

Application of the second payment services directive (“PSD2”) provisions to a various electronic money token (“EMT”) transactions

19 July 2024

A. Introduction

As set out in our previous letter to the Commission of 28 February 2024, Recital 66 and Article 48 of the MiCA Regulation state that EMTs “*shall be deemed to be*” e-money. EMTs may therefore be regarded as funds under PSD2, resulting in entities providing payment services using EMTs also falling within the scope of PSD2.

Whilst the application of conduct of business (“COB”) provisions of PSD2 to payment services undertaken with EMTs could be consistent with the treatment of non DLT e-money products, there are transfer transactions of EMTs that do not comprise payment services, and do not therefore warrant the application of PSD2 provisions.

Separately, we also note the time that will be required for authorisation by entities falling within the scope of PSD2 for existing services, and the need to ensure continuity of service and to minimise disruption. In this regard we ask that the Commission considers the means available to provide or encourage member states to provide for such time.

B. Distinguishing transfers of EMTs from payment transactions

We set out below, the circumstances under which transfers of EMTs could reasonably be regarded to have taken place without giving rise to payment transactions, and which therefore should not give rise to payment services regulation.

We also note that transfers that do not involve a CASP could not give rise to a regulated payment service - please see section 4 below.

1. **Sale & Purchase of EMTs:** transfers of EMTs that comprise the sale and purchase of EMTs, without there being a transfer of value to any third party.

This is comparable to the distribution of e-money, where e-money value is purchased by a distributor from an issuer, and resold to a payment services user (“PSU”) usually at grocery stores and similar outlets. This sale comprises the transfer in the rights associated with the e-money value, in a similar way as the sale of a good or a service. It is only once the PSU uses the e-money value to undertake a payment transaction that COB regulatory provisions are triggered and will apply in relation to the transaction.

Exchanges play an equivalent role to distributors for DLT products. They enable access to EMTs by listing and selling them to potential PSUs. It follows that the sale and purchase of EMTs by exchanges should therefore not be regarded as regulated payment transactions, but rather as the transfer of goods or services upon purchase.

We make further arguments below in relation to the merit of excluding the sale and purchase of EMTs from payment services, based on exclusions for settlement systems - please see paragraph 3 below.

We acknowledge in this context that the transfer of an EMT by an exchange to a third party, on behalf of its customer, may give rise to a regulated payment transaction under PSD2, where this is not for the purpose of trading or that of custody - please see sections 2-4 below.

2. **Transfer for custody:** whilst the concept of custody is not shared with e-money, the principle of transferring EMTs to a custodian for safekeeping is clearly also not a payment transaction, and should not be regulated as such. We make the distinction for custodians in the same way as we do for exchanges: such transfers are not payment services, but rather transfers of assets that comprise goods or services without there being a payment component. In this case, they are transferred for the purpose of safekeeping, and without the PSU transferring title to the EMT to any other person. Title to the EMT remains with the PSU.
3. **Additional basis for exclusion:** we furthermore draw an analogy between exchange and custody activity in relation to crypto assets, including EMTs, and those activities set out at Articles 3(h) and 3(i) of PSD2 that describe transfers of value that qualify for exemption. The articles provide for:

3(h) payment transactions carried out within a payment or securities settlement system between settlement agents, central counterparties, clearing houses and/or central banks and other participants of the system, and payment service providers, without prejudice to Article 35;

3(i) payment transactions related to securities asset servicing, including dividends, income or other distributions, or redemption or sale, carried out by persons referred to in point (h) or by investment firms, credit institutions, collective investment undertakings or asset management companies providing investment services and any other entities allowed to have the custody of financial instruments;

Both paragraphs 3(h) and 3(i) contemplate the exclusion of payments that are undertaken as part of the purchase of securities or other assets by participating entities within such a settlement system. Similarly, Article 3(i) extends such exemption to entities providing custodial services.

Whilst crypto assets were not contemplated at the time of drafting of PSD2, the business activities that were assessed as warranting exclusion are analogous to the purchase and sale of crypto assets as well as the provision of custody services in relation to crypto assets.

We propose therefore that the transfer of EMTs that are intrinsic to the trading and settlement system for the EMTs, should be excluded from the scope of payment services.

In summary therefore, there are a number of rationales for the exclusion of a significant part of the activity of exchanges and custodians from regulation as payment service providers.

4. Transfers by users without the involvement of CASPs

Given the ability of users to hold and transfer EMTs independently of CASPs, a number of scenarios arise, and which would benefit from clarification.

Please note that the analysis below assumes that exemptions on the basis of exchange, custody or settlement systems do not apply.

(i) Transfer of EMTs from one user to another on-chain, and without the involvement of an intermediary CASP:

This is a direct transfer of value from payer to payee that does not involve an intermediary, and there will therefore be no payment services obligations as there will not be a payment service provider as defined under Article 1(1) of PSD2 or those excluded under Article 32 or 33 of PSD2.

(ii) Transfers from one user to another on-chain, but involving one CASP acting for either the sender or the beneficiary:

This is likely to give rise to payment services obligation for the CASP acting as either sender or receiver of the EMTs, but not for the user that is acting without a CASP.

(iii) Transfer of EMTs from an exchange to a user's own unhosted wallet, on-chain.

Whilst this is a transfer of the type described at paragraph (ii) above, we believe this can be distinguished on the basis of the arguments made for excluding transfers for the purpose of custody. The transfer to a user's own wallet is simply an expression of their preference for how they wish to hold the EMTs. It should therefore be assessed in the same way as transfers for custody purposes. We propose therefore that such transfers are excluded from the scope of payment transactions for both the user and the CASP.

5. Conclusions:

(i) The sale and purchase of EMTs does not give rise to payment transactions, and when CASPs provide such exchange services, these should not be regulated as such.

(ii) The transfer of EMTs to a third party CASP for custody is undertaken for safekeeping only, and not to transfer value. It does not give rise to a transfer of ownership and can be distinguished from a payment transaction. It should therefore not be regulated as a payment transaction.

(iii) Exclusions in PSD2 Articles (3(h) and 3 (i) relating to settlement systems warrant extension to crypto assets and to EMT trading & settlement systems in particular. The transfer of EMTs as part of such trading should not give rise to a regulated payment transaction.

(iv) Other transfers that do not involve a CASP would not be regulated under PSD2, but even where a CASP is involved, this should be assessed to see whether the purpose of the transfer is analogous to another that is exempt - such as that of custody. This should assist in the development of a pragmatic and appropriate regulatory environment.

C. Next steps

We acknowledge that the issues relating to PSD2 are not entirely within the control of the European Commission and that Member States competence is likely to apply in many instances. We are grateful however for the efforts being made by the European Commission, The European Banking Authority, Member States and other European Institutions to assist in resolving these problems.

(i) We would be grateful for consideration being given to the arguments made in this letter and for the opportunity to engage with the European Commission and other competent authorities as a common position is developed. Industry can inform potential proposals and assist in developing a common approach.

(ii) We are also aware that EMT related obligations have already entered into force from the beginning of July 2024, and request that time be extended to exchanges and other potential CASPs looking to transact in EMTs to prepare and submit applications for authorisation; or alternatively, to amend their businesses to ensure that they exclude regulated payment services. A period of 12 months would be appreciated in this context.

(iii) The issues raised above are only part of a larger set of issues that require attention and we would be grateful for ongoing engagement and dialogue. Some of these issues will also require amendment of Level 1 text and may be better addressed as part of the forthcoming



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payments services package. To this extent, we would again request ongoing engagement and dialogue to ensure that an appropriate and fit for purpose approach can be developed.

Best regards,

Representatives of:

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