E-money and trusts: A property analysis

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I. Introduction

When persons who believe themselves to be the absolute owners of assets are found to hold these assets on trust, private property relations are thereby altered. The result, in the words of Lord Browne-Wilkinson, is that "assets which apparently belong to one person in fact belong to another."[1] The consequences of finding a trust are therefore significant, and not only for trustees and beneficiaries; their creditors and other third parties who might receive or assist in dealing with the assets may also be affected by such a finding.

In its capacity as competent authority for electronic money institutions ('EMIs'), the Financial Conduct Authority ('FCA') recently stated that EMIs hold funds they receive from customers in exchange for electronic money on trust.[2] Electronic money, or e-money as it is commonly known, is prepaid value denominated in fiat currency issued by firms with household names such as *PayPal* or *Wise*. Customers hold e-money on payment instruments,[3] which may be online accounts, payment cards or paper vouchers that can be used to make payments online or in physical locations. A common form of an e-money product is a scheme-branded prepaid card that is accepted in payment wherever credit and debit cards are also accepted.

The legal definition of e-money is provided in the Electronic Money Regulations 2011 ('EMRs'). It states that e-money is "issued on receipt of funds"[4] and that it is "electronically (including magnetically) stored monetary value as represented by a claim on the electronic money issuer."[5] Customers pay for e-money using cash or bank money, and they and any subsequent holders of the e-money (usually merchants who have accepted the e-money in payment) have a right against the issuer to exchange their e-money back into funds,[6] a process called redemption.

Until recently, the funds that EMIs receive from customers in exchange for e-money were regarded as their (the EMIs') absolute property. Rather than holding these funds for the benefit of their customers, EMIs were thought to be merely under a duty to provide equivalent funds should customers exercise their redemption rights. However, driven by the perceived need to strengthen firms' safeguarding arrangements in the time of Covid-19 and beyond,[7] the FCA recently stated that it considers "that a firm holds these funds on trust for its customers."[8] In doing so, the FCA relied on a case decided in the High Court in 2020, *Re Supercapital Ltd*.[9]

This sudden imposition of a trust over what the FCA in its guidance calls 'customer funds' has the potential to alter the property relations pertaining to assets worth several billion pounds[10] and is therefore of considerable significance to the sector. Since the publication of the FCA's guidance, another High Court case has ruled that the FCA was incorrect to find a trust.[11] While this has provided some certainty for EMIs at least as far as the legal status of safeguarded funds is concerned, the rationale underlying these contrasting opinions remains far from clear. This is problematic, not least because of parallel developments taking place both in relation to e-money at EU level and in relation to cryptoassets generally.[12] This article seeks to provide the missing analysis with the aim of clarifying the underlying property relations involved in e-money issuance. It is hoped that this will also contribute to the ongoing discussions on customer protection for other new or emerging digital assets used for payments[13] and on the legal nature of digital assets more broadly.[14]

II. Customer funds

At the heart of the FCA's trust finding lies a misunderstanding of the property relations involved in the issuance of e-money. This is reflected in the FCA's use of the term 'customer funds,' a term that, together with its alternatives 'client money' and 'client funds,' conveys a relation of continued ownership by customers of funds that they have handed over to a financial institution.[15] However, such continued ownership does not follow from the mere fact of funds having been handed over.

An example of a financial service where it does – and which therefore rightly employs the terms ‘client money’ and ‘client funds’ – is that of investment services and activities. In the UK, investment services have long involved the use of a statutory trust over client money, defined as money being held “for, or on behalf of” customers.[16] The Markets in Financial Instruments Directive 2004 (‘MiFID I’), which forms the basis of the FCA’s power under the Financial Services and Markets Act 2000 to protect customers’ property rights in funds by imposing a trust over these funds,[17] thus requires that “an investment firm shall, when holding funds *belonging to clients*, make adequate arrangements to safeguard the clients' rights and, except in the case of credit institutions, prevent the use of client funds for its own account.”[18]

However, other financial services involve different property relations. For example, when a bank accepts a deposit, the bank becomes its owner; in return, the customer receives bank money, which is a claim right (chose in action) against the bank to the deposited amount. The customer becomes the bank’s creditor.[19] Here, customers lose their property rights in the funds handed over in exchange for a new object of property in the form of a personal right against the bank.

Different property relations again exist when customers neither retain property rights in the underlying funds nor acquire personal rights against the financial institution, but receive an entirely independent object of property[20] to which their rights are transferred and which does not retain any link to the underlying funds. An example of this type of object are cryptoassets that are not asset-referenced and that are mined or issued without a direct claim against the issuer.[21] Consequently, the question that has been litigated in relation to such assets is not whether the funds with which the cryptoassets are paid for are held on trust, but whether the coins themselves[22] are held on trust.[23]

The property relations involved in e-money issuance can be situated somewhere between those involved in bank money and in cryptoassets.[24] This conclusion is not easily reached, chiefly because ‘monetary value’ in the definition of e-money is not itself a defined term. Is it property? Is it a debt or some other right? What exactly do customers receive when they are issued with e-money? While it is clear that they receive a claim right against the issuer – ““Electronic money” means electronically (including magnetically) stored monetary value *as* *represented by a claim on the electronic money issuer*"[25] – the nature and effects of this right on the underlying property relations are far from clear.

A starting point for the analysis can be found in the statutory distinction drawn between accepting funds for the purposes of issuing e-money and accepting funds as deposits. While e-money is issued and redeemed at par[26] and therefore corresponds, like bank money, to the value of the underlying funds on a 1:1 basis, these funds do not constitute a deposit as a matter of law.[27] When the first Electronic Money Directive ('EMD') was issued in the year 2000,[28] it explained this distinction by reference to the fact that the funds that an e-money issuer receives from customers are immediately *exchanged* into e-money, which effectively functions "as an electronic surrogate for coins and banknotes."[29] E-money issuance is therefore best understood as an exchange of one thing for another,[30] whereby the thing received by the customer is more than a mere right to be repaid the value of the thing provided in exchange, or to be specific, is more than the "legal right to enforce the chose in action entitling [the customer] to draw upon the credit balance with the bank or any overdraft facility,"[31] which is what bank money strictly-speaking consists of. Accordingly, e-money issuance has also been described as the "selling of payment tokens."[32]

But what is this 'more' that is sold to customers, and in what way is e-money a surrogate for coins and bank notes? In this respect, considering the nature of the redemption right in distinction to the claim right that bank money involves may be of help. The first point to make is that, with bank money, the deposited money is *itself* repayable,[33] while with e-money, it is the *e-money* that is redeemable.[34] In other words, bank money consists of nothing more than the right to be repaid the underlying funds, while e-money is something (of a yet unspecified kind) which is itself capable of being exchanged back for funds. Both claim rights are personal rights against the financial institution, but one is a right held by a person, the other a right that attaches to a 'thing.'

This links to the second point. With bank money, the personal relation with the bank is activated each time a payment is made. What is meant here is not that a payer enforces their right to be repaid their deposit in legal tender. Indeed, in most payments made with bank money, payers do not exercise that right, preferring instead "to treat the incorporeal claim and its proceeds as media of exchange in their own right."[35] The same could be said of e-money, which holders use as a medium of exchange without making use of the redemption right except when they wish to withdraw value from the e-money system at the end of the payment chain. In this sense, both bank money and e-money can be said to be 'money'[36] and are surrogates for coins and banknotes.

