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IOSCO

By email to [cryptoassetsconsultation@iosco.org](mailto:cryptoassetsconsultation@iosco.org)

31 July 2023

Dear Sir/Madam

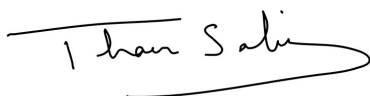
**Re: Policy Recommendations for Crypto and Digital Asset Markets - Consultation Report**

We welcome the opportunity to provide input on the IOSCO's proposed 'Policy Recommendations for Crypto and Digital Asset Markets'. The EMA represents payments, crypto-asset and FinTech firms, engaging in the provision of innovative payment services, including the issuance of e-money, stable coins (including e-money tokens as covered by the EU's MiCA regulation), open banking payment services, and crypto-asset-related services. A full list of our members is provided in the appendix to this document.

The EMA was established some 20 years ago and has a wealth of experience in regulatory policy relating to payments, electronic money and more recently crypto-assets.

We would be grateful for your consideration of our comments, which are set out below.

Yours faithfully,



Dr Thaer Sabri  
Chief Executive Officer  
Electronic Money Association

## Introduction

We welcome IOSCO's initiative to push for a globally harmonised regulation of crypto-asset markets by developing and issuing related high-level recommendations for implementation by its members. Given the genuinely cross-border nature of these markets a globally uniform regulatory approach and close cooperation between jurisdictional regulators is needed as a matter of urgency. It is our view that the proposed recommendations cover all key aspects of the rapidly evolving and maturing crypto-asset markets and will assist reaping the full potential benefit of the technological and financial innovation crypto-assets offer to the global financial system and retail investors.

As a European trading association, the EMA participated actively in the debate and legislative process leading to the EU's recently adopted Market in Crypto-Asset Regulation ("MiCA"). As advocated by IOSCO, Titles V and VI of MiCA draw on the existing legislation of traditional financial markets (i.e. the Markets in Financial Instruments Directive "MiFID" and the Market Abuse Directive "MAD"). MiCA introduces a comprehensive regime for crypto-asset markets which, we are confident, will ensure investor protection and market integrity as for traditional financial markets. We believe this regime to be well-balanced and well in line with IOSCO's proposed recommendations and we would encourage other regulators to follow the example set by Titles V and VI of the EU's MiCA .

That said, we do acknowledge that the dynamics of crypto-asset markets and their persisting potential for technological and financial innovation present significant challenges for regulators going forward. Whilst drawing on the existing financial market regulation, regulation of crypto-asset markets require a flexible and agile regulatory approach allowing for targeted and timely regulatory responses to ongoing change and upcoming new challenges. Here again we believe the EU's MiCA strikes the right balance by combining binding legislation (level 1) with the delegation of powers for more flexible, swift and detailed setting of regulatory standards (level 2) to the European Securities Markets Authority ("ESMA") and the European Banking Authority ("EBA") in cooperation with, and subject to approval by, the European Commission. For obvious reasons the multi-layered European regulatory system is unique but we encourage other regulators to develop suitable approaches to regulatory agility as needed to respond to the dynamics of crypto-asset markets.

IOSCO will surely play a key role in assisting globally consistent and timely regulatory responses to market developments going forward.

Given the comparatively more advanced stage of regulation of crypto-asset markets in the EU, we do not see the need to provide detailed responses to all of the questions put forward in IOSCO's consultation report. Instead, we believe Titles V and VI of the EU's MiCA offer the most useful regulatory reference and an example of a comprehensive and generally well-balanced regime for the regulation of crypto-asset markets. Complementary, more detailed standard-setting is currently pursued by ESMA and EBA and will surely contribute to the regulatory debate and the development of regulation of crypto-asset markets also at the wider international level.

That said, we fully acknowledge that the regulatory regime MiCA introduces must remain under review and that there is room and the need for further improvements. We will address issues, which we believe need further scrutiny, in the following more specific comments on some of the questions in IOSCO's consultative report.

