

I

(Resolutions, recommendations and opinions)

OPINIONS

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 5 December 2008

on a proposal for a Directive on the taking up, pursuit and prudential supervision of the business of electronic money institutions

(CON/2008/84)

(2009/C 30/01)

Introduction and legal basis

On 30 October 2008, the European Central Bank (ECB) received a request from the Council of the European Union for an opinion on a proposal for a directive of the European Parliament and of the Council 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 ⁽¹⁾ (hereinafter the 'proposed directive').

The ECB's competence to deliver an opinion is based on Article 105(4), in conjunction with the first and fourth indents of Article 105(2) of the Treaty establishing the European Community, as the proposed directive concerns basic tasks of the European System of Central Banks (ESCB), namely to define and implement the monetary policy of the Community ⁽²⁾ and to promote the smooth operation of payment systems. The ECB's competence is also based on Article 105(5) of the Treaty, pursuant to which the ESCB contributes to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

General observations

The objective of the proposed directive is to open the market for the issuance of electronic money (hereinafter 'e-money') by electronic money institutions (hereinafter 'ELMIs'), which are regulated under a lighter prudential regime than the one applicable to credit institutions. The ECB supports the 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 ⁽³⁾, as this recognises that Directive 2000/46/EC is not entirely in line with the current market expectations as regards the issuance of e-money. At the same time, the ECB has serious concerns regarding the proposal to change the legal definition of ELMIs from 'credit institution' to 'financial institution', as defined in Directive 2006/48/EC of the

⁽¹⁾ COM(2008) 627 final.

⁽²⁾ In this respect, the ECB's competence under Article 5 of the Statute of the European System of Central Banks and the European Central Bank (hereinafter the 'ESCB Statute') is also of relevance, as the proposed directive have an impact on the collection of statistics for the definition and implementation of the monetary policy of the euro area.

⁽³⁾ OJ L 275, 27.10.2000, p. 39.

European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) ⁽¹⁾; this may have wide-ranging consequences for the conduct of monetary policy. In the same vein, the proposed directive poses concerns from a supervisory perspective, as it lightens the supervisory regime for ELMIs while simultaneously broadening the scope of their activities. The above concerns are set out in more detail below.

Specific observations

1. *The legal nature of ELMIs*

1.1. To assess the implications of the proposed directive, it is important first to understand the legal nature of ELMIs. In this respect, point (b) of Article 4(1) of Directive 2006/48/EC defines ELMIs as credit institutions within the meaning of Directive 2000/46/EC. According to point (a) of Article 1(3) of Directive 2000/46/EC, an ELMI is defined as 'an undertaking or any other legal person, other than a credit institution as defined in Article 1, point 1, first subparagraph (a) of Directive 2000/12/EC [now Directive 2006/48/EC] which issues means of payment in the form of electronic money'. Article 17(1) of the proposed directive removes ELMIs from the above definition of credit institution and reclassifies them as 'financial institutions' in accordance with Article 4(5) of Directive 2006/48/EC. However, in view of the type of activities which ELMIs will be allowed to undertake under the proposed directive, the legal nature of ELMIs would continue to be equivalent to that of credit institutions. This conclusion is based on the analysis of the definition of credit institution under point (a) of Article 4(1) of Directive 2006/48/EC, according to which a 'credit institution' means 'an undertaking whose business it is to receive deposits or other repayable funds from the public and to grant credits for its own account'.

1.2. 'an undertaking'

The term 'undertaking' is that used in the competition rules of the Treaty ⁽²⁾. While this term is not defined in the Treaty, its meaning has been generally set out in Community law as the term includes any natural or legal person engaged in commercial ⁽³⁾ or economic activity regardless of their legal status or the way they are financed ⁽⁴⁾. Article 2(1) of the proposed directive defines an ELMI as 'a legal person that has been granted authorisation ... to issue electronic money'. Thus, the first part of the requirement of being 'an undertaking', as required by the definition of credit institution, is fulfilled. Moreover, an ELMI's issuance of e-money and the provision of other payment services in general, as set out in Article 8 of the proposed directive, can certainly be said to be both a commercial and economic activity.