Rather, what is meant is that, because bank money is a debt, a payment with bank money requires the activation of the contractual relation under which the debt arises. When a payer initiates a payment, the payer's bank extinguishes the debt between itself and the payer with a view to creating a new debt between the payee's bank and the payee, the banks acting as agents in the process.[37] This means that bank money cannot be 'transferred' (nothing is in fact transferred, as a new asset is created in every transfer[38]) *but* with the involvement of the payer's bank, thus requiring at least three parties.[39]

In contrast, e-money involves a separate thing (the e-money), something that does not exist with bank money, given that it just consists of a personal right. This separate thing can itself be transferred without the need to activate the relation with the issuer. Indeed, once the customer has bought the e-money, there is no relevant relation that could even be activated. While the e-money holder will be in an ongoing contractual relation with the issuer regarding the provision of the payment service and use of the e-money system,[40] the relation between the e-money holder and the issuer as far as the e-money itself is concerned is one of buyer and seller after a purchase has been completed, i.e., a relation that has concluded. And while the redemption right continues to exist, moving with the e-money as it passes from hand to hand, it plays no role in the transfer of the e-money, remaining inactive until the last holder in the payment chain decides to activate it by requesting to redeem their e-money. Another way of describing this distinction would be to say that with bank money, the claim right is an integral part of the asset that is needed in order to deal with it, while with e-money, it merely functions to delimitate the asset's borders – when e-money is redeemed, it ceases to exist. As a result, the redemption right plays part no during the 'life' of the e-money, and this adds a different sense to the 'surrogacy' argument: The transfer of e-money only requires two parties and in this respect is like the transfer of coins and banknotes.

This distinction between e-money and bank money becomes most obvious when recalling early forms of e-money held on prepaid cards that directly communicated with merchant terminals rather than with the issuer's system.[41] Like cash, this e-money was under the exclusive control of the holder, who could transfer, lose or destroy it without the involvement of the issuer, the last two characteristics of which are also shared by cryptoassets and linked by Sarah Green to their cash-like nature.[42] Under the first EMD, e-money could even have a period of validity, after which it simply expired.[43] While expiration of e-money is no longer permitted and such cards no longer exist,[44] the element of the e-money definition that describes it as "electronically *stored* monetary value"[45] still points to such an independent thing of value stored by the issuer on behalf of the e-money holder rather than to a mere accounting reference to underlying funds. This renders e-money similar to coins and particularly bank notes, which also combine possession with a claim right.[46] E-money, like bank notes, does not reference ownership of anything other than itself during its use as a means of payment: "The possession of a £20 note is not evidence of entitlement to £20, it is £20."[47]

Neither the fact that e-money involves a claim right against the issuer nor the fact that it involves an ongoing contractual relation with the issuer is therefore indicative of a relation in which the customer only holds a right to enforce payment of the underlying funds. E-money is itself a *thing* (chose in possession) rather than just a claim right *to* a thing (chose in action),[48] and this moves it closer to cryptoassets, which are also described as "a thing of value, rather than being a representation of an underlying asset."[49] As with other digital assets, the fact that e-money consists of nothing more than a ledger entry on the issuer's system should have no bearing on this legal analysis.[50]

While it is not essential for the purposes of the discussion around e-money and trusts that the argument that e-money is a chose in possession should succeed, recognising e-money as an independent thing of value helps to distinguish it from a claim right to underlying funds, whether this claim right is a personal right against the financial institution for the funds (deposits) or a proprietary interest in the funds (investments). This understanding of e-money makes it implausible to argue that e-money holders also retain property rights in the funds with which they pay for the e-money. If this were the case, customers would effectively double the value in their hands; not only would they receive monetary value in the form of the e-money, which they could then transfer or use in payment for goods or services, they would also receive a proprietary interest in the funds with which they paid for this monetary value in the first place.

It is for these reasons that the funds which EMIs receive in exchange for issuing e-money should not be seen as belonging to e-money holders and should not be termed 'customer funds.' They are funds that beneficially belong to EMIs, constituting consideration for the monetary value issued. However, EMIs must ensure they have funds of an equivalent amount to outstanding e-money available to meet any redemption requests. This is the purpose of the safeguarding requirements, which will be discussed next.

III. Distinguishing means of protecting customer confidence

EMIs are subject to statutory safeguarding rules that require them to (a) segregate funds they have received from customers in exchange for e-money ('relevant funds') and either place them into a designated safeguarding account or invest them in secure, liquid, low-risk assets which are then placed into a designated safeguarding account,[51] or (b) cover relevant funds by an insurance policy or comparable guarantee, the proceeds of which are payable into a designated safeguarding account on the issuer's insolvency.[52] The EMRs stipulate that in both of these cases, the claims of e-money holders are to be prioritised over the claims of other creditors when it comes to distributing the assets in the designated safeguarding account in the event of an EMI's insolvency.[53]

This safeguarding regime has been taken by the FCA to be indicative of a trust arrangement because the FCA is of the view that "a person who holds specific assets with a prohibition on own use and with a duty or power to apply them in a particular way will likely be a trustee."[54] However, this view does not take into account the range of measures in existence for preserving customer confidence in a financial institution's ability to meet its liabilities in relation to handed-over funds, some of which include such restrictions without thereby creating a trust. These measures form a continuum, at either end of which ownership in the funds rests either with the institution or the customer. When placed on this continuum, it becomes clear that in the case of e-money, a trust is by no means a foregone conclusion.

At one end of the continuum lies a measure such as a compensation scheme as it is contemplated by the European Deposit Guarantee Scheme Directive[55] – in the UK, the Financial Services Compensation Scheme ('FSCS') – which insures the claim right that makes up bank money in the case of bank failure.[56] It does so without affecting property rights in the underlying funds, which are owned by the bank absolutely. Indeed, a large proportion of bank money is created through loans without any underlying funds at all,[57] rendering the debate about 'customer funds' only partially relevant in this context. E-money balances are not subject to a compensation scheme.

Banks are also subject to extensive prudential requirements that, amongst other things, impose restrictions on the type and liquidity of the assets they must hold. These requirements are calculated by reference to a bank's risk exposures, which means there is a link between a bank's liabilities (including bank money) and its assets. One could regard this link as having the effect of moving these measures further along towards customer ownership on the continuum; however, these requirements are applied at the level of a bank's balance sheet rather than to specific funds received from customers. They are aimed at ensuring financial stability and depositor protection,[58] and they do so by preventing bank failure, not by protecting or creating property rights in handed-over funds.

While EMIs are not subject to the full range of prudential requirements applied to banks, the safeguarding regime that applies to them replicates some of their features. For example, requirements for assets are referenced to outstanding e-money and are subject to a certain standard of liquidity.[59] The difference is that, in the case of EMIs, these requirements cover all the liabilities represented by outstanding e-money rather than merely a part of them, which makes for both a stricter and a simpler regime than that applied to banks. While this could lead one to find a trust, these safeguarding requirements are still aimed at ensuring that EMIs can meet their liabilities rather than at protecting or creating property rights in handed-over funds.

