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Senior Managers & Certification Regime Call For Evidence
Financial Services Strategy
HM Treasury
1 Horse Guards Road SW1A 2HQ

By email to: SMCR@HMTreasury.gov.uk

1 June 2023

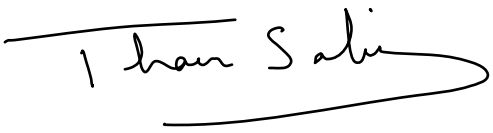
Dear Sir/Madam,

Re: EMA response to HMT Senior Managers & Certification Regime Call for Evidence

The Electronic Money Association (EMA) has been representing electronic money issuers and payment service providers in the UK for over 20 years. Our members include leading global payments and e-commerce businesses, providing online payments, e money wallets, cryptoasset services, TPP and online banking payments, card-based products, electronic vouchers, and mobile payment instruments. A list of current EMA members is provided at the end of this document for reference.

Thank you for taking our comments into consideration.

Yours sincerely,



Dr Thaer Sabri
Chief Executive Officer
Electronic Money Association

General statement

The EMA has a keen interest in any regulatory developments affecting the e-money and payment services sector, and welcomes this opportunity to provide a response to the HMT's Call for Evidence on the Senior Managers and Certification Regime ("SM&CR").

The EMA represents e-money issuers and payment service providers, many of whom are authorised or registered as Electronic Money Institutions ("EMIs") or Payment Institutions ("PIs"), operating in the UK as well as the EU, and in many cases - globally. UK EMIs and PIs are not subject to the SM&CR (unless engaged in other in-scope FSMA-regulated activities). Instead, the prudential requirements for the directors and senior managers of EMIs and PIs - known as "EMD/PSD Individuals" – apply, as part of the e-money and payment services regulatory framework implementing the EU Payment Services and E-money Directives.

In the "Payments Regulation and the Systemic Perimeter" Consultation published in July 2022, the HMT explored the application of the SM&CR to the e-money and the payments sector. The EMA's response to Questions 12 and 13 set out reasons why the application of SM&CR to the e-money and payments sector more broadly (i.e. beyond the payments entities recognised as systemically important and brought within the Bank of England's regulatory perimeter) would be disproportionate. Whilst the extension of the SM&CR to EMIs and PIs is not the subject of the government's current proposals, or addressed in this current consultation, we ask the HMT to take into consideration the EMA's previous comments as equally relevant in the context of this consultation.

We believe the application of SM&CR to EMIs and PIs would be disproportionate to the risks associated with e-money and payment service activities. The introduction of SM&CR, departing from or replacing the established EMD and PSD Individual requirements, would introduce regulatory complexity and an additional compliance burden, including for firms which that continue to be subject to the EU compliance requirements. Ultimately, we believe this could negatively impact the competitiveness of the industry and reduce the attractiveness of the UK as a potential destination for the e-money and payment services businesses.

We provide below a response to select questions from the current SM&CR consultation, with a specific focus on the (potential) application of SM&CR to Fintech sector firms, such as EMIs and PIs, under this or future proposals. We are available to answer any questions you may have, and remain committed to working closely with the government and the FCA to ensure a regulatory regime that is suitable, proportionate and which reinforces the UK's position a global financial services hub.

5 What impact does the SM&CR have on the UK's international competitiveness? Are there options for reform that could improve the UK's competitiveness?

The EMA believes the application of SM&CR would have an impact on the international competitiveness of the UK, including in particular as regards the Fintech sector.

As stated in response to Q9, the EMA believes that the application of SM&CR to EMIs and PIs would be disproportionate to the risks posed by the industry. It could also negatively impact the competitiveness of the industry, both internationally and in comparison to other, established financial services industry firms, as outlined below.

EMIs and PIs are an important part of the UK's Fintech sector, which includes start-ups and smaller firms with limited resources, operating in a highly competitive environment, including as regards talent acquisition. For example, it is not uncommon for such firms to be managed by, at least initially, a small number of directors and managers performing multiple roles. The senior managers within EMIs and PIs come from various backgrounds, i.e. not exclusively with the traditional financial services experience, which contributes to their ability to innovate. It is also not uncommon for EMIs and PIs to pool their expertise and resources group-wide, particularly after Brexit, with senior management roles being performed by managers based outside of the UK. To encourage innovation, growth and competition in the sector, SM&CR requirements would have to be sufficiently agile and proportionate, and respond to the characteristics and risks of the sector. Strict requirements, particularly as to the composition of the Board, number of directors, or their location, could pose a significant challenge to the existing and new entrants into the market and should therefore be avoided.