## **CHAPTER I: OVERARCHING RECOMMENDATION ADDRESSED TO ALL REGULATORS**

**Question 1: Are there other activities and/or services in the crypto-asset markets which Recommendation 1 should cover? If so, please explain.**

We concur with the proposed coverage of IOSCO's draft recommendations and do not think regulation should be extended to other crypto-asset-related activities and/or services. We particularly welcome IOSCO's emphasis on the need for "regulators to analyse the applicability and adequacy of their regulatory frameworks, and the extent to which:

- (1) crypto-assets are, or behave like substitutes for, regulated financial instruments, and
- (2) investors have substituted other financial instrument investment activities with crypto-asset trading activities"

IOSCO should continue monitoring and providing guidance on the proper scope of crypto-asset regulation. In particular the regulatory approach to crypto-assets commonly referred to as non-fungible tokens ("NFTs") should remain under scrutiny. Large parts of the current production and issuance of NFTs generates from a wide range of creative professions. Generally, these NFTs are not, and do not behave like, substitutes of regulated financial instruments. They also, generally, do not lend themselves to investment activities substituting investments in financial instruments.

Regarding NFTs we remain unconvinced by the approach taken under the EU's MiCA. We are concerned that the exemption in Article 2 (3) of MiCA which is not sufficiently clear, will give rise to diverging interpretations by, and supervisory practices of, national competent authorities across the EU and will result in application of MiCA to a range of NFTs that should remain unregulated.

The proposed "substitution test" (see above) seems to us to be a much more sensible approach. It ensures appropriate and risk-adjusted regulatory outcomes and provides the flexibility needed to respond to market developments and product and technological innovation going forward.

Careful consideration of the proper product-specific regulatory approach is needed well beyond the specific issues raised by NFTs. In this regard we fully concur with IOSCO's emphasis on the fundamental principle of 'same activities, same risks, same regulatory outcomes'. This principle clearly implies that also differences regarding the relevant features of activities and products and the associated risks must be taken into account and must give rise to corresponding risk-adequate differences of the regulatory approach and the resulting regulatory outcomes. Whether opting for a new regulatory framework or adapting and applying

an existent regulatory framework, regulators need to ensure a strictly risk-driven regulatory categorisation of crypto-asset products and services. At the same time basic regulatory categorisation must be combined with the discretionary leeway needed for regulatory agility and ongoing risk-adequate adjustment of regulatory outcomes to the evolving risk-profile of crypto-asset products and services.

Within this broader regulatory framework the widely accepted principle of technological neutrality requires that crypto-assets replicating the characteristics of existing financial products have to remain subject to the corresponding regulatory regime. Accordingly, the existing regime for financial instruments must continue to apply regardless as to whether the instrument is packaged into block-chain technology. Obviously, that regime must be complemented, as needed, by requirements addressing any specific operational, market integrity or market abuse risks associated with the technology used. We welcome that the IOSCO consultation clearly pursues this approach.

In contrast, crypto-assets that, given their specific characteristics and related exposure to risks associated with the way they are traded and the markets, on which they are traded, cannot and should not be assimilated to financial instruments. The regulatory approach must respond to the product-specific risk profile. It may draw on but must be different from the regulatory approach to financial instruments and must ensure fully risk-adequate regulatory outcomes.

Crypto-assets issued or effectively used for payment purposes will most likely require a different regulatory approach than crypto-assets exposed to price volatility incompatible with their use for payment purposes. This broad distinction may well require further differentiation going forward.