This becomes apparent when one considers the safeguarding requirements applicable to EMIs together with the redemption right, which is the reason for their existence in the first place. E-money only works as a means of payment if the last holder in the payment chain is confident that it is possible to withdraw value from the e-money system by exchanging e-money back into funds. The redemption right provides this assurance without, however, thereby rendering these funds deposits or repayable funds. As the EMD states: "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 [the law applying to credit institutions]."[60] The rationale behind the redemption right is therefore clear: customer confidence in e-money, not property rights in underlying funds. However, on its own, the redemption right would not achieve the objective of providing the assurance needed to make e-money a trusted means of payment. The EMI must also be seen to be in a position in which it can meet any claims for redemption brought against it, hence the safeguarding requirements. The redemption right and the safeguarding requirements therefore serve to protect the monetary function of e-money in transfers and payment rather than customers' property rights in the funds.[61]

But this is not all. Redeemability and safeguarding are also necessary from a perspective of monetary and payment systems policy. The European Central Bank ('ECB') thus suggested in a report preceding the first EMD that issuers should be required to redeem e-money and cover their outstanding e-money liabilities in order to mitigate the risk of the potential overissue of e-money issued on credit and ensure the continued demand for central bank money.[62] In a subsequent opinion on the proposed EMD, the ECB then wrote the following: "From the monetary policy point of view, the redeemability requirement is necessary in order, *inter alia*, to preserve the unit-of-account function of money, to maintain price stability by avoiding the unconstrained issuance of electronic money, and to safeguard both the controllability of liquidity conditions and the short-term interest rates set by the ESCB [European System of Central Banks]."[63] At no point was it thought that redeemability and safeguarding were necessary to protect customers' property rights, something that is also exemplified by the fact that funds held in relation to outstanding e-money liabilities were initially described as making up a 'float.'[64]

This objective of protecting an EMI's ability to meet its liabilities rather than customers' property rights in the funds can be contrasted with a measure at the other end of the continuum that is aimed at protecting precisely such property rights. Safeguarding rules that apply to investment firms impose both segregation requirements and a trust over client money in an attempt to keep investment firms from dealing with that money for their own account and to ensure its return to customers on insolvency. While on first sight these obligations may appear similar to those imposed on EMIs, they differ in one important respect, namely that in relation to investments, they aim to protect *customers'* property and therefore their rights *in rem*, while in relation to e-money, they aim to protect *EMIs'* property so that they can meet *in personam* claims made against them. Thus, the measures are calibrated to the underlying property relations, which, in the case of e-money, do not involve customer ownership of funds.

The distinction between a measure aimed at protecting customers' property rights and an issuer's ability to meet claims brought against it is also supported by the fact that EMIs have two options to safeguard funds, described above as option (a) and (b). They can either segregate such funds, in which case certain investment restrictions apply, or they can take out an insurance policy or guarantee that will pay out funds corresponding to issued e-money on insolvency, but will otherwise leave EMIs free to deal with the funds they receive from customers as they wish. It is clear that the insurance option would not sit well with a trust analysis whereby a trust would come into being on receipt of funds regardless of any subsequent segregation.[65] EMIs who choose the insurance option would therefore not be free to deal with the funds for their own purposes. Perhaps for this reason, the FCA has restricted its trust finding to funds that have already reached the safeguarding account.[66]

However, if the problem is, as indeed it appears to be,[67] that customers are unable to exchange their e-money back for funds on issuers' insolvency because issuers have not complied with the safeguarding requirements and have comingled funds, and if the objective of the FCA is to "ensure that assets are protected from general creditors,"[68] a trust over segregated funds would be of little use. If anything, the FCA should seek a trust over all relevant funds at the point of receipt.[69] However, as the Lehman Brothers litigation has shown, even a statutory trust of precisely that kind is ineffective if a financial institution fails to comply with related requirements by neglecting to sufficiently identify and segregate client money. This highlights the need for regulatory oversight rather than a change to the ownership status of the funds. Be this as it may, could it be argued that a statutory trust arises under the legislation applicable to EMIs? The answer is no, as will be shown in the next section.

IV. Do the EMRs require a trust?

Under English law, a trust comes into being when expressly created either by the settlor (express trust) or by statute (statutory trust), or when it arises/is imposed by the operation of law (resulting and constructive trusts). It is not possible, as it is in other jurisdictions, for courts to impose trusts in order to redistribute property rights "to reflect various policy goals which are subject to the courts' discretion."[70] This limits the situations in which a trust may be found; if the conditions for a resulting or constructive trust are not present, it must be shown that the parties either intended to enter into a trust arrangement or that a trust was created by statute.

The FCA neither argues that EMIs intend to hold funds received from their customers on trust nor that the conditions for a resulting or constructive trust are present. The latter is particularly significant, as it is an acknowledgement that the underlying property relations do not indicate continued ownership of the funds by customers. Given that the FCA does not have the statutory power to make rules that require EMIs to hold such funds on trust,[71] its statement in this respect can only be read as an exercise in statutory interpretation. The question, therefore, must be whether the EMRs impose a trust.

The starting point for finding an express trust, whether in a statute or elsewhere, is to look for what Garton et al. term "a specific intention to benefit by way of trust – that is, to create a property interest having the attributes of a trust as conceived in equity."[72] As applied to a statutory trust, this means that one would need to show that the legislator intended the legal owner of the funds, i.e., the EMI, to hold these funds on trust for its customers. Such an intention would need to be clearly and unambiguously expressed in order to dislodge the longstanding presumption used in statutory interpretation "that Parliament did not intend to take away private property law rights."[73]

It is clear that the legislator in this case did not express such an intention, as there is no explicit imposition of a trust by the EMRs. Therefore, the FCA's reading of the EMRs can only render an implicit requirement. And indeed, the FCA writes that "in our view, these regulations *implicitly* give e-money holders . . . a beneficial interest in the funds in the safeguarding account."[74] This appears to be an analogous approach to finding an express trust in circumstances where the settlor has not used the word 'trust' but has nevertheless set up what amounts to a trust arrangement and therefore can be said to have intended a trust.[75] After all, in the interpretation of a settlement, the subjective intention of the settlor is irrelevant, as what counts is "the objective meaning that the words of the document convey to the court when considered as a whole in the light of the surrounding circumstances."[76] If these words and these circumstances indicate to the reasonable person that a trust was intended, this supplies the requisite intention.[77]

Accordingly, the FCA claims that "a person who holds specific assets with a prohibition on own use and with a duty or power to apply them in a particular way will likely be a trustee, *even if the word 'trust' is not used*."[78] In this respect, the FCA relies on the case of *Re Supercapital Ltd*, which found that payment institutions (which are subject to similar safeguarding provisions under the PSRs) hold funds received from customers on a statutory trust.[79] In the case, Agnello J compares the safeguarding provisions applicable to payment institutions under the PSRs to those applicable to investment firms under chapter 7 of CASS in the FCA Handbook, noting the absence of an express declaration of trust in the PSRs. Confirming the implicit intention approach, she states that this absence of an express declaration "in itself of course is not determinative, merely an indication that many of the provisions set out in the PSRs are those one would expect to see in the event that a statutory trust is created."[80] Whether this approach can be adopted in relation to a statutory trust is doubtful, given both the presumption against an intention to interfere with private property rights, the ability of the legislator to express its intentions in technical legal language and its clear intention to subject EMIs to a safeguarding regime that functions as an alternative to a statutory trust.[81] However, it is still worth examining the possible arguments in this respect, and five of the purported trust characteristics mentioned either in *Re Supercapital Ltd* or by the FCA will now be discussed.