We are concerned that the application of SM&CR requirements to EMIs and PIs could impact the availability of, and consequently the ability to attract and retain suitably qualified staff for senior management roles. In other EU jurisdictions that already have a similar regime to the SM&CR for EMI and PIs, including strict location requirements, the Fintech, EMI and PI industry experiences great difficulty attracting and retaining talent, so much so that the government has had to get involved.

It is important to ensure that the regulatory environment supports the ability of EMIs and PIs to grow and compete with other, more established players, both in the UK as well as in the international context. The 2021 Khalifa Review of UK Fintech[1] acknowledged that a core component of the UK's "levelling up" agenda would need to be met by addressing the Fintech skills and talent gap in the UK.

Further, to facilitate the competitiveness of the UK, it is important to ensure that the process for senior manager approvals is agile and does not result in unnecessary delays. To that end, we consider it is paramount to ensure that the regulators are appropriately resourced, both in terms of number of staff, as well as suitable expertise required. In addition, effective accountability and

[1] Khalifa Fintech Review Final Report (February 2021)

scrutiny processes are necessary in order to help identify and address regulatory processes and policies that do not meet their objectives.

Over the last year or so, firms in the e-money and payments sector have experienced significant delays in both obtaining their authorisations as well as for routine approvals of the EMD and PSD Individuals. Introducing SM&CR requirements would increase the complexity of authorisation applications, the time and resources needed to prepare them and therefore the time it takes for firms to get authorised. We acknowledge that the FCA has made improvements in the time it takes to process new applications. Nevertheless, the past experience has shown that the extension of the SM&CR scope has resulted in delays and the regulatory approval deadlines not being met.[2] Firms in the Fintech sector must be agile in order to remain competitive, and this extends to their ability to hire new senior individuals. Administrative delays such as these can have an impact on a firm's ability to hire and retain senior management personnel throughout the application process.

We submit that the challenges and the additional regulatory burden associated with SM&CR requirements are not justified for the e-money and payment services sector. It would also increase the time and cost investment needed before new entrants can get authorised and, ultimately, reduce the attractiveness of the UK as a potential destination of the e-money and payment services businesses.

8 Are there specific areas of the SM&CR that respondents have concerns about or which they believe are perceived as a deterrent to firms or individuals locating in the UK? If so, what potential solutions should be considered to address these? Respondents should provide as much detail as possible to help build the fullest picture of any issues.

Putting in place SM&CR compliance processes and procedures requires a significant amount of time and resources, which new entrants into the market do not necessarily have. The ability to attract and compete for suitably qualified staff for senior management roles is also a concern, particularly for start-up or smaller firms. This is of particular concern if the SM&CR results in strict requirements concerning senior management location, composition or minimum number of positions to be held. As outlined in response to Q5, it is not unusual for smaller firms in the Fintech sector, at least initially, to have smaller number of directors performing multiple roles, or for international firms to utilise non-UK based staff group-wide. We submit that the SM&CR requirements should be applied where necessary and proportionate, and allow for sufficient flexibility in how firms organise themselves and allocate responsibilities.

There is a significant disconnect between the regulatory expectation that senior management arrangements are finalised on submission of an application for authorisation (for a 'complete' application), and the time it takes to obtain authorisation, i.e. before the firm is allowed to operate. The approval of an application, generally speaking, takes at least 6 months and in many

[2] See the FCA's Authorisation Update October 2022.

cases longer. New entrants face significant complexity and expense in finding and recruiting suitable senior management, before they can generate revenue, and at a risk that the application/intended senior management arrangements will not be approved by the regulator. We submit that there is a need for a more effective and proportionate approach to this process. For example, a more proportionate regulatory approach might allow for firms to get authorised with a smaller number of directors/senior managers initially, and to fill other positions after authorisation in accordance with a plan agreed with the regulator.

