To: European Commission
From: Electronic Money Association
Re: Feedback on "Virtual worlds (metaverses) – a vision for openness, safety and respect"
Date: 3 May 2023

We welcome the opportunity to provide feedback on the European Commission's call for evidence aimed at informing its approach to promoting open, interoperable and innovative virtual worlds that can be used safely and with confidence by the public and businesses in the EU.

The EMA is the European trading association for electronic and digital payment instruments and services. It represents leading payments and e-commerce businesses, including FinTechs and BigTechs, providing electronic payment services and products, issuing e-money, e-money tokens, stable coins, and increasingly also other crypto-assets and providing a broad range of related services. A full list of EMA members can be found here.

As such, the EMA has a strong interest in the EU's rapidly evolving digital economy and society, the digitalisation of payment-related financial services and markets and the development of a corresponding comprehensive and consistent regulatory framework in the EU. Regarding the implications of technological innovation including in particular decentralised ledger technology ("DLT") we welcome the global lead the EU has taken in building a regulatory framework addressing and facilitating the changes these innovative dynamics are bringing about for the EU's financial sector and its economy and society more widely. The EU's incoming Markets in Crypto-Assets Regulation ("MiCA") represents a major step towards creating a regulatory environment that provides welcome legal certainty and much needed prudential and supervisory safeguards for a broad range of financial sector activities related to crypto-assets.

However, MiCA does have shortfalls, which we believe are important and need to be addressed and revisited as a matter of urgency as part of the Commission's wider metaverse initiative. Due to the broad definition of crypto-assets in Article 3 of MiCA we are concerned that MiCA will apply to crypto-asset-related business activities outside the financial sector. Article 3 (1) (5) of MiCA defines crypto-assets as "digital representation of a value or of a right that is able to be transferred and stored electronically using distributed ledger technology or similar technology". A proposal of the European Parliament to insert after "… digital representation of a value or of a right …" a reference to "… for direct investment or finance purposes …" has been rejected. As a consequence, whilst MiCA is meant "… to ensure that Union legislative acts on financial services are fit for the digital age, and contribute to a future-proof economy that works for people, including by enabling the use of innovative technologies …" (see recital 1 of MiCA) it effectively applies to crypto-assets developed and used outside the financial sector including in particular by artists, musicians, and other creative professions. Such use cases do not pose any of the risks associated with financial sector activities and services and do not warrant in any way stringent financial sector regulation.

Article 2 (3) of MiCA does provide for an exemption of so-called non-fungible tokens ("NFTs"). However, the actual coverage of this exemption is unclear and the provision is subject to interpretation and application by national competent authorities. Moreover, depending on the specific features, many crypto-assets developed and issued increasingly

by artists, musicians and other creative professions will not meet the criteria for qualification as NFTs. MiCA will apply to these crypto-asset products and related creative activities without posing any of the risks MiCA is meant to contain.
The remainder of this note sets out the significant issues arising with regard to the interpretation and application of the NFT exemption in Article 2 (3) MiCA and the related potential major adverse impact application of MiCA would have to the EU's creative workforce:

NFTs pose a particular challenge since the term comprises a broad variety of products. The acronym does not stand for a homogeneous product category with clearly defined (or definable) features capable of informing a coherent regulatory approach.

As with crypto-assets more generally, the underlying blockchain technology allows for a "digital packaging" of many assets ranging from the physical to the digital, having different purposes, and a spectrum of values. For example, some refer to digital files generated as an integral part of an artistic or some other creative activity (e.g., photos, videos, musical recordings, etc.) while others represent rights to participate in events or enter venues, and some capture rights to and records of interest in real estate. Any regulatory approach should consider in the first place how it would respond to the specific features of the underlying asset or value and the related professional occupation. Only if the digital packaging as NFTs gives rise to an investment or payment utility and hence to its use for financial purposes, would regulation under MiCA of their trading and related trading platforms warrant consideration. For the vast majority of these creative products and activities regulation under MiCA along the lines of existing regulation of financial instruments and their markets is entirely inappropriate. Applying MiCA would cause a major adverse impact and put the EU's artistic and cultural workforce at a significant disadvantage compared to its competitors elsewhere in the world.

A number of examples of NFTs and NFT use cases are set out below to provide further context.

a) In the first example, 300 cinema tickets for a newly released film are being sold as NFTs, with all of the seats individually numbered. As each seat has an identifying number, it could be said that these tickets are not fungible and unique. As such, these NFTs are excluded from the application of MiCA by its Article 2 (3), which makes sense as this type of product and activity should not be regulated.

b) The second example is the same as that above, but here the cinema seats are not individually numbered. As they do not have a unique identifying number, they could now be considered as fungible and not unique. As such, this instance would no longer be covered by the proposed exemption, and this type of NFT product and activity would be regulated under MiCA when it surely should not be.

c) In the third example, there are 30,000 tickets issued as NFTs for the last ever Rolling Stones concert. The concert is open air, and as such, it is impossible to have individually numbered seats. As in example b) above this could give rise to consider the NFTs as fungible and not unique in nature. As such they would not be exempted by Article 2 (3) from the application of MiCA despite the fact that the crypto-asset product and related business activity does not warrant in any way stringent financial sector regulation.

d) However, for this same example and since it's the last ever Rolling Stones concert the tickets may have a post- (and potentially pre-) event resale value on secondary markets. The prices of these tickets could skyrocket and they could effectively become collectibles attracting investment aimed at benefitting from a surge in value over time (expired paper-based tickets for historic Rolling Stones concerts are being traded at high prices on e-bay). Under these circumstances one may consider appropriate to apply MiCA and regulate not necessarily the crypto-asset product but the digital marketplace itself on which the tickets are listed.

e) The fourth and final example relates to established digital platforms for the streaming, acquisition and downloading of digital audio files (such as Bandcamp and Soundcloud), which are key distribution channels securing a revenue stream for an increasing number of musicians who have limited or no access to distribution by commercial music publishing companies. These audio files could be packaged in NFTs and issued as part of a series or collection, which as a consequence could result in application of and regulation under MiCA. However, these artistic activities and their output do not merit or warrant financial sector regulation. It would also go against the principle of technology-neutrality to apply financial sector regulation in that audio files traded on existing online platforms were captured only because these same audio files are being packaged in NFTs.

Well beyond this example much of the same applies to a broad range of other creative professions increasingly using NFTs as an additional distribution channel for their creative work. Going forward application of MiCA to these type of use cases would most likely have a significant negative impact on a growing part of the EU's creative and artistic workforce.

The above examples demonstrate that there is a growing number of DLT-based creative products (commonly referred to as NFTs) which are on the brink of being fungible, or are actually fungible, but yet still do not warrant in any way application of financial sector regulation. A more suitable approach would be to assess the nature and use case of these DLT-based products and activities and limit application of MiCA to cases where there is financial use and exposure to associated financial risks. This approach can help ensure that regulation is applied proportionately and only if warranted with a view to the investment or payment purpose of the given DLT-based product. Without a specific assessment of the given use case and the financial or non-financial purpose of the given DLT-based product regulation under MiCA will become a barrier to innovation and growth of DLT-based products and markets putting at risk potentially significant benefits by effectively prohibiting use-cases related to artistic and other creative activities and production. As mentioned before, it risks putting the EU's creative and artistic workforce at a significant competitive disadvantage compared to its peers in other jurisdictions and hence run counter the very objective of the Commission's initiative regarding the emerging metaverses.