Ownership designation

In its feedback statement to comments received from stakeholders on its proposed guidance, the FCA states that the EMD clearly indicates customer ownership of funds by explicitly referring to them as 'funds of electronic money holders.'[82] However, a more careful reading of the Directive would have shown that while the description 'funds of electronic money holders' is used in two non-legally-binding recitals in order to distinguish these funds from other funds of the EMI that are not related to outstanding e-money,[83] the actual safeguarding provisions employ the more accurate description "funds that have been received in exchange for electronic money that has been issued,"[84] a description which has been retained in the EMRs[85] to define 'relevant funds' and is also used in the Markets in Crypto-assets ('MiCA') regulation proposed by the European Commission in relation to e-money tokens.[86] The use of this description in the definition of 'relevant funds' is particularly important, as, given that 'relevant funds' are also what must be covered by the insurance policy,[87] they cannot be funds that are subject to a trust. If they were, they would then need to be segregated regardless of the firm opting for insurance rather than segregation, effectively doubling protection of the funds under the insurance option.

While the second EMD makes reference to the safeguarding provisions in the Payment Services Directive that explicitly refer to funds 'held on behalf of' payment service users,[88] these provisions are clearly drafted with transfers of the funds themselves in mind ("delivered to the payee or transferred to another payment service provider"[89]), which would not be the case with e-money, which is *itself* transferred. Unsurprisingly, these provisions are therefore varied by the e-money-specific provisions in the EMD,[90] which do not contain language that indicates either an acknowledgement of pre-existing property rights by customers in the funds or an intention to divest issuers of the beneficial ownership in the funds for the benefit of their customers.

Segregation

Agnello J interprets the requirement to segregate funds received from customers as being "inconsistent . . . with a creditor debtor relationship which would enable such funds to be used by the company as part of its business."[91] Other than the obvious point that, in the case of the insurance option, such funds *can* be used by the company as part of its business, one might point out that segregation is neither necessary for a trust over money to arise[92] nor even indicative of a trust: As Lord Hope had stated in the Lehman Brothers litigation, while segregation is in practice necessary to avoid the loss of funds through mixing, "under English law the mere segregation of money into separate bank accounts is not sufficient to establish a proprietary interest in those funds in anyone other than the account holder. A declaration of trust over the balances standing to the credit of the segregated accounts is needed to protect those funds in the event of the firm's insolvency."[93] This brings one back to the need for an expressed intention to create a trust, whether by the person holding the funds or by the legislator.

Record keeping

In Agnello J's view, the requirement to keep records relating to segregated funds[94] indicates a prohibition of own use ("demonstrates that such funds are not to be treated as company funds"[95]). However, it should be obvious that accurate record keeping is necessary whether the segregation or insurance option is adopted, and also in order to comply with the redemption obligation. On its own, record keeping therefore says little about the ownership or permitted use of funds – as confirmed at first instance in the Lehman Brothers litigation.[96]

Prohibition of own use/ duty or power to apply the funds in a particular way

Agnello J also takes the stipulation that no person other than the institution may have an interest in or right over the relevant funds or assets in the safeguarding account[97] to mean that these funds or assets do not belong to the firm.[98] However, the segregation option does in fact permit own use, as it allows the funds to be invested, with income earned from the investment accruing to EMIs, not their customers.

It also goes without saying that both for EMIs adopting the insurance option and for credit institutions issuing e-money (which are not subject to safeguarding provisions in respect of funds received from customers even though they are subject to the same redemption obligation[99]), own use of relevant funds is not restricted at all. This speaks for the intention of the legislator to protect EMIs' ability to meet their personal obligations on insolvency through the segregation requirement rather than to create property rights for customers in the funds during the normal course of business. If the objective had been the latter, then allowing EMIs unrestricted use of the funds under the insurance option while normal business was proceeding would have been contradictory, something that was also observed by Halpern in *Re Ipagoo LLP*.[100] In this respect, it is useful to distinguish the alternative to immediate segregation of client money that is available to investment firms: While investment firms are also able to avoid immediate segregation and instead receive client money into their own bank account, they are required to conduct a daily reconciliation to ensure that the balance of the client account reflects the total amount of client money held.[101] This is not required under the insurance option, which leaves the EMI free to deal with the funds as long as the insurance is in place.

A better reading of this provision would therefore have been that it ensures *that* the funds are owned by the institution (and not by third parties), so that they are then available to meet personal claims brought against it for redemption. This reading conforms with the wording in the first EMD, which did not employ the term 'safeguarding' at all, simply requiring EMIs to "have [certain defined] investments of an amount of no less than their financial liabilities related to outstanding electronic money."[102] Once again, what becomes apparent is the safeguarding regime's aim of ensuring the availability of funds to EMIs rather than protecting or creating property rights of customers in the funds.

While Agnello J focuses on the restrictions that the legislation imposes on dealing with the funds, the FCA highlights the "duty or power to apply them in a particular way."[103] It is true that a trust arrangement comes with certain duties and powers in relation to trust assets, but at least as far as duties are concerned, these are specific duties relating to the interests of beneficiaries, first and foremost "the duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries."[104] Without this duty – which would in any case be difficult to read into an e-money scheme, as duties such as the obligation to redeem relate to the issued e-money in whoever's hands it may be, not a person – there is unlikely to be a trust. A statute could impose that duty, but when it is argued that what the statute imposes *already* amounts to a trust, the absence of anything that looks like this duty must cause this argument to fail.

Priority over other creditors

The last point Agnello J makes is that the provisions in the PSRs and EMRs on the priority of customer claims to safeguarded assets in insolvency[105] speak for the creation of a trust.[106] She finds that this "in many respects goes somewhat further in the content of the regulations than those found in CASS 7."[107] However, under a statutory trust such as that in chapter 7 of CASS, priority does not need to be stipulated, as it follows from the trust arrangement as a matter of law. Indeed, the proprietary interests of beneficiaries do not only come into being on insolvency of the trustee but persist throughout the arrangement. The fact that priority on insolvency – and *only* on insolvency – is a subject addressed in the EMRs and PSRs, therefore speaks directly against a legislative intention of imposing a statutory trust. As Halpern remarks in *Re Ipagoo LLP*, "the imposition of a trust or charge would at best duplicate Reg 24 [the insolvency provision in the EMRs], and at worst conflict with it."[108]

V. Conclusion

This article has put forward an analysis of the property relations underlying e-money issuance that contradicts the FCA's view that funds received by EMIs in exchange for e-money are held on trust. It has argued that a trust would not reflect these underlying property relations, that it would not sit well with the objectives of the applicable safeguarding regime and that, as a matter of trusts law, an intention to impose a statutory trust cannot be read into the

Electronic Money Regulations 2011. The latter point has recently been confirmed by the High Court in *Re Ipagoo LLP*, where it was said that there is indeed "no basis for implying a trust."[109]