Finally, the time it takes to process the applications, both at authorisation application stage and more routine SM&CR applications, is also a significant concern. As stated in response to Q5, it is therefore important to ensure that the regulators should be adequately resourced to assess the applications and that there are effective accountability and scrutiny processes are necessary in order to help identify and address regulatory processes and policies that do not meet their stated objectives.

9 Is the current scope of the SM&CR correct to achieve the aims of the regime? Are there opportunities to remove certain low risk activities or firms from its scope?

In relation to the scope of SM&CR, the EMA has submitted reasoned arguments why it would not be appropriate to extend the regime to EMIs and PIs in response to the HMT's "Payments Regulation and the Systemic Perimeter" consultation. Given the broad impact and disruption to the sector in the event the SM&CR scope was so extended, we find it necessary to reiterate our position in the context of this consultation.

Risk-based outcomes

The government broadly advocates the principle of 'same risk, same regulatory outcome' concerning financial services regulation. We believe this principle should equally apply in considering the appropriateness of extending the SM&CR beyond its current scope and, in particular, that the risks associated with the e-money and payment services sector necessarily justify the extension of the SM&CR to EMIs and PIs.

The regulatory regime as applied to EMIs and PIs should be proportionate to the risks associated with their services. The risks associated with e money issuance and/or providing payment services are different and, in our view, much lower than the risks associated with other types of financial services, such as lending/consumer credit or engaging in investment activities. E-money is a prepaid instrument/value used for payments, whereby e-money holders have a right to redeem e-money, at par value. PIs can only receive funds from users for the execution of payments in accordance with the user payment instructions, and some payment services (for example, account information services) do not involve the receipt of any customer funds at all. Funds received in exchange for e-money or in relation to payment services must be safeguarded, ensuring protection of those funds, including in the event of insolvency of an EMI/PI. The e-money and payments sector covers a heterogenous group of firms, varying in their size and scale of activities. However, the size of (some) EMIs and PIs should not be used a sole measure of risk

associated with the e-money and payment services activities, nor as a sole justification for applying the SM&CR to the sector.

Existing regime for EMD/PSD Individuals

The appropriateness of extending SM&CR to EMIs and PIs should also take into account that the directors and senior managers of these firms are already subject supervisory requirements applicable to EMD/PSD Individuals under the Electronic Money Regulations 2011 ("EMRs") and the Payment Services Regulations 2017 ("PSRs") respectively. This includes:

- Satisfying the FCA that EMD/PSD Individuals are of good repute and possess appropriate knowledge and experience[3], both at application for authorisation or registration and whenever EMD/PSD Individuals change.
- If the FCA has concerns about EMD/PSD Individuals (e.g. as regards their fitness and propriety), it has powers to vary or impose conditions to the authorisation or registration of the EMI or PI or, ultimately, take action to cancel it[4].
- The FCA's disciplinary powers and can take a direct enforcement action against EMD/PSD Individual if the individual is found to have been knowingly concerned in the firm's breaches of the EMRs and/or PSRs[5].

One of the intended benefits of SM&CR is improved governance. We note that the FCA already has a range of tools it can use to this end, including as regards EMIs and PIs. For example, the FCA is already requiring EMIs and PIs to focus on governance issues, as set out in its March 2023 'Dear CEO' letter and, to some extent, thought the new Consumer Duty rules. It would not be appropriate to introduce new requirements in this area, certainly not before firms have had an opportunity to address the FCA's feedback and the FCA has been able to review progress in these areas.

Further, given the existing regulatory framework, the EMA believes the application of SM&CR could create an unnecessary and disproportionate compliance burden on EMIs and PIs. Firms operating in the EU would have to continue to meet the compliance requirements for their EMD/PSD Individuals, potentially increasing the regulatory complexity. If SM&CR was to be introduced for the UK firms, further clarity is needed on how the EMD/PSD Individual and SM&CR regimes would interact with each other in the event they were both to apply. Furthermore, it is important to ensure that any future proposals for application of SM&CR to EMIs/PIs are subject to a proper consultation, including an analysis of the costs and benefits of the application of the new rules and the specific issues they are intended to address.

[3] Regulation 6(6)(b) of the EMRs; Regulation 6(7)(b) of the PSRs.