1.3. 'whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account'

As noted by the Court of Justice of the European Communities, 'it is common ground that the taking of deposits from the public and the granting of credits represent the basic activities of credit institutions' ⁽⁵⁾. Attention is drawn to the cumulative character of the two aspects of such a business, i.e. the need for them to co-exist for a credit institution to come within the scope of the definition set out in Directive 2006/48/EC. It is enough, however, if an undertaking is entitled under its statutes to carry out the two types of business; it is not necessary that it actually pursues both of them at the same time or even that it pursues them in practice at all ⁽⁶⁾. What is critical in this respect is whether the institution is legally entitled to conduct the relevant transactions. These elements are assessed in further detail below.

⁽¹⁾ OJ L 177, 30.6.2006, p. 1. See Article 4(1) and (5) of Directive 2006/48/EC.

⁽²⁾ See Usher, J.A., *The Law of Money and Financial Services in the EC*, 2nd edition, Clarendon Press, Oxford, 2000, p. 116.

⁽³⁾ Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — Polypropylene) (OJ L 230, 18.8.1986, p. 1).

⁽⁴⁾ Case C-41/90 *Höfner and Elser v Macroton* [1991] ECR I-1979; Case T-319/99 *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities* [2003] ECR II-357.

⁽⁵⁾ Paragraph 16 of Case C-442/02 *Caixa-Bank France v Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-8961.

⁽⁶⁾ See Clarotti, P., 'The Harmonization of Legislation relating to Credit Institutions', *Common Market Law Review*, Vol. 19, No 2, Kluwer Law International, 1982, p. 249 and Verheugd, P., 'Definition of credit institution', *Banking and EC Law Commentary*, M. van Empel and R. Smits eds, Kluwer Law International, Deventer, 1992, p. 17.

1.4. 'receive deposits or other repayable funds'

1.4.1. Article 8(2) and (3) of the proposed directive prohibit ELMs from taking deposits. While Directive 2006/48/EC does not define deposit-taking, the concept of 'deposits or other repayable funds' under Directive 2006/48/EC has been broadly interpreted by the Court of Justice, which has noted that 'the term "other repayable funds" ... refers not only to financial instruments which possess the intrinsic characteristic of repayability, but also to those which, although not possessing that characteristic, are the subject of a contractual agreement to repay the funds paid' ⁽¹⁾. It does not matter whether such funds are received in the form of deposits or in other forms, such as 'the continuing issue of bonds and other comparable securities' ⁽²⁾, as referred to in a forerunner of Directive 2006/48/EC. Thus, 'all receipts of monies may amount to deposit-taking business (in the broader sense) if they involve repayment of the monies received. It is unimportant in this regard whether the requirement of repayment already exists at the time the funds are received (and forms an "essential" element of that transaction), or whether this obligation only arises as a result of the creation of a contractual entitlement' ⁽³⁾. A proper interpretation of deposit-taking 'will have to be guided by the question of the range of the savings to be protected and the interpretation of the characteristics of "credit business" in the light of the risks considered significant in terms of the protection of recovery of deposits. The outcome is a tendency towards a broad interpretation both of deposit-taking business and credit' ⁽⁴⁾.

1.4.2. In view of the above, it should be noted that recital 8 of Directive 2000/46/EC states that the 'receipt of funds from the public in exchange for electronic money, which results in a credit balance left on account with the issuing institution, constitutes the receipt of deposits or other repayable funds'. Under the proposed directive such receipt of funds will no longer constitute a deposit or other repayable fund. There is no reason given for such change in the explanatory memorandum to the proposed directive; however, it appears to be a general attempt to align Directive 2000/46/EC with Directive 2007/64/EC ⁽⁵⁾. As already noted in Opinion CON/2006/21 of 26 April 2006 on a proposal for a directive on payment services in the internal market ⁽⁶⁾, the ECB considers that receiving funds in this manner amounts to deposit-taking. The reason is that the funds may be kept for an indefinite period and the issuer is allowed to pay interest on the funds received. Specifically in respect of the provision of interest, the Court of Justice has recognised that 'where credit institutions which are subsidiaries of foreign companies seek to enter the market of a Member State, competing by means of the rate of remuneration paid on sight accounts constitutes one of the most effective methods to that end ... The restriction on the pursuit and development of the activities of those subsidiaries resulting from the prohibition at issue [a prohibition on the remuneration of sight accounts] is all the greater in that it is common ground that the taking of deposits from the public and the granting of credits represent the basic activities of credit institutions' ⁽⁷⁾.