Given that EMIs are already subject to safeguarding requirements that restrict the use of the funds, does the trust issue really matter in practice? The answer is yes. If safeguarded funds were found to be trust funds, a number of adverse consequences would follow. Amongst them would be the protection of these funds under the Financial Services Compensation Scheme,[110] a European proposal of which, based on precisely the view that funds received in exchange for e-money are 'client funds,' already exists.[111] Banks operating safeguarding accounts would also be required to apply customer due diligence measures to individual e-money holders – who would furthermore constantly change as the e-money changed hands. The probable outcome would be the rising cost of safeguarding accounts if not their closure altogether, as banks could not risk non-compliance with their statutory obligations and EMIs could not afford to pay for them. More generally (and potentially more significantly given the anticipated growth in the use of cryptoassets for payments), a trust finding might also affect the regulatory approach to cryptoassets such as stablecoins. This is not only because some cryptoassets are already classified as e-money under MiCA and will therefore be subject to the e-money regulatory regime, but also because the way of thinking about underlying funds has shown itself to be easily transferrable to other types of digital assets. For example, the Bank of England considers as one possible backing model for digital money, bank deposits "held in trust on behalf of digital money issuers,"[112] and in doing so expressly relies on the FCA's finding that funds received in exchange for e-money are held on trust.[113] Clarity by competent authorities and courts alike on the property relations underlying the issuance of e-money is therefore urgently required.

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[1] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at [705].

[2] The FCA published a consultation on its proposals in May 2020 (FCA "Coronavirus and Safeguarding Customers' Funds: Proposed Guidance for Payment Firms" (22 May 2020) accessed at https://www.fca.org.uk/publications/guidance-consultations/coronavirus-safeguarding-customers-funds-proposed-guidance-payment-firms on 6 July 2021), a feedback statement and final guidance in July 2020 (FCA "FS20/10: Coronavirus and Safeguarding Customers' Funds: Guidance for Payment and E-Money Firms" (9 July 2020) accessed at https://www.fca.org.uk/publication/feedback/fs20-10.pdf on 6 July 2021; FCA "Coronavirus and Safeguarding Customers' Funds: Additional Guidance for Payment and E-Money Firms" (9 July 2020) accessed at https://www.fca.org.uk/publication/finalised-guidance/coronavirus-safeguarding-

customers-funds-additional-guidance-payment-e-money-firms.pdf on 6 July 2021) and a consultation on incorporating the guidance into its approach document for the sector in January 2021 (FCA "CP21/3 Changes to the SCA_RTS and to the Guidance in 'Payment Services and Electronic Money – Our Approach' and the Perimeter Guidance Manual" (January 2021) accessed at https://www.fca.org.uk/publication/consultation/cp21-3.pdf on 6 July 2021). Feedback and a policy statement are expected in the autumn of 2021. The guidance also applies to payment institutions, which, however, are not the subject of this article (for an analysis relevant to payment institutions, see M. Simpson, J. Hui and C. Faith, "Unfinished Business? The Payment Services Safeguarding Rules after *Supercapital*" (2020) Butterworths Journal of International Banking and Financial Law 734).

[3] Defined in regulation 2(1) of the Electronic Money Regulations 2011 (SI 2011/99) as a "(a) personalised device; or (b) personalised set of procedures agreed between the payment service user and the payment service provider."

[4] Electronic Money Regulations 2011 (SI 2011/99), regulation 2(1).

[5] Electronic Money Regulations 2011 (SI 2011/99), regulation 2(1).

[6] Electronic Money Regulations 2011 (SI 2011/99), regulation 39.

[7] Initially, the guidance was supposed to be "temporary guidance to strengthen payment firms' . . . arrangements for safeguarding customers' funds in light of the exceptional circumstance of the coronavirus pandemic" (FCA "Coronavirus and Safeguarding Customers' Funds: Proposed Guidance for Payment Firms" (22 May 2020) accessed at https://www.fca.org.uk/publications/guidance-consultations/coronavirus-safeguarding-customers-funds-proposed-guidance-payment-firms on 6 July 2021). However, it is now being made permanent (FCA "CP21/3 Changes to the SCA_RTS and to the Guidance in 'Payment Services and Electronic Money – Our Approach' and the Perimeter Guidance Manual" (January 2021) accessed at https://www.fca.org.uk/publication/consultation/cp21-3.pdf on 6 July 2021, paragraph 1.4).

[8] FCA "Coronavirus and Safeguarding Customers' Funds: Additional Guidance for Payment and E-Money Firms" (9 July 2020) accessed at https://www.fca.org.uk/publication/finalised-guidance/coronavirus-safeguarding-customers-funds-additional-guidance-payment-e-money-firms.pdf on 6 July 2021, paragraph 1.8.

[9] *Re Supercapital Ltd (In Administration)* [2020] EWHC 1685 (Ch).

[10] According to FCA data, £9.7bn of e-money is currently at issue in the UK, with the use of e-money anticipated to grow further (Bank of England "New Forms of Digital Money: Discussion Paper" (7 June 2021) accessed at https://www.bankofengland.co.uk/paper/2021/new-forms-of-digital-money on 6 July 2021). In the euro area, the amount was €17.6bn at the end of December 2020 (ECB Statistical Data Warehouse, "Electronic Money Issued in the Euro Area" accessed at https://sdw.ecb.europa.eu/reports.do?node=1000003509 on 6 July 2021). While FCA guidance does not directly affect funds held by e-money institutions authorised in EU member states, there are signs that EU regulatory bodies are adopting the FCA's view (see footnote 111 below).

[11] *Re Ipagoo LLP (In Administration)* [2021] EWHC 2163 (Ch).

[12] More on this in the conclusion.

[13] Bank of England "New Forms of Digital Money: Discussion Paper" (7 June 2021) accessed at https://www.bankofengland.co.uk/paper/2021/new-forms-of-digital-money on 6 July 2021.

[14] Law Commission "Digital Assets: Electronic Trade Documents – A Consultation Paper" (30 April 2021) accessed at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-

11jsxou24uy7q/uploads/2021/04/Electronic-trade-documents-CP.pdf on 6 July 2021; Law Commission "Digital Assets: Call for Evidence" (April 2021) accessed at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/04/Call-for-evidence.pdf on 6 July 2021.

[15] The term 'financial institution' is here used loosely rather than as a defined category of regulated entity.

[16] FCA Handbook Glossary.

[17] Financial Services and Markets Act 2000, c. 8, section 137B(1).

[18] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, article 13(8), emphasis added. MiFID II retains this wording (Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, article 16(9)).

[19] M. Bridge, L. Gullifer, K. Low and G. McMeel, *The Law of Personal Property* (London: Sweet & Maxwell, 2018), paragraph 1-017, pages 9-10.

[20] While there is a question over what type of property cryptoassets represent (choses in action, choses in possession or a third type), a legal consensus has formed that they do represent objects of property. See K. Low and E. Teo, "Bitcoins and Other Cryptocurrencies as Property?" (2017) 9:2 Law, Innovation and Technology 235; *Vorotyntseva v Money-4 Limited (t/a Nebeus.com)* [2018] EWHC 2596 (Ch); UK Jurisdiction Taskforce "Legal Statement on Cryptoassets and Smart Contracts" (November 2019) accessed at https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/11/6.6056_JO_Cryptocurrencies_Statement_FINAL_WEB_111119-1.pdf on 6 July 2021; *Liam David Robertson V Persons Unknown* (unreported 15 July 2019); *AA v Persons Unknown* [2019] EWHC 3556 (Comm); *Ruscoe v Cryptopia Ltd (in Liquidation)* [2020] NZHC 728; D. Fox "Cryptocurrencies in the Common Law of Property" in D. Fox and S. Green (eds) *Cryptocurrencies in Public and Private Law* (Oxford: Oxford University Press, 2019); *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 2. The Law Commission has also accepted "that the law will treat certain digital assets as personal property" (Law Commission "Digital Assets: Call for Evidence" (April 2021) accessed at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/04/Call-for-evidence.pdf on 6 July 2021, paragraph 2.5, page 6).

