received)

In Case C-389/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court, Lithuania), made by decision of 21 June 2017, received at the Court on 29 June 2017, in the proceedings brought by

'Paysera LT' UAB, formerly 'EVP International' UAB,

intervener:

Lietuvos bankas,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, Vice-President of the Court, acting as President of the First Chamber, J.-C. Bonichot, E. Regan (Rapporteur), C.G. Fernlund and S. Rodin, Judges,

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 27 June 2018,

after considering the observations submitted on behalf of:

– the Lithuanian Government, by R. Krasuckaitė, G. Taluntytė, V. Vasiliauskienė and D. Kriaučiūnas, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by H. Tserepa-Lacombe and A. Steiblytė, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 October 2018,

gives the following

* Language of the case: Lithuanian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 5(2) and 6(1)(a) 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).

2 The request has been made in proceedings brought by 'Paysera LT' UAB, formerly 'EVP International' UAB ('Paysera'), concerning a decision by the Lietuvos banko Priežiūros tarnyba (Supervision Board of the Bank of Lithuania) issuing a warning to the applicant on the ground that it had incorrectly applied the methods for the calculation of own funds to certain payment transactions ('the contested decision').

Legal context

Directive 2009/110

3 Recitals 2, 7 to 9 and 11 of Directive 2009/110 state:

'(2) In its review of 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)], 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.

…

(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 [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)]. 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. …

…

(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.'

4 According to Article 2 of Directive 2009/110, headed 'Definitions':

'For the purposes of this Directive, the following definitions shall apply:

…

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;

…'

5 Article 5 of that directive, entitled 'Own funds', provides in paragraphs 2 and 3 thereof:

'2. In regard to the activities referred to in Article 6(1)(a) that are not linked to the issuance of electronic money, the own funds requirements of an electronic money institution shall be calculated in accordance with one of the three methods (A, B or C) set out in Article 8(1) and (2) of Directive 2007/64/EC. The appropriate method shall be determined by the competent authorities in accordance with national legislation.

In regard to the activity of issuing electronic money, the own funds requirements of an electronic money institution shall be calculated in accordance with Method D as set out in paragraph 3.

Electronic money institutions shall at all times hold own funds that are at least equal to the sum of the requirements referred to in the first and second subparagraphs.

3. Method D: The own funds of an electronic money institution for the activity of issuing electronic money shall amount to at least 2% of the average outstanding electronic money.'

6 Article 6 of that directive, entitled 'Activities', provides in paragraph 1(a) thereof:

'1. In addition to issuing electronic money, electronic money institutions shall be entitled to engage in any of the following activities:

(a) the provision of payment services listed in the Annex to Directive 2007/64/EC'.

7 Article 11 of Directive 2009/110, entitled 'Issuance and redeemability', provides in paragraphs 1 and 2 thereof:

'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.'

Directive 2007/64/EC

8 Article 4 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), entitled 'Definitions', provides:

'For the purposes of this Directive, the following definitions shall apply:

…

3. "payment service" means any business activity listed in the Annex;

…

5. "payment transaction" means an act, initiated by the payer or by the payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and the payee;

…'

9 Article 8 of that directive, entitled 'Calculation of own funds', provides in paragraphs 1 and 2 thereof:

'1. Notwithstanding the initial capital requirements set out in Article 6, Member States shall require payment institutions to hold, at all times, own funds calculated in accordance with one of the following three methods, as determined by the competent authorities in accordance with national legislation:

Method A

The payment institution's own funds shall amount to at least 10% of its fixed overheads of the preceding year. The competent authorities may adjust that requirement in the event of a material change in a payment institution's business since the preceding year. Where a payment institution has not completed a full year's business at the date of the calculation, the requirement shall be that its own funds amount to at least 10% of the corresponding fixed overheads as projected in its business plan, unless an adjustment to that plan is required by the competent authorities.

Method B

The payment institution's own funds shall amount to at least the sum of the following elements multiplied by the scaling factor k defined in paragraph 2, where payment volume (PV) represents one twelfth of the total amount of payment transactions executed by the payment institution in the preceding year:

(a) 4,0% of the slice of PV up to EUR 5 million,

plus

(b) 2,5% of the slice of PV above EUR 5 million up to EUR 10 million,

plus

(c) 1% of the slice of PV above EUR 10 million up to EUR 100 million,

plus

(d) 0,5% of the slice of PV above EUR 100 million up to EUR 250 million,

plus

(e) 0,25% of the slice of PV above EUR 250 million.

Method C

The payment institution's own funds shall amount to at least the relevant indicator defined in point (a), multiplied by the multiplication factor defined in point (b) and by the scaling factor k defined in paragraph 2:

(a) The relevant indicator is the sum of the following:

– interest income,

– interest expenses,

– commissions and fees received, and

– other operating income.