1.4.3. Finally, when arguing that ELMs will continue to take deposits or other repayable funds it is decisive that funds paid to an ELMI are redeemable in accordance with Article 5 of the proposed directive, according to which the funds in question are to be paid back to the e-money holder at par value on request.

1.5. 'from the public'

Regarding deposit-taking, the institution must be in the business of receiving deposits 'from the public'. In the absence of any case-law of the Court directly addressing the term 'public' used in the definition of credit institution under Directive 2006/48/EC, several legal scholars have expressed their opinion on the meaning of the term 'public' in the definition of 'credit institution' as laid down in

⁽¹⁾ See paragraph 17 of Case C-366/97 *Massimo Romanelli* [1999] ECR I-855.

⁽²⁾ Recital 5 of the First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (OJ L 322, 17.12.1977, p. 30).

⁽³⁾ See Alexander Bornemann, 'Abridged Opinion on the Concept of the Credit Institution in the Directives of the European Community Relating to Bank Regulation and Supervision', p. 11. Available as a PDF file at: <http://www.money-advice.net/media.php?id=234>

⁽⁴⁾ *Ibid.*

⁽⁵⁾ 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 L 319, 5.12.2007, p. 1).

⁽⁶⁾ OJ C 109, 9.5.2006, p. 10.

⁽⁷⁾ See paragraphs 14 and 16 of Case C-442/02 *Caixa-Bank France v Ministère de l'Économie, des Finances et de l'Industrie*.

the first indent of Article 1 of Directive 77/780/EEC, which has been reproduced verbatim in point (a) of Article 4(1) of Directive 2006/48/EC. It has been recognised that 'At the time of the adoption of the First Banking Directive the chief objective of the prudential supervision of credit institutions was the protection of depositors and savers ... For that reason, an undertaking raising its funds on the inter-bank market from credit institutions or from other professional market parties — as, for instance, institutional investors and insurance companies — does not qualify as a credit institution' ⁽¹⁾. Therefore, 'Institutions which are active only in the interbank markets ... would not qualify as credit institutions under EC law, because they are not receiving funds from the public' ⁽²⁾. From this it can be seen that the concept of 'public' encompasses physical or legal persons considered as requiring protection under the law, while those entities which do not need such protection, such as those who fund themselves only in the interbank markets, are not considered as falling within the scope of the term 'public'. Therefore, any legal or natural person other than a credit or financial institution will be classified as 'public' for the purposes of the definition of a credit institution. Indeed, in the ELMI context, the holders of e-money are to be considered 'the public' from whom issuers of e-money receive funds.

1.6. 'to grant credits for its own account'

Under Article 1(5)(a) of Directive 2000/46/EC, the business activities of ELMIs are restricted and specifically exclude 'the granting of any form of credit'. Since the business of a credit institution covers both deposit taking and the granting of credit, it could be argued that ELMIs, today, do not fulfil both criteria of deposit taking and granting of credit and are only considered to be credit institutions due to the definition laid down in Directive 2006/48/EC. However, irrespective of the prohibition in the proposed directive on ELMIs taking deposits, they will *de facto* continue to take such deposits or other repayable funds. In addition, they will continue to fulfil the other criteria of granting credit. More specifically, in accordance with point b of Article 8(1) of the proposed directive, ELMIs will be allowed to grant credit when offering certain types of payment services ⁽³⁾. Admittedly, however, ELMIs wishing to grant such credit can only do so subject to a number of specific conditions ⁽⁴⁾.

- 1.7. The definition of 'credit institution' in Directive 2006/48/EC relates to the nature of the business transacted, not to the nature of the entity that transacts it ⁽⁵⁾. In this respect, it seems clear that irrespective of ELMIs ceasing to be credit institutions under the proposed directive and irrespective of its prohibition on ELMIs taking deposits or other repayable funds, they will *de facto* continue to take such deposits. More specifically, funds received may be kept for an indefinite period until the holder requests them to be redeemed and issuers of e-money may pay interest on the funds received. In addition, ELMIs will continue to fulfil the other criteria of the business of credit institutions. Therefore, from a legal point of view, it would seem that an ELMI, as defined in the proposed directive, would have features resembling those of credit institutions even more than today since deposit-taking activity remains unchanged and restricted granting of credit will be allowed in the future. With this in mind, it should be noted that in the context of the development of the definition of 'credit institution', scholars have stated that 'There must be a uniform approach in this field to avoid distortions in

⁽¹⁾ Verheugd, P., 'Definition of credit institution', *Banking and EC Law Commentary*, M. van Empel and R. Smits eds, Kluwer Law International, Deventer, 1992, p. 23.