[21] Where these cryptoassets are asset-referenced, certain requirements apply to the reserve that the financial institution maintains in relation to the issued assets (Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, article 33).

[22] This expression is used as a shorthand; the strings of data that make up cryptoassets are consumed and recreated in transactions rather than transferred as 'coins' (D. Fox "Cryptocurrencies in the Common Law of Property" in D. Fox and S. Green (eds) *Cryptocurrencies in Public and Private Law* (Oxford: Oxford University Press, 2019), paragraph 6.18, page 144).

[23] See, for example, *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02.

[24] David Halpern, sitting as a Deputy High Court Judge in *Re Ipagoo LLP*, disagrees somewhat. He finds that they can be situated somewhere between a bare trust and a personal obligation to repay (*Re Ipagoo LLP (In Administration)* [2021] EWHC 2163 (Ch) at [48]). However, this finding is not sufficiently supported by analysis.

[25] Electronic Money Regulations 2011 (SI 2011/99), regulation 2(1), emphasis added.

[26] Electronic Money Regulations 2011 (SI 2011/99), regulation 39.

[27] Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 No. 544, article 9A.

[28] Even after Brexit, the successive versions of the EMD continue to be of relevance for the statutory interpretation of the domestic legislation that once implemented them. For an explanation, see *Re Ipagoo LLP (In Administration)* [2021] EWHC 2163 (Ch) at [9].

[29] 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, recital 7. The same explanation is included in the second EMD (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, recital 13).

[30] Both the first and the second EMD frequently use the term 'exchange' to describe the process of issuance. To give one example, the second EMD states that the definition of e-money "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" (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, recital 7, emphasis added).

[31] D. Fox, *Property Rights in Money* (Oxford: Oxford University Press, 2008), paragraph 1.39, page 12, footnote omitted. Bridge et al. also point out that bank money "is not a debt pure and simple because the account holder must first make a demand before suing on the debt" (M. Bridge, L. Gullifer, K. Low and G. McMeel, *The Law of Personal Property* (London: Sweet & Maxwell, 2018), paragraph 7-010, footnote 33, page 153).

[32] S. Gleeson, *The Legal Concept of Money* (Oxford: Oxford University Press, 2018), paragraph 10.36, page 206. While the term 'sale' or 'purchase' is not used in the EMD, it has been used to describe e-money from its inception and is also used by commentators such as Charles Proctor (C. Proctor, *Mann on the Legal Aspect of Money* (Oxford: Oxford University Press, 2012), paragraph 1.80, page 50). The purpose of describing issuance in these terms is not, however, to indicate that the Sale of Goods Act 1979 should apply to the sale of e-money, which in any case excludes money from the definition of 'goods' (Sale of Goods Act 1979 c. 54, section 61(1)).

[33] Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 No. 544, article 5(2).

[34] Electronic Money Regulations 2011 (SI 2011/99), regulation 39(b).

[35] D. Fox, *Property Rights in Money* (Oxford: Oxford University Press, 2008), paragraph 1.54, page 17.

[36] Indeed, the FCA treats e-money as 'money' at least as far as regulation 14A(3)(b) of the Money Laundering Regulations 2017 is concerned (The Joint Money Laundering Steering Group "Prevention of Money Laundering / Combating Terrorist Financing: Guidance for the UK Financial Sector" (June 2020) accessed at https://secureservercdn.net/160.153.138.163/a3a.8f7.myftpupload.com/wp-content/uploads/2020/07/JMLSG-Guidance_Part-II_-July-2020.pdf on 6 July 2021, Part II: Sectoral Guidance, paragraph 22.18, page 254). For an argument in this respect, also see D. Fox, *Property Rights in Money* (Oxford: Oxford University Press, 2008), paragraph 1.53, page 16.

[37] D. Fox, *Property Rights in Money* (Oxford: Oxford University Press, 2008), paragraphs 5.04-5.05 and 5.13, pages 165 and 167.

[38] D. Fox, *Property Rights in Money* (Oxford: Oxford University Press, 2008), paragraph 5.23, page 170.

[39] D. Fox, *Property Rights in Money* (Oxford: Oxford University Press, 2008), paragraph 5.11, page 167.

[40] The rules of this system are in part determined by the contract between the e-money issuer and the holder, in part by statute, such as the EMRs and the Payment Services Regulations 2017 ('PSRs'), and in part by third parties, such as the payment schemes.

[41] M. Bridge, *The Law of Personal Property* (London: Sweet & Maxwell, 2019), paragraph 7-018, page 157. Also see M. Brindle, R. Cox et al., *Law of Bank Payments* (London: Sweet & Maxwell, 2018), chapter 4, section V.

[42] S. Green "It's Virtually Money" in D. Fox and S. Green (eds) *Cryptocurrencies in Public and Private Law* (Oxford: Oxford University Press, 2019), paragraph 2.05, page 16.

[43] 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, article 3(1).

[44] Virtually all e-money is now stored in accounts or ledgers on the issuer's system which are personal to the e-money holder. However, the involvement of issuers in transfers from such accounts is due to their role in the operation of the accounts (as well as in the oversight of the e-money system as a whole) rather than any rights between the parties relating to the e-money itself. It is also worth noting that some e-money retains cash-like characteristics even today. This e-money can be transferred to a new holder (with no control remaining with the original holder) by transferring possession of its associated means of access. The new holder obtains a redemption right against the issuer, but obtains this only on the basis of having obtained control over the e-money instrument itself. For instance, under the Payment Services Directive, certain low-value, anonymous e-money instruments are exempt from provisions relating to notification, blocking and liability in cases of loss or theft (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, article 63). This means that this e-money shares with cash its nature of being transferrable through possession (C. Proctor, *Mann on the Legal Aspect of Money* (Oxford: Oxford University Press, 2012), paragraph 1.75, page 47).

[45] Electronic Money Regulations 2011 (SI 2011/99), regulation 2(1), emphasis added.

[46] C. Proctor, *Mann on the Legal Aspect of Money* (Oxford: Oxford University Press, 2012), paragraph 1.46, page 30.

[47] C. Proctor, *Mann on the Legal Aspect of Money* (Oxford: Oxford University Press, 2012), paragraph 1.50, page 33, footnote 140. Proctor refers to *Hill v R* [1945] KB 329, per Humphreys J at [334] in this respect. The Law Commission uses a similar analogy in a different context: "more like a bag of gold than a contractual right" (Law Commission "Digital Assets: Electronic Trade Documents – A Consultation Paper" (30 April 2021) accessed at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/04/Electronic-trade-documents-CP.pdf on 6 July 2021, paragraph 2.18, page 11).