Each element shall be included in the sum with its positive or negative sign. Income from extraordinary or irregular items may not be used in the calculation of the relevant indicator. Expenditure on the outsourcing of services rendered by third parties may reduce the relevant indicator if the expenditure is incurred from an undertaking subject to supervision under this Directive. The relevant indicator is calculated on the basis of the 12-monthly observation at the end of the previous financial year. The relevant indicator shall be calculated over the previous financial year. Nevertheless own funds calculated according to Method C shall not fall below 80% of the average of the previous 3 financial years for the relevant indicator. When audited figures are not available, business estimates may be used.

(b) The multiplication factor shall be:
(i) 10% of the slice of the relevant indicator up to EUR 2,5 million;
(ii) 8% of the slice of the relevant indicator from EUR 2,5 million up to EUR 5 million;
(iii) 6% of the slice of the relevant indicator from EUR 5 million up to EUR 25 million;
(iv) 3% of the slice of the relevant indicator from EUR 25 million up to 50 million;
(v) 1,5% above EUR 50 million.

2. The scaling factor k to be used in Methods B and C shall be:

(a) 0,5 where the payment institution provides only the payment service listed in point 6 of the Annex;

(b) 0,8 where the payment institution provides the payment service listed in point 7 of the Annex;

(c) 1 where the payment institution provides any of the payment services listed in points 1 to 5 of the Annex.'

10 The Annex to Directive 2007/64, entitled 'Payment Services (Definition 3 in Article 4)' sets out the list of activities regarded as such:

'1. Services enabling cash to be placed on a payment account as well as all the operations required for operating a payment account.

2. Services enabling cash withdrawals from a payment account as well as all the operations required for operating a payment account.

3. Execution of payment transactions, including transfers of funds on a payment account with the user's payment service provider or with another payment service provider:

– execution of direct debits, including one-off direct debits,

– execution of payment transactions through a payment card or a similar device,

– execution of credit transfers, including standing orders.

4. Execution of payment transactions where the funds are covered by a credit line for a payment service user:

– execution of direct debits, including one-off direct debits,

– execution of payment transactions through a payment card or a similar device,

– execution of credit transfers, including standing orders.

5. Issuing and/or acquiring of payment instruments.

6. Money remittance.

7. Execution of payment transactions where the consent of the payer to execute a payment transaction is given by means of any telecommunication, digital or IT device and the payment is made to the telecommunication, IT system or network operator, acting only as an intermediary between the payment service user and the supplier of the goods and services.'

The dispute in the main proceedings and the question referred for a preliminary ruling

11 Paysera is a company incorporated under Lithuanian law which holds licences issued to it by the Lietuvos bankas (Bank of Lithuania) to operate as an electronic money institution and a payment institution, under which it is authorised to issue electronic money and to provide services linked to the issuance of such money as well as other payment services.

12 Following an inspection of Paysera's operations conducted by the Supervision Board of the Bank of Lithuania, by the contested decision, that board issued a warning to that company and required it to rectify the infringement of the rules for the calculation of the own funds requirements of electronic money institutions.

13 The Supervision Board of the Bank of Lithuania refused to recognise the following activities pursued by the applicant in the main proceedings as constituting payment services linked to the issuance of electronic money:

– payments (transfers) made by an electronic money holder from an electronic money account with an electronic money institution to third-party accounts with credit institutions ('Service I');

– the collection of payments for goods and (or) services supplied by the clients (traders) of an electronic money institution holding electronic money accounts from persons (buyers) not participating in the electronic money system acquiring (paying for) such goods or services ('Service II').

14 Subsequently, since the action brought against the contested decision was dismissed by decision of 13 January 2016 of the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania), the applicant in the main proceedings brought an appeal before the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court, Lithuania).

15 The referring court raises the question of whether Services I and II should be classified as 'payment services linked to the issuance of electronic money'.

16 In those circumstances, the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court, Lithuania) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 5(2), read in conjunction with Article 6(1)(a), of Directive [2009/110] to be interpreted as meaning that, in circumstances such as those in the present case, the following are to be regarded as payment services that are (not) linked to the issuance of electronic money:

(a) a payment transaction whereby, at the request (instruction) of the electronic money holder to the electronic money institution (the issuer), the electronic money (redeemable funds) redeemed at par value is transferred to a third-party bank account; and

(b) a payment transaction whereby, on the instruction of the seller, the buyer (payer) of goods and/or services pays for the goods and/or services by making a transfer/payment of funds to an electronic money institution (issuer of electronic money), which, upon receipt of the funds, issues electronic money, at par value of the funds received, for the benefit of the seller (electronic money holder)?'