[4] Regulations 10 and 11 of the EMRs; Regulations 10, 12 of the PSRs.

[5] Schedule 3, paragraph 1 of the EMRs; Schedule 6, paragraph 1 of the PSRs.

Additional regulatory burden at the time of significant regulatory change

SM&CR would impose a significant additional regulatory burden on EMIs and PIs. For example, it is expected that this would include an overly formal process in recruiting and seeking senior management approval from the FCA as well as annual fit & proper certification and training requirements. Putting in place compliance with these requirements will require firms to invest time and resources - there should be a clear benefit to extending the SM&CR requirements to justify the additional burden.

The SM&CR changes would also come at a time where EMIs and PIs are already having to tackle a significant amount of regulatory change resulting from Brexit and evolving FCA's policies and requirements. The anticipated changes from the Payment Services Regulations Review and the implementation of the new Consumer Duty are just some of the examples of such regulatory change. In summary, in the absence of a risk and/or evidence-based justification for extending the SM&CR requirements to EMIs and PIs, we believe it would not be appropriate to introduce additional changes by extending SM&CR to EMIs and PIs, particularly at this time.

Impact on competitiveness and ability to grow

In addition, there is a concern that SM&CR would adversely impact the ability of EMIs and PIs to attract suitably qualified talent for their senior management roles. The additional compliance burden associated with SM&CR requirements would be difficult to meet for smaller or start-up firms operating in a competitive environment with limited resources. Any strictly defined requirements regarding Board composition, number of senior managers or their location will inhibit the firm's ability to grow and scale up, or allocate resources effectively. Please refer to our response to Q5 in that regard.

10 Are there "lessons learned" that government should consider as part of any future decisions on potential changes to the scope of the regime to ensure a smooth rollout to firms or parts of the financial services sector?

The previous experience shows that the extension of the scope of SM&CR applications has resulted in backlog and delays in senior management approval applications and the FCA not achieving their stated timelines.[6] As per our response to Q5, it is of paramount importance to ensure that the senior management approval process is agile and that regulators are appropriately resourced and able to meet their regulatory responsibilities. Any increases in the scope of SM&CR should be adequately planned for in order to avoid any unnecessary delays.

The extension of the SM&CR scope also raises concerns over firm's ability to attract and retain suitably qualified staff for the senior management roles – our comments in response to Q5 in that regard equally apply here.

[6] See the FCA's Authorisation Update October 2022.

An agile regulatory approach dictates that there should be further scope in variance in the level scrutiny of the senior management applications. A "grandfathering" clause, coupled with an automatic approval or recognition of existing senior managers as approved under SM&CR, should also be considered. This could alleviate at least some of the challenges faced by firms as well as the regulators associated with bringing new firms within the SM&CR scope, under any future proposals. Bringing new firms within the fold of SM&CR must also be accompanied by a sufficiently lengthy implementation process, to enable the firms to plan and prepare for the change.

Members of the EMA, as of May 2023

AAVE LIMITED
Airbnb Inc
Airwallex (UK) Limited
Allegro Group
Amazon
American Express
ArcaPay UAB
Banked
Bitstamp
BlaBla Connect UK Ltd
Blackhawk Network EMEA Limited
Boku Inc
Booking Holdings Financial Services International Limited
BVNK
CashFlows
Checkout Ltd
Circle
Citadel Commerce UK Ltd
Contis
Corner Banca SA
Crypto.com
eBay Sarl
ECOMMPAY Limited
Em@ney Plc
emerchantpay Group Ltd
Etsy Ireland UC
Euronet Worldwide Inc
Facebook Payments International Ltd
Financial House Limited
First Rate Exchange Services
FIS
Flex-e-card
Flywire
Gemini
Globepay Limited
GoCardless Ltd
Google Payment Ltd
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IDT Financial Services Limited
Imagor SA
Ixaris Systems Ltd
J. P. Morgan Mobility Payments Solutions S. A.
Modulr Finance Limited
MONAVATE
Moneyhub Financial Technology Ltd
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PPRO Financial Ltd
PPS
Ramp Swaps Ltd
Remitly
Revolut
Ripple
Sable International FX Limited
Securiclick Limited
Skrill Limited
Soldo Financial Services Ireland DAC
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