[48] David Kreltszheim in its early analysis of e-money, however, concludes that "it is presently not appropriate to reify electronic messages by speaking of 'electronic money' or 'electronic negotiable instruments'" (D. Kreltszheim "The Legal Nature of 'Electronic Money': Part 2" (2003) 14 Journal of Banking and Finance Law

and Practice 261, page 287 and D. Kreltszheim "The Legal Nature of 'Electronic Money': Part 1" (2003) 14 Journal of Banking and Finance Law and Practice 161).

49 S. Green "It's Virtually Money" in D. Fox and S. Green (eds) *Cryptocurrencies in Public and Private Law* (Oxford: Oxford University Press, 2019), paragraph 2.04, page 15. Also see the Law Commission's current work on digital assets (Law Commission "Digital Assets: Call for Evidence" (April 2021) accessed at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/04/Call-for-evidence.pdf on 6 July 2021).

50 As things stand, intangibles are not yet choses in possession as a matter of English law (*OBG v Allan* [2007] UKHL 21). However, this is set to change, as the Law Commission has recently stated that "tangibility is not a necessary criterion of possessibility" (Law Commission "Digital Assets: Electronic Trade Documents – A Consultation Paper" (30 April 2021) accessed at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/04/Electronic-trade-documents-CP.pdf on 6 July 2021, paragraph 5.37, page 78).

51 Electronic Money Regulations 2011 (SI 2011/99), regulation 21.

52 Electronic Money Regulations 2011 (SI 2011/99), regulation 22.

53 Electronic Money Regulations 2011 (SI 2011/99), regulation 24.

54 FCA "FS20/10: Coronavirus and Safeguarding Customers' Funds: Guidance for Payment and E-Money Firms" (9 July 2020) accessed at https://www.fca.org.uk/publication/feedback/fs20-10.pdf on 6 July 2021, paragraph 3.3.

55 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.

56 Under the Prudential Regulation Authority Rulebook (Depositor Protection 4.2), the threshold for insured balances is currently £85,000.

57 M. McLeay, A. Radia and R. Thomas "Money Creation in the Modern Economy" (2014) Bank of England Quarterly Bulletin accessed at https://www.bankofengland.co.uk/-/media/boe/files/quarterly-bulletin/2014/money-creation-in-the-modern-economy.pdf on 6 July 2021. Also see D. Fox, *Property Rights in Money* (Oxford: Oxford University Press, 2008), paragraph 1.139, page 43.

58 L. Dragomir, *European Prudential Banking Regulation and Supervision: The Legal Dimension* (London: Routledge, 2010) p. 54.

59 See the definition of 'secure, liquid, low-risk assets' in the Electronic Money Regulations 2011 (SI 2011/99), regulation 21(6).

60 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), recital 18.

61 Proctor writes that "the legal framework [applicable to EMIs] is designed to secure the continued availability of e-money once it has been issued to a holder" (C. Proctor, *Mann on the Legal Aspect of Money* (Oxford: Oxford University Press, 2012), paragraph 1.80, page 50).

62 European Central Bank "Report on Electronic Money" (August 1998) accessed at https://www.ecb.europa.eu/pub/pdf/other/emoneyen.pdf on 6 July 2021, pages 13-14.

63 European Central Bank "Opinion of the European Central Bank of 18 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" (18 January 1999) paragraph 19. This view is reiterated in a report by the BIS's Committee on Payment and Settlement Systems in the following year (Bank for International Settlements "Survey of Electronic Money Developments" (May 2000) accessed at https://www.bis.org/cpmi/publ/d38.pdf on 6 July 2021, page 24).

[64] European Central Bank "Report on Electronic Money" (August 1998) accessed at https://www.ecb.europa.eu/pub/pdf/other/emoneyen.pdf on 6 July 2021.

[65] In the Lehman Brothers litigation, the appellants brought the argument that the ability of investment firms to deal with client money in an alternative way to segregation under chapter 7 of the Client Assets sourcebook ('CASS') in the FCA Handbook spoke against a trust arising over such money except on segregation. This argument was rejected by the majority in the Supreme Court, who thought that a trust over client money arose as soon as that money was received by the firm, as it made little sense to regard client money as the property of the client on transfer, of the firm on receipt and then of the client again on segregation (*Re Lehman Brothers International (Europe) (In Administration)* [2012] UKSC 6.) This interpretation accords with the intention of the safeguarding provisions both in MiFID and CASS to protect property rights in client money, property rights that are not dependent on a firm's segregation of that money but arise as a matter of property law.

[66] "In our view, these regulations implicitly give e-money holders and payment service users a beneficial interest in the funds *in the safeguarding account* (FCA "Coronavirus and Safeguarding Customers' Funds: Proposed Guidance for Payment Firms" (22 May 2020) accessed at https://www.fca.org.uk/publications/guidance-consultations/coronavirus-safeguarding-customers-funds-proposed-guidance-payment-firms on 6 July 2021, emphasis added).

[67] FCA "Coronavirus and Safeguarding Customers' Funds: Proposed Guidance for Payment Firms" (22 May 2020) accessed at https://www.fca.org.uk/publications/guidance-consultations/coronavirus-safeguarding-customers-funds-proposed-guidance-payment-firms on 6 July 2021.

[68] FCA "FS20/10: Coronavirus and Safeguarding Customers' Funds: Guidance for Payment and E-Money Firms" (9 July 2020) accessed at https://www.fca.org.uk/publication/feedback/fs20-10.pdf on 6 July 2021, paragraph 3.4.

[69] It goes without saying that the present analysis would not support such a trust. Nonetheless, precisely such a trust is assumed to exist in the proposal put forward by HM Treasury for a special administration regime for EMIs and payment institutions which "will require the special administrator to undertake reasonable efforts to include any customer funds and assets identifiable in any other accounts held by the institution in the asset pool (e.g. relevant funds that were not properly segregated). . . . We are not aware of any ways in which this could disturb creditor assets given that identifiable money in nonsegregated accounts is already part of the trust that contains the property and interests that belong to clients" (HM Treasury "Insolvency Changes for Payment and Electronic Money Institutions: Consultation" (December 2020) accessed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/940738/20120

2_Lapwing_consultation_document_with_annexes.pdf on 6 July 2021, paragraph 3.8, page 11). Halpern, despite concluding that relevant funds are not held on trust, also regards the asset pool as being made up of all relevant funds, whether or not they have been segregated (*Re Ipagoo LLP (In Administration)* [2021] EWHC 2163 (Ch) at [52-55]). He does so despite the fact that this directly contradicts the relevant provisions in regulation 24 of the EMRs.

[70] Y. K. Liew, *Rationalising Constructive Trusts* (Oxford: Hart, 2017), page 245.

[71] EMIs are authorised under the EMRs, not the Financial Services and Markets Act 2000.

[72] J. Garton, R. Probert and G. Bean, *Moffat's Trusts Law: Text and Materials* (Cambridge: Cambridge University Press, 2020), page 120.

[73] *Re Lehman Brother International (Europe) (In Administration)* [2010] EWCA Civ 917, per Arden L. J. at [69]. In the case, the presumption was displaced by the rules of trust law that the statutory trust brought into operation, but here a trust had been expressly provided for, with only its interpretation being at issue.