**Question 2: Do respondents agree that regulators should take an outcomes-focused approach (which may include economic outcomes and structures) when they consider applying existing regulatory frameworks to, or adopting new frameworks for, crypto-asset markets?**

Yes. An outcomes-focused regulatory approach is needed regardless as to whether regulators apply an existing or adopt a new regulatory framework. As already set out in our response to question 1 regulatory outcomes must be informed by, and strictly adhere to, the fundamental principle of 'same activities, same risks, same regulatory outcomes'. The proper categorisation of crypto-assets reflecting the product-specific risk profile and differentiating between stablecoins, crypto-assets having characteristics of financial instruments, and other crypto-assets is key for achieving risk-adequate outcomes and reducing as much as possible regulatory arbitrage.

## **CHAPTER 2: RECOMMENDATIONS ON GOVERNANCE AND DISCLOSURE OF CONFLICTS**

**Question 3:** Does Chapter 2 adequately identify the potential conflicts of interest that may arise through a CASP's activities? What are other potential conflicts of interest which should be covered?

**Question 4:** Do respondents agree that conflicts of interest should be addressed, whether through mitigation, separation of activities in separate entities, or prohibition of conflicts? If not, please explain. Are there other ways to address conflicts of interest of CASPs that are not identified? **CHAPTER 3: RECOMMENDATIONS ON ORDER HANDLING AND TRADE DISCLOSURES (TRADING INTERMEDIARIES VS MARKET OPERATORS)**

**Question 5:** Does Recommendation 3 sufficiently address the manner in which conflicts should be disclosed? If not, please explain.

**Question 6:** What effect would Recommendations 4 and 5 have on CASPs operating as trading intermediaries? Are there other alternatives that would address the issue of assuring that market participants and clients are treated fairly?

**Question 7** Do respondents believe that CASPs should be able to engage in both roles (i.e. as a market operator and trading intermediary) without limitation? If yes, please explain how the conflicts can be effectively mitigated.

**Question 8** Given many crypto-asset transactions occur “off-chain” how would respondents propose that CASPs identify and disclose all pre- and post-trade “off-chain” transactions?

We concur with IOSCO's emphasis on the importance of addressing conflicts of interest in the regulation of crypto-asset markets. In our view the EU's MiCA offers a comprehensive and generally well-balanced regulatory approach containing the risks associated with potential conflicts of interest through a combination of stringent requirements for the identification, prevention, management and disclosure of conflicts (see Article 72 of MiCA) and, where needed, limitations of activities. As a matter of principle, we believe outright prohibitions should be avoided as much as possible but do acknowledge that e.g. CASPs operating a trading platform for crypto-assets should not be allowed to deal on own account on that trading platform (Article 76 (5) MiCA) and may only engage in matched principal trading not giving rise to conflicts of interest (Article 76 (6) MiCA).

Work on regulatory technical standards setting out in more detail the requirements under Article 72 of MiCA

- to establish and maintain effective policies and procedures, taking into account the scale, nature and range of CASP, to identify, prevent, manage and disclose conflicts of interest (Article 72 (1) of MiCA); and
- to disclose the general nature and sources of conflicts of interest (Article 72 (2) of MiCA)

is under way. ESMA has just published a consultation paper on these and other aspects of its pending work on technical standards complementing the more high-level requirements in MiCA.

#### **CHAPTER 4: RECOMMENDATIONS IN RELATION TO LISTING OF CRYPTO-ASSET AND CERTAIN PRIMARY MARKET ACTIVITIES**

**Question 9: Will the proposed listing/delisting recommendations in Chapter 4 enable robust public disclosure about traded crypto-assets? Are there other mechanisms that respondents would suggest to assure sufficient public disclosure and avoid information asymmetry among market participants?**

**Question 10: Do respondents agree that there should be limitations, including prohibitions on CASPs listing and / or trading any crypto-assets in which they or their affiliates have a material interest? If not, please explain.**

As set out in our feedback to IOSCO recommendations regarding conflicts of interest in Chapters 2 and 3, we believe, that, as a matter of principle, outright prohibitions should be avoided as much as possible. Regulation and regulatory outcomes must respond in a proportionate manner to actual risks. Regarding in particular the issuance by CASPs of exchange-native tokens, we would encourage IOSCO to engage in a proper and comprehensive analysis of related risks and benefits and assist regulation at jurisdictional level by outlining alternative mitigating measures for each risk category.

