Electronic Money Association
68 Square Marie-Louise
Brussels 1000
Belgium
www.e-ma.org

30 August 2023

Dear Madam/Sir,

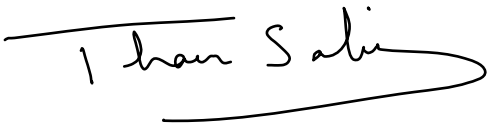
Re: Consultation on the European Commission proposal to amend Directive 2014/49/EU as regards the scope of deposit protection, use of deposit guarantee schemes funds, cross-border cooperation, and transparency

The EMA is the EU trade body representing electronic money issuers and alternative payment service providers. Our head office is in Brussels, and we have branches in Ireland, the Netherlands, Luxembourg, Lithuania, and Malta. Our members include leading payments and e-commerce businesses worldwide, providing online payments, card-based products, electronic vouchers, mobile payment instruments and cryptoasset services. Most of our members operate across the EU, most frequently on a cross-border basis. A list of current EMA members can be found here.

We are writing today to respond to your proposal for amending the Deposit Guarantee Schemes Directive. Our response relates specifically to the proposed wording of the new Article 8b, which sets out rules to harmonise the scope of deposit protection for funds deposited by e-money institutions for safeguarding purposes. We suggest alternative wording that in our opinion more accurately reflects the legal relationships pertaining to these funds.

We hope you will consider the need for these amendments. We remain available for any comments or questions you might have.

Yours sincerely,



Dr Thaer Sabri
Chief Executive Officer
Electronic Money Association

EMA response

Articles 2(1)(20) and 8b: Coverage of client funds deposits

The EMA welcomes the express inclusion of funds deposited with a credit institution by e-money institutions for safeguarding purposes within national deposit guarantee schemes. Coverage of these funds will mitigate the risk of financial harm stemming from bank failure for both e-money institutions and their customers. We also welcome the option to pay funds to either customers or e-money institutions.

However, there is further scope to improve the wording used to describe these safeguarded funds in order to more accurately reflect the legal relations that pertain to them and avoid the possible interpretation of their ownership by customers. While the proposed wording is already an improvement from that used in Article 7(4), which until now has been used by some Member States to include safeguarded funds (i.e., funds to which 'the depositor is not absolutely entitled'), it still leaves scope for the interpretation that customers of e-money institutions hold property rights in safeguarded funds.

Such property rights would be at odds with the legal relations pertaining to safeguarded funds. E-money institutions are the absolute owners of safeguarded funds; they may invest these funds, derive income from them and may even substitute them with an appropriate insurance or guarantee. They would also be at odds with the fact that customers hold equivalent rights to the value of safeguarded funds in the e-money itself. If customers were regarded as holding rights in safeguarded funds, e-money would cease to be an object of property, becoming merely an indication of property rights held elsewhere. This would be problematic both in terms of e-money's acceptance as a means of payment by merchants and the treatment of safeguarded funds, which might then be regarded as being held on trust or an equivalent arrangement for the benefit of customers.

Furthermore, it might blur the distinction between e-money issuance and deposit acceptance. E-money institutions issue payment instruments, they do not thereby become debtors, nor their customers creditors. Their obligation to customers is to redeem any e-money presented to them (whose existence as an object of property is thereby extinguished), not to return safeguarded funds.

For these reasons it is essential that the wording adopted is amended, and we would be grateful if you could consider the following proposals:

> *Article 2(1)*
>
> *(20) 'client funds deposits' means funds that account holders that are financial institutions as defined in Article 4(1), point (26), of Regulation (EU) No 575/2013 deposit in the course of their business with a credit institution for the account of their clients* ***or in relation to obligations owed to their clients****;*
>
> *Article 8b*
>
> *Coverage of client funds deposits*

1. Member States shall ensure that client funds deposits are covered by the DGSs where all of the following applies:

(a) such deposits are placed on behalf and for the account of clients ***or in relation to obligations owed to clients*** *who are eligible for protection in accordance with Article 5(1);*

(b) such deposits are made to segregate client funds in compliance with safeguarding requirements laid down in Union law regulating the activities of the entities referred to in Article 5(1), point (d);

[…]

Article 8b(1)(c): The identification requirement

Article 8b(1)(c) requires that customers to which client funds deposit relate are "identified or identifiable" prior to the determination that a credit institution has failed in order for these deposits to be covered. While we agree that there is good reason to require the identification of customers before funds are directly repaid to them, this provision may pose two problems in relation to e-money where safeguarded funds are transferred to another credit institution under Article 8b(3) (i.e., if funds are repaid "to the account holder for the benefit of each client" rather than to customers directly).

Firstly, some e-money may be subject to an exemption from CDD, meaning the issuer has not identified the e-money holder. Usually, exempted e-money is restricted to small values that do not warrant asking customers to undergo lengthy identification processes. Requiring such identification simply because (unbeknown to the customer) a safeguarding credit institution fails and funds are transferred to another credit institution, would result in a disruption of the issuer's business and may also result in needless consumer harm, as holders of small balances would likely rather abandon their e-money than comply with requests for identification. Until the e-money is extinguished, issuers would also be under a continuing obligation to safeguard funds regardless of applicable deposit guarantee scheme protection, putting an additional strain on the e-money business.

Secondly, it should be borne in mind that it is not possible to attribute public wallet addresses to holders of e-money tokens (EMTs) without additional processes. Issuers of EMTs do not always have a direct relationship with customers, which is either established by custodians and exchanges or is entirely non-existent (e.g., where EMTs are held on private wallets). Issuers are therefore unable to determine what balances are held by what customers or indeed identify them. To require identification in the event that covered deposits are transferred to another credit institution would create an unreasonable burden for both issuers and customers, as it would require an insolvency-like discovery process by which customers are asked to identify themselves and their holdings to the issuer.

For these reasons it is essential that the wording adopted is amended, and we would be grateful if you could consider the following proposal:

Article 8b

Coverage of client funds deposits

1.

[…]

(c) ***where covered deposits are repaid to clients directly,*** *the clients referred to in point (a) are identified or identifiable prior to the date on which a relevant administrative authority makes a determination as referred to in Article 2(1), point (8)(a) or a judicial authority makes a ruling as referred to in Article 2(1), point (8)(b).*