[74] FCA "Coronavirus and Safeguarding Customers' Funds: Proposed Guidance for Payment Firms" (22 May 2020) accessed at https://www.fca.org.uk/publications/guidance-consultations/coronavirus-safeguarding-customers-funds-proposed-guidance-payment-firms on 6 April, emphasis added.

[75] "A trust can be created by the most untechnical of words" (F.W. Maitland, *Equity: A Course of Lectures* (Cambridge: Cambridge University Press, 2011), page 65).

[76] L. Tucker, N. Le Poidevin QC and J. Brightwell, *Lewin on Trusts* (London: Sweet & Maxwell, 2020), paragraph 7-004, page 302, footnote omitted.

[77] *Ong v Ping* [2017] EWCA Civ 2069.

[78] FCA "FS20/10: Coronavirus and Safeguarding Customers' Funds: Guidance for Payment and E-Money Firms" (9 July 2020) accessed at https://www.fca.org.uk/publication/feedback/fs20-10.pdf on 6 July 2021, paragraph 3.3, emphasis added

[79] *Re Supercapital Ltd (In Administration)* [2020] EWHC 1685 (Ch) at [9]. See, for example, paragraph 10.37 of the proposed revised text of the FCA's approach document (FCA "CP21/3 Changes to the SCA_RTS and to the Guidance in 'Payment Services and Electronic Money – Our Approach' and the Perimeter Guidance Manual" (January 2021) accessed at https://www.fca.org.uk/publication/consultation/cp21-3.pdf on 6 July 2021, page 147).

[80] *Re Supercapital Ltd (In Administration)* [2020] EWHC 1685 (Ch) at [9].

[81] The maxim "expressio unius est exclusio alterius" applies (*Swain v The Law Society* [1980] 1 WLR 1335, per Slade J at [1340]).

[82] FCA "FS20/10: Coronavirus and Safeguarding Customers' Funds: Guidance for Payment and E-Money Firms" (9 July 2020) accessed at https://www.fca.org.uk/publication/feedback/fs20-10.pdf on 6 July 2021, paragraph 3.3. Also see the proposed revised text of the FCA's approach document, which repeats the reference to this phrase (FCA "CP21/3 Changes to the SCA_RTS and to the Guidance in 'Payment Services and Electronic Money – Our Approach' and the Perimeter Guidance Manual" (January 2021) accessed at https://www.fca.org.uk/publication/consultation/cp21-3.pdf on 6 July 2021, paragraph 10.73, page 147).

[83] 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, recitals 11 and 14.

[84] 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, article 7(1).

[85] Electronic Money Regulations 2011 (SI 2011/99), regulation 20(1).

[86] Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, article 49.

[87] Electronic Money Regulations 2011 (SI 2011/99), regulation 22(1)(a).

[88] 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, article 10(1)(a). The reference is in article 7(1) 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.

[89] 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, article 10(1)(a).

[90] 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, article 7(1).

[91] *Re Supercapital Ltd (In Administration)* [2020] EWHC 1685 (Ch) at [9].

[92] *Hunter v Moss* [1994] 1 WLR 452.

[93] *Re Lehman Brothers International (Europe) (In Administration)* [2012] UKSC 6 at [2]. The same conclusion was reached by the Singapore Court of Appeal in *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02, per Sundaresh Menon CJ at [145]: "In our respectful view, the mere fact that Quoine's assets were segregated from its customer's cannot in and of itself lead to the conclusion that there was a trust."

[94] Electronic Money Regulations 2011 (SI 2011/99), regulation 21(5); Payment Services Regulations 2017 (SI 2017/752), regulation 23(11).

[95] *Re Supercapital Ltd (In Administration)* [2020] EWHC 1685 (Ch) at [9].

[96] "Protection by the identification by appropriate records and accounts of client money, as separate from the firm's own money, as required by Article 16(1)(a) of the MiFID implementing Directive, is equally ineffective in English law unless also accompanied by the imposition of a trust" (*Re Lehman Brothers International (Europe) (In Administration)* [2009] EWHC 3228 (Ch), per Briggs J at [148]).

[97] Electronic Money Regulations 2011 (SI 2011/99), regulations 21(4) and 22(2); Payment Services Regulations 2017 (SI 2017/752), regulations 23(8) and 23(13).

[98] *Re Supercapital Ltd (In Administration)* [2020] EWHC 1685 (Ch) at [9].

[99] Credit institutions can issue e-money without thereby becoming e-money institutions, and the safeguarding provisions only apply to e-money institutions (see the definition of 'electronic money issuer' in the Electronic Money Regulations 2011 (SI 2011/99), regulation 20(1)). Notably, the entity issuing e-money under the PayPal brand, PayPal (Europe) S.à r.l. et Cie, S.C.A., is authorised as a credit institution in Luxembourg, now deemed authorised in the UK.

[100] *Re Ipagoo LLP (In Administration)* [2021] EWHC 2163 (Ch) at [47].

[101] FCA Handbook, CASS 7.13.54 G to CASS 7.13.69 G. Accordingly, this alternative has no bearing on the fact that all client money received is subject to a statutory trust (*Re Lehman Brothers International (Europe) (In Administration)* [2012] UKSC 6.)

[102] 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, article 5(1).

[103] FCA "FS20/10: Coronavirus and Safeguarding Customers' Funds: Guidance for Payment and E-Money Firms" (9 July 2020) accessed at https://www.fca.org.uk/publication/feedback/fs20-10.pdf on 6 July 2021, paragraph 3.3.

[104] *Armitage v Nurse* [1998] Ch 241, per Millet LJ at [253].

[105] Electronic Money Regulations 2011 (SI 2011/99), regulation 24(1); Payment Services Regulations 2017 (SI 2017/752), regulation 14.

[106] *Re Supercapital Ltd (In Administration)* [2020] EWHC 1685 (Ch) at [9].

[107] *Re Supercapital Ltd (In Administration)* [2020] EWHC 1685 (Ch) at [9].

[108] *Re Ipagoo LLP (In Administration)* [2021] EWHC 2163 (Ch) at [49].

[109] *Re Ipagoo LLP (In Administration)* [2021] EWHC 2163 (Ch), per Halpern at [49].

[110] For an analysis in this respect, see M. Simpson, J. Hui and C. Faith, "Unfinished Business? The Payment Services Safeguarding Rules after *Supercapital*" (2020) Butterworths Journal of International Banking and Financial Law 734.

[111] In a recently-issued consultation, the European Commission asked whether the "client funds" that EMIs hold with banks should be covered by a deposit guarantee scheme in all member states "to preserve clients' confidence and contribute to the developments in innovative financial services" (European Commission, "Public Consultation: Review of the Crisis Management and Deposit Insurance Framework" (25 February 2021) accessed at https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/2021-crisis-management-deposit-insurance-review-consultation-document_en.pdf on 6 July 2021, page 12).

[112] Bank of England "New Forms of Digital Money: Discussion Paper" (7 June 2021) accessed at https://www.bankofengland.co.uk/paper/2021/new-forms-of-digital-money on 6 July 2021, page 39.

[113] Bank of England "New Forms of Digital Money: Discussion Paper" (7 June 2021) accessed at https://www.bankofengland.co.uk/paper/2021/new-forms-of-digital-money on 6 July 2021, page 61 and footnote 71.