Consideration of the question referred

17 By its question, the referring court asks, in essence, whether Article 5(2) of Directive 2009/110 must be interpreted as meaning that services provided by electronic money institutions in payment transactions such as those at issue in the main proceedings constitute activities linked to the issuance of electronic money.

18 In that regard, it should be noted that, in accordance with Article 5 of that directive, electronic money institutions are required to comply with certain own funds requirements.

19 In particular, it is clear from Article 5(2) and (3) of that directive that, with regard to the activity of issuing electronic money, the own funds requirements of an electronic money institution are to be calculated in accordance with Method D and must amount to at least 2% of the average outstanding electronic money.

20 By contrast, with regard to the activities which are not linked to the issuance of electronic money, and which, on that ground, constitute a payment service within the meaning of point 3 of Article 4 of Directive 2007/64, the own funds requirements of an electronic money institution are calculated in accordance with one of the three methods (A, B or C) set out in Article 8(1) and (2) of that directive.

21 Consequently, taking into account the own funds requirements relating to each of those methods, an electronic money institution is required to have more own funds when those are calculated by using methods A, B or C, than when they are calculated in accordance with method D.

22 Therefore, it must be held that Article 5(2) and (3) of Directive 2009/110 creates an exception to the rules on own funds laid down by Directive 2007/64 as regards payment services linked to the issuance of electronic money provided, in so far as those services are linked to the activity of issuing electronic money.

23 Thus, in order to determine whether the services in question in the main proceedings constitute activities linked to the issuance of electronic money, it is necessary to determine whether those services are inherently linked to the issuance or redemption of electronic money.

24 The concept of the 'issuance of electronic money' is not defined by Directive 2009/110, which merely specifies, in Article 2(2) thereof, that the concept of 'electronic money' is to be understood as 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, and which is accepted by a natural or legal person other than the electronic money issuer.

25 Point 5 of Article 4 of Directive 2007/64 defines a payment transaction as an act, initiated by the payer or by the payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and the payee. Furthermore, as is clear from point 3 of Article 4, read in conjunction with the Annex to that directive, the execution of a payment transaction, including the transfer of funds to a payment account, constitutes a payment service.

26 Additionally, it must be noted that Article 11(2) of Directive 2009/110 requires electronic money issuers to redeem, upon request by the electronic money holder, at any moment and at par value, the monetary value of the electronic money held.

27 As regards the concept of 'redemption', which is not defined by Directives 2007/64 and 2009/110, it consists in the conversion of electronic money to its par value and the subsequent payment of funds on the instruction of the electronic money holder. In that regard, those directives do not require that those funds are paid into the account of the electronic money holder or to a third-party account.

28 Since the issuance of electronic money unconditionally and automatically confers entitlement to redemption, the concept of 'payment service linked to the issuance of electronic money' also includes the redemption of the electronic money within the meaning of Article 5(2) of Directive 2009/110.

29 Thus, a payment service provided for the purpose of enabling the redemption of the par value of the electronic money constitutes an activity linked to the issuance of electronic money.

30 In order to determine whether the services at issue in the main proceedings constitute payment services linked to the issuance of electronic money, it must therefore be determined whether the provision of those services triggers the issuance or redemption of electronic money in a single payment transaction.

31 In that regard, Service I consists of a payment transaction whereby, at the request of the electronic money holder, the electronic money institution redeems the funds at par value and transfers them to a third-party bank account.

32 In so far as the funds are redeemed solely for the purpose of their transfer and in a single payment transaction – which it is for the referring court to ascertain – a service such as Service I may be regarded as being linked to the issuance of electronic money within the meaning of Article 5(2) of Directive 2009/110.

33 As regards Service II, it consists of a transaction whereby, at the request of the seller, the buyer of the goods or services pays for them by making a transfer of funds for that purpose to the electronic money institution, which, upon receipt of the funds, issues electronic money for the benefit of the seller (electronic money holder).

34 Subject to the findings of the referring court, a service such as Service II is also directly linked to the issuance of electronic money, if the transfer of funds automatically triggers, in a single payment transaction, the issuance of electronic money. The transfer of funds is thus linked to the issuance of electronic money.

35 In light of the above, the answer to the question referred is that Article 5(2) of Directive 2009/110 must be interpreted as meaning that services provided by electronic money institutions in payment transactions such as those at issue in the main proceedings constitute activities linked to the issuance of electronic money, within the meaning of that provision, if those services trigger the issuance or redemption of electronic money in a single payment transaction.

Costs

36 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 5(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, must be interpreted as meaning that services provided by electronic money institutions in payment transactions such as those at issue in the main proceedings constitute activities linked to the issuance of electronic money, within the meaning of that provision, if those services trigger the issuance or redemption of electronic money in a single payment transaction.

[Signatures]