⁽²⁾ Dassesse, M., Isaacs, S., and Penn, J., *EC Banking Law*, 2nd edition, Lloyd's of London Press, 1994, p. 19.

⁽³⁾ The payment services that ELMIs will be allowed to undertake are those referred to in points 4, 5 and 7 of the Annex to Directive 2007/64/EC: (i) the execution of payment transactions where the funds are covered by a credit line to a payment service user when executing direct debits, payment transactions through a payment card and credit transfers; (ii) issuing and/or acquiring of payment instruments; and (iii) mobile payments where the mobile operator is acting as an intermediary for the sale of goods and services.

⁽⁴⁾ Article 8(1)(b) of the proposed directive refers to Article 16(3) and (5) of Directive 2007/64/EC meaning that (a) the credit is ancillary and granted exclusively in connection with the execution of a payment transaction; (b) the credit is repaid within a period not exceeding 12 months; (c) the credit may not be granted from the funds received or held for the purpose of executing a payment transaction; (d) the ELMI's own funds will at all times be appropriate and to the satisfaction of supervisors in view of the overall amount of credit granted; and (e) is without prejudice to other relevant Community or national legislation regarding the conditions for granting credit to consumers.

⁽⁵⁾ See Usher, J.A., *The Law of Money and Financial Services in the EC*, 2nd edition, Clarendon Press, Oxford, 2000, p. 116.

competition which would occur if undertakings which were basically similar and carried on the same business, or at least a very similar business, were subjected to administrative control in one country but were exempt in another' ⁽¹⁾. From a central bank perspective, ELMIs are part of the money-issuing sector and a level playing field should continuously be ensured with credit institutions, as defined in Directive 2006/48/EC ⁽²⁾.

2. Monetary policy

- 2.1. According to the first sentence of Article 19.1 of the ESCB Statute, 'the ECB may require credit institutions established in Member States to hold minimum reserves on accounts with the ECB and national central banks in pursuance of monetary policy objectives'. In view of their legal status as credit institutions, ELMIs are subject to Eurosystem ⁽³⁾ reserve requirements, as further regulated in Regulation ECB/2003/9 of 12 September 2003 on the application of minimum reserves ⁽⁴⁾. Minimum reserves are an important measure for the implementation of monetary policy, i.e. the steering of short-term interest rates, which can only be imposed on credit institutions. Therefore, the definition of credit institution, as contained in Directive 2006/48/EC, is of significance to the ECB and the national central banks.
- 2.2. Should ELMIs cease to be covered by the definition of credit institution, as suggested in Article 17(1) of the proposed directive, it would have wide-ranging consequences from a central bank perspective. Since e-money also substitutes for means of payments offered by banks (e.g. in the form of debit card transactions), such means of payments would be offered by e-money institutions which are no longer subject to reserve requirements. Inconsistent treatment across various means of payment which are quite similar in many respects should be avoided.
- 2.3. In addition, shifting balances between e-money and bank accounts would affect banks' liquidity situations and could complicate the implementation of monetary policy. While currently existing volumes of e-money are too small to create problems in this regard, the potential for e-money holdings to increase rapidly in the future exists, as foreseen in the impact assessment accompanying the proposed directive as a consequence of the relaxed regulatory requirements that would apply to ELMIs following the adoption of the proposed directive. The implications of reclassifying ELMIs as financial institutions, as defined in Article 4(5) of Directive 2006/48/EC, would be that they would no longer be subject to reserve requirements under Article 19.1 of the ESCB Statute. In this situation, and if e-money replaces cash to a significant extent, the liquidity conditions of the banking sector would in the ECB's view be significantly affected. Consequently, the implementation of monetary policy by the Eurosystem would become more difficult and the results more uncertain.
- 2.4. In conclusion, considerations from a monetary policy perspective strongly support that ELMIs should continue to be classified as credit institutions contrary to the suggestion made in the proposed directive. In this respect, the ECB is of the view that the concerns relating to monetary policy identified above clearly outweigh the rationale underlying the proposed directive to align the regulatory framework applicable to ELMIs with that applicable to payment institutions as defined in Article 4(4) of Directive 2007/64/EC, which are not covered by the definition of credit institution ⁽⁵⁾.