## **CHAPTER 5: RECOMMENDATIONS TO ADDRESS ABUSIVE BEHAVIORS**

Regarding the proposed Recommendation 8 we do agree that regulation of market abuse “... should cover all relevant fraudulent and abusive practices such as market manipulation, insider dealing and unlawful disclosure of inside information; money laundering / terrorist financing; issuing false and misleading statements; and misappropriation of funds.” In our view Title VI of the EU’s MiCA on “Prevention and prohibition of market abuse involving crypto-assets” presents a well-balanced regime covering comprehensively all relevant aspects of potential abuse of crypto-asset markets (incl. insider information, requirements regarding its public disclosure, prohibition of unlawful disclosure, of insider dealing and market manipulation, and stringent requirements for the prevention and detection of market abuse).

In contrast, we would welcome further clarification regarding the request for regulators to “bring enforcement actions against offences involving fraud and market abuse in crypto-asset markets, taking into consideration the extent to which they are not already covered by existing regulatory frameworks”. In our view any enforcement presupposes regulation that is being enforced. Enforcement without prior regulation would be against the rule of law. It would run counter the very essence and objective of market regulation and the creation of competent regulatory authorities vested with the corresponding regulatory and enforcement powers.

**Question 11: In addition to the types of offences identified in Chapter 5, are there:**

- a) **Other types of criminal or civil offences that should be specifically identified that are unique to crypto-asset markets, prevention of which would further limit market abuse behaviors and enhance integrity?**
- b) **Any novel offences, or behaviors, specific to crypto-assets that are not present in traditional financial markets?**

**If so, please explain.**

We are not aware of types of criminal or civil offences or any other behaviours unique to crypto-asset markets that are not identified in Chapter 5 and not covered in the market abuse regime under Title VI of the EU’s MiCA. We believe the EU’s MiCA is drafted in such a manner as to allow for flexible regulatory responses to new developments and upcoming new market abuse threats. We note and welcome that Article 92 paragraph 1 of MiCA on the “prevention and detection of market abuse” specifically refers to “other aspects of the functioning of the distributed ledger technology such as the consensus mechanism, where there might exist circumstances indicating that market abuse has been committed, is being committed or is likely to be committed”.

We encourage IOSCO and national regulators in other jurisdictions to continue monitoring developments in crypto-asset markets also in this regard and we stand ready to assist any regulatory initiatives aimed at containing market abuse including any idiosyncratic types of fraudulent and manipulative practices related to crypto-assets.



**Question 12: Do the market surveillance requirements adequately address the identified market abuse risks? What additional measures may be needed to supplement Recommendation 9 to address any risks specific to crypto-asset market activities? Please consider both on- and off-chain transactions.**

Yes. We welcome the proposed Recommendation 9 and believe that Article 92 of the EU's MiCA (see above) is well suited to deliver the targeted regulatory outcome.

## **CHAPTER 6: RECOMMENDATION ON CROSS-BORDER COOPERATION**

**Question 13: Which measures, or combination of measures, would be the most effective in supporting cross-border cooperation amongst authorities? What other measures should be considered that can strengthen cross-border co-operation?**

Given the persisting dynamics of crypto-asset markets and their genuine cross-border nature, globally harmonised regulation must be complemented by ongoing close cooperation between national regulators. We fully concur with IOSCO's analysis and conclusions in Chapter 6 and share the emphasis on the need for close regulatory cooperation not just regarding policy development but also in the day-to-day supervision of CASPs and across the full spectrum of crypto-asset activities, products and services. We very much welcome IOSCO's work on bilateral and multilateral cooperation arrangements and the Memoranda of Understanding IOSCO has developed.

