



Electronic Money Association

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ESMA

29 April 2024

Dear Sir/Madam

Re: EMA response to ESMA “[Consultation on reverse solicitation and classification of crypto assets as financial instruments under MiCA](#)”

The EMA is the EU trade body representing electronic money issuers and alternative payment service providers. Our members include leading payments and e-commerce businesses worldwide, providing online payments, card-based products, electronic vouchers, and mobile payment instruments. Most members operate across the EU, most frequently on a cross-border basis. A list of current EMA members is provided at the end of this document.

I would be grateful for your consideration of our comments and proposals.

Yours sincerely,

A handwritten signature in black ink that reads 'Thaer Sabri'. The signature is written in a cursive style and is underlined with a long horizontal stroke.

Dr Thaer Sabri
Chief Executive Officer
Electronic Money Association

EMA responses

Q1: Do you agree with the approach chosen by ESMA? ...

We generally agree with the basic concept of reverse solicitation and ESMA's approach to specifying it. Active participation of providers of financial services in the EU's internal financial market must be subject to full compliance with EU regulations applicable to that market. 3rd country firms must pay the "regulatory entrance fees" if they want to participate in that market. However, ESMA should give more consideration to the need of striking the right balance between the fundamental principle of freedom of contract of EU citizens incl. as related to financial products and services offered by 3rd country firms from outside the EU without participating in the EU internal financial market and the regulation of these products and services if provided within the EU. Under the ESMA's draft proposal and given the genuinely global nature of the internet there seems to be hardly any room for a 3rd country provider of financial services to set up a website with meaningful information on the firm and its business activities without that information to be regarded as solicitation of EU clients and hence circumvention of the MiCA authorisation requirement. Even geo-blocking is recognised by ESMA merely as "a strong indication that a third-country firm is not soliciting clients in the Union via such website".

The draft guidelines' focus is on setting what according to ESMA constitutes solicitation. In contrast, there is little guidance for 3rd country firms without any malicious intent to circumvent the MiCA authorisation requirements on how to ensure that publicly available information provided by themselves (e.g. on their website) or by other persons is NOT viewed as solicitation of EU clients. Specifying "safe haven" conditions to be met by 3rd country firms would be most helpful. ESMA could for instance set out what else 3rd country firms applying geo-blocking would need to do to ensure that the information e.g. published on their website is not regarded as soliciting EU clients.

Moreover, regarding solicitation carried out by another person different from the 3rd country firm we urge ESMA to state clearly that the solicitation by that other person amounts to a breach of the MiCA authorisation requirements by the 3rd country firm only if the other person is actually acting on behalf of that firm. Whether the other person explicitly or implicitly (see para 15) purports to act on behalf of the 3rd country firm is irrelevant. Accordingly, ESMA should also make clear that the examples of circumstances indicating that a person is acting on behalf (see the last sentence of para 15) only represent indications. For any supervisory action against a 3rd country firm for breach of the MiCA authorisation requirements it has to be clearly established that that other person did in fact act on behalf of that firm. 3rd country firms cannot control and be held responsible for the acts of another person they may not even be aware of.

Finally, in the interest of a consistent application of the concept of reverse solicitation in supervisory practices across the EU and across all financial sectors we urge ESMA to ensure that the draft guidelines for reverse solicitation under MiCA remain fully aligned to the existing

policy and supervisory practices for reverse solicitation regarding other financial products and services as developed in particular in response to the Brexit.

... Do you see any potential loophole that could be exploited by third-country firms to circumvent the MiCA authorisation requirements?

We don't see any potential loophole for third-country firms to circumvent the MiCA authorisation requirements.

Q2: Are you able to provide further examples of pairs of crypto-assets that would not belong to the same type of crypto-assets for the purposes of Article 61 of MiCA? ...

No

... Or are you able to provide other criteria to be taken into account to determine whether two crypto-assets belong to the same type?

No

Q3: Do you consider the proposed supervision practices effective with respect to detecting undue solicitations? Would you have other suggestions?

We hope ESMA's finalised guidelines will assist effective supervisory practices based upon careful case-by-case consideration and giving rise to supervisory action only where malicious intent to circumvent MiCA authorisation requirements can be clearly established.

Members of the EMA, as of January 2024

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
Circle
Citadel Commerce UK Ltd
Contis
Corner Banca SA
Crypto.com
eBay Sarl
ECOMMPAY Limited
Em@ney Plc
emerchantpay Group Ltd
eToro Money
Etsy Ireland UC
Euronet Worldwide Inc
Facebook Payments International Ltd
Financial House Limited
First Rate Exchange Services
Flex-e-card
Flywire
Gemini
Globepay Limited
GoCardless Ltd
Google Payment Ltd
HUBUC
IDT Financial Services Limited
Imagor SA
Ixaris Systems Ltd
J. P. Morgan Mobility Payments Solutions S. A.
Modulr Finance B.V.
MONAVATE
MONETLEY LTD
Moneyhub Financial Technology Ltd
Moorwand
MuchBetter
myPOS Payments Ltd
Nuvei Financial Services Ltd
OFX
OKG Payment Services Ltd
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
Securiclick Limited
Segpay
Skrill Limited
Soldo Financial Services Ireland DAC
Square
Stripe
SumUp Limited
Swile Payment
Syspay Ltd
Transact Payments Limited
TransferMate Global Payments
TrueLayer Limited
Trustly Group AB
Uber BV
VallettaPay
Vitesse PSP Ltd
Viva Payments SA
Weavr Limited
WEX Europe UK Limited
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Yapily Ltd