⁽¹⁾ See Clarotti, P., 'The Harmonization of Legislation relating to Credit Institutions', *Common Market Law Review*, Vol. 19, No 2, Kluwer Law International, 1982, p. 248.

⁽²⁾ This position is consistent with the advice provided in the 'Report on electronic money' published by the ECB in August 1998, where it was argued that the applicable Banking Directive at the time should be amended to ensure that ELMIs would fall under the definition of credit institutions. Further information is available on the ECB's website at: www.ecb.europa.eu

⁽³⁾ The Eurosystem is composed of the ECB and the national central banks of the Member States that have introduced the euro.

⁽⁴⁾ OJ L 250, 2.10.2003, p. 10.

⁽⁵⁾ See paragraph 5.1 of ECB Opinion CON/2006/21, where the ECB expressed a preference for payment institutions being covered by the definition of credit institutions by stating that 'if payment institutions are allowed to hold funds which in both economic and legal terms qualify as deposits, although conceptually not characterised as such under the proposed directive, the level of risk will be equal to that of credit or e-money institutions. Accordingly, the level of safeguards should be the same as that applied to credit and/or e-money institutions. It follows that payment services should preferably be restricted to credit or e-money institutions. This would ensure sufficient protection of customer funds and sound financial activity, and is therefore the ECB's preferred approach'.

- 2.5. The ECB welcomes the fact that Article 5 of the proposed directive to a large extent maintains the redeemability requirements contained in Article 3 of Directive 2000/46/EC. Redeemability is a core issue from a central bank point of view. ELMIs must, therefore, be legally obliged to redeem e-money for central bank money at par value at the request of the holder of the e-money. It is only by ensuring that the holder of e-money can reconvert the value of e-money into banknotes or scriptural money that confidence in e-money as an effective and reliable substitute for coins and banknotes will be preserved. From a monetary policy perspective, the redeemability requirement is necessary, *inter alia*, in order to preserve the unit-of-account function of money, to maintain price stability by avoiding unconstrained issuance of e-money and to safeguard the ability to control liquidity conditions and short-term interest rates set by the ECB.
- 2.6. Redemption by e-money issuers to holders of e-money as described above should be made either in legal tender or, with the respective e-money holder's consent via banking channels by making an irrevocable payment order to credit the e-money holder's bank account. Redemption payments should be denominated in the same currency as the currency in which the issued e-money is denominated⁽¹⁾. In this respect, the ECB notes that Article 5(1) of the proposed directive implies that the holder of e-money can request to be redeemed, at any moment, at 'the monetary value of the electronic money held'. The provision in question does not mirror the content of Article 3(1) of Directive 2000/46/EC according to which the holder can choose between being redeemed at par value in both coins and banknotes or by transfer to an account. For reasons of legal clarity and to ensure consistent transposition of the provision into the national legislation of the Member States, the ECB suggests amending Article 5(1) of the proposed directive accordingly to ensure that an e-money holder is free to choose their preferred method of redemption.
3. *Supervisory framework*
- 3.1. Article 8(1) of the proposed directive considerably broadens the scope of activities which ELMIs will be entitled to engage in compared to Article 1(5) of Directive 2000/46/EC according to which the business activities of ELMIs, other than the issuing of e-money, are restricted to the provision of closely related financial and non-financial services, excluding the granting of any form of credit. The proposed directive enlarges the activities permitted to: (i) providing payment services listed in the Annex to Directive 2007/64/EC, which includes granting certain credits; (ii) operating payment systems; and (iii) engaging in business activities other than issuing e-money. Simultaneously with the liberalisation of the list of allowed activities, the supervisory regime is relaxed by, *inter alia*, substantially lowering initial capital requirements and removing the existing limitations on investments contained in Article 5 of Directive 2000/46/EC. The ECB understands that the basic justification for this fundamental change is the aim of aligning and ultimately integrating the regulatory framework for ELMIs into Directive 2007/64/EC. Accordingly, the proposed supervisory regime aligned with the provisions applicable to payment institutions under Directive 2007/64/EC, corresponds to the proposed change in the definition of ELMIs. Against this background, the following aspects are worth considering.
- 3.2. First, the ECB is of the view that apart from the right of ELMIs and credit institution to issue e-money, the distinction between ELMIs and payment institutions is unclear; this makes the assessment of risks and related safeguards a challenging task from a supervisory perspective. More concretely, the difficulty arises not only due to the fact that ELMIs may hold funds that are in practice equivalent to deposits and other repayable funds, but also due to an ELMI's ability to grant credit financed by money received from the public. In addition, the alignment of ELMIs with payment institutions is complicated by the need to differentiate between payment services based on payment accounts and e-money payment services based on centralised accounts.