We would, however, encourage the key international standard-setter (including IOSCO, the BCBS and the FSB) to pursue the global harmonisation of regulation of crypto-assets and crypto-asset markets to the point of facilitating a regulatory approach at jurisdictional level based upon the concept of "substituted compliance" and mutual recognition of regulatory equivalence. It would be a major achievement if the recommendations proposed by IOSCO gave rise to jurisdictional regulations that are sufficiently uniform to allow for comprehensive bilateral and multilateral supervisory cooperation based upon a shared regulatory framework and mutually recognised regulatory requirements. An important intermediate step would be to deliver regulatory outcomes across key jurisdictions such that national regulators would find themselves in a position to allow for the distribution and listing of stablecoins and other crypto-assets in their jurisdiction based upon the regulation of their issuance and of the custody of the backing assets in another jurisdiction. This approach would minimise most effectively regulatory arbitrage and would facilitate enormously the management of the given crypto-asset, of the backing assets and of the full range of related risks eventually to the benefit of investors and retail holders of that crypto-asset.



## **CHAPTER 7: RECOMMENDATIONS ON CUSTODY OF CLIENT MONIES AND ASSETS**

**Question 14: Do the Recommendations in Chapter 7 provide for adequate protection of customer crypto-assets held in custody by a CASP? If not, what other measures should be considered?**

**Question 15:**

- (a) Should the Recommendations in Chapter 7 address the manner in which the customer crypto-assets should be held?**
- (b) How should the Recommendations in Chapter 7 address, in the context of custody of customer crypto-assets, new technological and other developments regarding safeguarding of customer crypto-assets?**
- (c) What safeguards should a CASP put in place to ensure that they maintain accurate books and records of clients' crypto-assets held in custody at all times, including information held both on and off-chain?**
- (d) Should the Recommendations in Chapter 7 include a requirement for CASPs to have procedures in place for fair and reliable valuation of crypto-assets held in custody? If so, please explain why.**

**Question 16: Should the Recommendations address particular safeguards that a CASP should put in place? If so, please provide examples.**

We concur with the analysis in Chapter 7 and the proposed Recommendations 12 to 16. We believe the requirements in Article 70 and 75 of MiCA regarding the safekeeping of clients' crypto-assets and funds and the provision of custody services for crypto-assets comprehensively deliver the regulatory outcomes targeted by the proposed recommendations. These requirements address in particular

- the contractual agreements required for the provision of custody services and their minimum contents,
- key aspects of the manner in which crypto-assets should be held,
- the need to establish and disclose to clients a comprehensive custody policy,
- the keeping of records and the valuation of crypto-assets held in custody, and
- the obligation to provide statements of position including the balance, value and any transfers of crypto-assets (quarterly and on request by the client),

We note that MiCA also introduces a requirement for CASPs to have in place a plan supporting their orderly wind-down.

That said, we would urge IOSCO to also address in its recommendations the need for regulators to develop policies aimed at preventing theft of crypto-assets by directly targeting criminals and platforms where fraudulent activities take place.

## **CHAPTER 8: RECOMMENDATION TO ADDRESS OPERATIONAL AND TECHNOLOGICAL RISKS**

**Question 17: Are there additional or unique technology/cyber/operational risks related to crypto-assets and the use of DLT which CASPs should take into account? If so, please explain.**

**Question 18: Are there particular ways that CASPs should evaluate these risks and communicate these risks to retail investors?**

We concur with IOSCO's analysis in Chapter 8 and welcome the proposed Recommendation 17. EU legislation covering the full spectrum of ICT-related and other operational risks including cyber and more generally operational resilience of financial institutions has evolved significantly over recent years. Scrutiny and ongoing monitoring of related threats unique to crypto-assets and the underlying technologies is needed. Proper disclosure by CASPs is important, however, the regulatory emphasis should be on the requirement for CASPs to implement and maintain proper risk management frameworks in line with the current and evolving EU regulation.