⁽¹⁾ For additional information please see the 'Report on electronic money' and ECB Opinion CON/1998/56 of 19 January 1999 at the request of the Council of the European Union under Article 105(4) of the Treaty establishing the European Community and Article 4(a) of the Statute of the European System of Central Banks and of the European Central Bank on 1. a Commission proposal for a European Parliament and Council Directive on the taking up, the pursuit and the prudential supervision of the business of electronic money institutions; and 2. a Commission proposal for a European Parliament and Council Directive amending Directive 77/780/EEC on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions.

- 3.3. Second, the proposed change in the definition of ELMIs would not reduce risks associated with their activities. By contrast, the impact assessment accompanying the proposed directive does not address the risks that may be associated with the broader range of activities that ELMIs are entitled to undertake.
- 3.4. Third, the ECB is of the view that clear evidence of the alleged disproportion between safeguarding requirements and actual risks associated with ELMI activities is still missing. On the basis of the above mentioned considerations, there is a clear need to further consider the potential risks associated with the new 'legal nature' of ELMIs to ensure their proper regulatory and supervisory treatment.
- 3.5. Fourth, as already noted above, it is also worth stressing that Article 5 of Directive 2000/46/EC concerning restrictions in investment strategies is not mirrored in the proposed directive. The fairly restrictive nature of Directive 2000/46/EC in terms of the options that it leaves e-money issuers to make a profit through the issuance of e-money has been relaxed in the proposed directive. This proposed amendment may prove positive for the industry's future growth. However, the significant liquidity and default risks which an ELMI may face, if it is allowed to invest in any kind of assets, must be taken into account. In this regard, a well balanced solution could be achieved by providing a more flexible regime of investment limitations than currently set by Directive 2000/46/EC. Full liberalisation of the existing investment limitations, as contained in the proposed directive, would require an amendment which would impose additional supervisory safeguards.
- 3.6. Finally, the proposed directive raises the thresholds for identification and customer due diligence requirements in accordance with Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing ⁽¹⁾. However, these thresholds do not correspond to the thresholds in Directive 2007/64/EC. A substantial increase of the current thresholds would facilitate anonymity in payment transactions and increase money laundering and financing of terrorism risks associated with the issuance of e-money, in particular through the acquisition of multiple prepaid cards.

4. *Statistics*

ELMIs currently form part of the reporting population of monetary financial institutions (MFI) for the ECB's monetary and financial statistics, in accordance with Regulation ECB/2001/13 of 22 November 2001 concerning the consolidated balance sheet of the monetary financial institutions sector ⁽²⁾. It is noted that even if ELMIs will no longer be defined as credit institutions, they will fall into the statistical definition of MFI under Part I, Section I, paragraph 2 of Annex 1 to Regulation ECB/2001/13, according to which resident financial institutions other than credit institutions are subject to statistical reporting requirements depending, *inter alia*, on the degree of substitutability between the instruments they issue and deposits placed with credit institutions; the reason is that ELMIs will continue to receive funds equivalent to overnight deposits from entities other than MFIs and make investments in securities for their own account.

5. *Additional legal and technical comments*

- 5.1. Article 1(3) of the proposed directive lays down that it does not apply to services based on instruments which, *inter alia*, are used within 'limited networks'. The ECB acknowledges that recital 5 could be used to interpret this to mean that instruments used within a limited network 'can be used only for the purchase of goods and services in a specific store, a chain of stores or for a limited range of goods and services'. However, the provision in question would benefit from further clarification since the issuance of e-money within the network of e.g. two large chains of stores could potentially represent an exemption for the issuance of a substantial amount of e-money.

⁽¹⁾ OJL 309, 25.11.2005, p. 15.

⁽²⁾ OJL 333, 17.12.2001, p. 1.

- 5.2. Subject to certain qualifications, Article 1(4) of the proposed directive exempts mobile phone operators from the scope of application of the proposed directive. The ECB understands that the exemption applies in cases where the mobile phone operator acts as an intermediary without adding 'intrinsic value' to the goods or services, as stated in the last sentence of recital 5 of the proposed directive. For reasons of legal clarity, the ECB recommends that recital 5 of the proposed directive is further elaborated by providing guidance as to whether the purchase of e.g. ring tones or weather forecasts would be covered by the exemption.
- 5.3. The e-money definition in Article 2(2) of the proposed directive is worded very broadly and covers most types of accounts; it sets out what in general is considered as e-money, which also covers bank accounts and payment accounts since bookkeeping and storing of funds are nowadays handled by electronic means irrespective of the type of account concerned. The reference to payment transactions as defined in Directive 2007/64/EC adds another very general concept to the definition, since payment transactions are not restricted to traditional means of payments but also cover transfer and withdrawal of funds. This general definition of e-money would imply that traditional bank accounts as well as payment accounts could be considered as e-money. The ECB would therefore advise specifying that any funds received can only be used for the sole purpose of electronic transfer of funds from the e-money holder to its payees.
- 5.4. Without prejudice to the ECB's view expressed above as to the legal nature of the funds received *de facto* being deposits, Article 8(2) of the proposed directive already seems to cover the content of Article 8(3), for which reason the latter paragraph could be deleted.
- 5.5. Article 11(1) of the proposed directive regulates the Commission's adoption of implementing measures. In particular, point c of Article 11(1) provides a legal basis for doing so in respect of 'measures to take account of technological and market developments', which the ECB considers to be too broadly formulated, unlimited in scope and possibly not fulfilling the requirement in Article 11(2) of the proposed directive according to which any implementing measures must be 'designed to amend non-essential elements' of the proposed directive.

Drafting proposals

Where the above advice would lead to changes in the proposed directive, drafting proposals are set out in the Annex.

Done at Frankfurt am Main, 5 December 2008.

The President of the ECB
Jean-Claude TRICHET

ANNEX

Drafting proposals

| Text proposed by the Council | Amendments proposed by the ECB ⁽¹⁾ |
|--|--|
| Amendment 1 Article 2(2) of the proposed directive | |
| 2. 'electronic money' means a monetary value as represented by a claim on the issuer which is stored electronically and issued on receipt of funds, for the purpose of making payment transactions as defined in Article 4(5) of Directive 2007/64/EC, and is accepted by natural or legal persons other than the issuer; | 2. 'electronic money' means a monetary value as represented by a claim on the issuer which is stored electronically and issued on receipt of funds, for the sole purpose of making payment transactions as defined in Article 4(5) of Directive 2007/64/EC transferring funds by electronic means from the electronic money holder to its payees , and is accepted by natural or legal persons other than the issuer; |
| <i>Justification</i> — See paragraph 5.3 of the opinion | |
| Amendment 2 Article 5(1) of the proposed directive | |
| 1. Member States shall ensure that, upon request by the holder, issuers of electronic money redeem, at any moment and at par value, the monetary value of the electronic money held. | 1. Member States shall ensure that, upon request by the holder, issuers of electronic money redeem, at any moment and at par value, in coins and bank notes or by a transfer to an account the monetary value of the electronic money held. |
| <i>Justification</i> — See paragraph 2.6 of the opinion | |
| Amendment 3 Article 8(3) of the proposed directive | |
| 3. Electronic money institutions shall not conduct the business of taking deposits or other repayable funds within the meaning of Article 5 of Directive 2006/48/EC. | [Deletion] |
| <i>Justification</i> — See paragraph 5.4 of the opinion | |
| Amendment 4 Article 17 of the proposed directive | |
| <p style="text-align: center;"><i>Article 17</i></p> <p style="text-align: center;">Amendments to Directive 2006/48/EC</p> <p>1. Article 4 is amended as following:</p> <p>(a) Point (1)(b) is replaced by the following: '(1) "credit institution" means an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account;'</p> <p>(b) Point (5) is replaced by the following: '(5) "financial institution" means an undertaking other than a credit institution, the principal activity of which is to acquire holdings or to carry on one or more of the activities listed in points 2 to 12 and 15 of Annex I.'</p> <p>2. The following point 15 is added to Annex I: '15. Issuing electronic money'.</p> | [Deletion] |
| <i>Justification</i> — See sections 1, 2 and 4 of the opinion | |
| <p>⁽¹⁾ Strikethrough in the body of the text indicates where the ECB proposes deleting text. Bold in the body of the text indicates where the ECB proposes inserting new text.</p> | |