## **CHAPTER 9: RETAIL DISTRIBUTION RECOMMENDATION**

**Question 19: What other point of sale / distribution safeguards should be adopted when services are offered to retail investors?**

**Question 20: Should regulators take steps to restrict advertisements and endorsements promoting crypto-assets? If so, what limitations should be considered?**

We concur with the proposed Recommendation 18 that CASPs should “operate in a manner consistent with IOSCO's Standards regarding interactions and dealings with retail clients ...” including requirements for “assessing the appropriateness and/or suitability of particular crypto-asset products and services offered to each retail client”. Regulation should draw on, and be developed consistently with, current standards for traditional financial markets. We would guard against introducing specific, more demanding legislation targeted at crypto- and other digital assets. The related markets are still in an early stage of development and any perceived specific risks regarding the distribution to retail clients should be addressed based upon an agile

regulatory approach through targeted guidance and supervisory practices rather than standards set in legislative stone. Where necessary such targeted regulatory responses may include specific requirements regarding advertisements and endorsements. However, regulators should ensure that any related measures are proportionate, effective and workable.

Moreover, we believe an effective regulatory approach to market abuse in crypto-asset markets must acknowledge that CASPs should not be the one and only line of defence. A comprehensive and agile regulatory approach should respond to the digital nature of crypto-asset markets and, hence, also ensure oversight over promotion materials on digital platforms, and crypto-asset advertising through other channels, including social media.

**Question 21: Are there additional features of stablecoins which should be considered under Chapter 10? If so, please explain.**

The discussion of stablecoins in Chapter 10 is in our view both comprehensive and concise covering all key features of stablecoins that require consideration.

We note in this regard that the EU's MiCA introduces an additional regulatory feature, which we find unhelpful. For the two regulatory categories of electronic money tokens and asset-referenced tokens, MiCA distinguishes between significant and non-significant tokens. Significant tokens are subject to a much more demanding prudential regime including considerably higher own funds and liquidity requirements. We remain unconvinced that the mostly size-based significance criteria in Article 43 of MiCA properly reflects heightened risks that call for a step-change of the regulatory regime. As for other areas of financial sector regulation, we acknowledge the need to address systemic relevance and contain related risks. However, we believe that the enormous increase in own funds and liquidity requirements applicable under MiCA to significant tokens is disproportionate and effectively prohibitive. It causes major and most harmful cliff-edge effects in particular for electronic money tokens turning significant.

Moreover, the approach runs against the widely accepted regulatory principle of technological neutrality. The resulting differences in the regulation of electronic money tokens as compared to the regulation of traditional forms of electronic money may well give rise to unwelcome regulatory arbitrage. It is in our view a key aspect where MiCA requires swift review and needs to be corrected. We encourage IOSCO to continue monitoring crypto-asset markets and to develop guidance informing

- an international consistent approach to assessing systemic risks as caused by electronic money tokens and other crypto-assets, and
- proportionate, internationally consistent regulatory responses to contain such risks.

## Our members

Our membership includes large e-commerce businesses, fintech service providers, a large number of prepaid card issuers, digital currency businesses, AIS/PIS providers, acquirers, bill payment providers, corporate incentive providers, mobile payment specialists, and business to business services.

### The current EMA membership

- 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
- MONETLEY LTD
- Moneyhub Financial Technology Ltd
- Moorwand
- MuchBetter
- myPOS Payments Ltd
- Nuvei Financial Services Ltd
- OFX
- OKTO
- One Money Mail Ltd
- OpenPayd
- Own.Solutions
- Park Card Services Limited
- Paymentsense Limited
- Paynt
- Payoneer Europe Limited
- PayPal Europe Ltd
- Paysafe Group
- Paysend EU DAC
- Plaid
- PPRO Financial Ltd
- PPS
- Ramp Swaps Ltd
- Remitly
- Revolut
- Ripple

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- [emerchantpay Group Ltd](#)
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- [Facebook Payments International Ltd](#)
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- [First Rate Exchange Services](#)
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