



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL
MARKETS UNION

The Director-General

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Subject: Interplay between MiCA and PSD2 – Possible “no action letter” by the EBA

Dear Mr Campa and Ms Ross,

Regulation (EU) 2023/1114 on markets in crypto-assets (MiCA) regulates, among other things, the provision of crypto-asset services within the Union and the authorisation of crypto-asset service providers (CASPs). Directive (EU) 2015/2366 on payment services in the internal market (PSD2) regulates the provision of payment services in the EU.

As indicated in Recitals 90 and 93 of MiCA, there is a certain overlap between crypto-asset services provided by CASPs under MiCA and payment services regulated under PSD2, notably in the case of certain services relating to e-money tokens (EMTs) ⁽¹⁾. Under Article 48(2) of MiCA, “[e]-money tokens shall be deemed to be electronic money” and, therefore, EMTs fall within the definition of “funds” set out in Article 4, point (25) of PSD2. This means that EMTs have a dual nature being, at the same time, crypto-assets regulated under MiCA, and electronic money/funds within the meaning of PSD2. Accordingly, where CASPs provide payment services with EMTs, they need to either hold an authorisation as a payment service provider (PSP), or partner with a PSP having an authorisation to provide the respective payment services.

⁽¹⁾ EMTs are defined in MiCA as “a type of crypto-asset that purports to maintain a stable value by referencing the value of one official currency” (Article 3(1), point (7)).

Depending on the business model, and on the basis of a case-by-case analysis, the provision of transfers of EMTs by CASPs may be considered as a payment service under point 3 of Annex I of PSD2 (“*execution of payment transactions*”) and require an authorisation. Depending on the circumstances of the case, crypto-asset services relating to EMTs could also be considered as other payment services, e.g. payment service services referred to in points 1 and 2 of Annex I of PSD2 which refer to “*operations required for operating a payment account*”⁽²⁾. This could be the case for example where a CASP offers custodial wallets enabling its clients (the holders of the EMTs) to make transfers of EMTs to and from third parties, with the CASP controlling on behalf of its client the private cryptographic key to the EMTs.

By contrast, in the Commission services’ view, an authorisation as a PSP would generally not be required where a CASP which provides the service of “*exchange of crypto-assets for funds*” or “*exchange of crypto-assets for other crypto-assets*”, as defined in Article 3(1), points (19) and (20) of MiCA, does not act as an intermediary between a payer and a payee, but in its own name, as seller/buyer of the EMTs, and does not provide other transfers of EMTs on behalf of its clients.

However, other cases where EMTs are not used as a means of payment or for peer-to-peer (P2P) payment transactions, but rather for investment or trading purposes (for example, where a CASP intermediates the exchange of EMTs for funds or other crypto-assets between buyers and sellers, without handling other funds) may be inadvertently covered by the broad definition of a “*payment transaction*” in Article 4, point (5) of PSD2 and as a result fall within the scope of PSD2. In such cases, a requirement to have a dual authorisation and to comply with a dual set of requirements under MiCA and PSD2 may create a significant burden for both CASPs and national competent authorities (NCAs).

I note from regular Commission contacts with NCAs, and from exchanges between the Commission’s services and EBA/ESMA staff, that there are diverging interpretations amongst Member States about the interplay between MiCA and PSD2. In view of these diverging interpretations, the application of both PSD2 and MiCA provisions in relation to EMT services may raise significant issues of regulatory arbitrage, as well as consumer protection issues.

Furthermore, I am aware that the treatment of EMTs from a payment service perspective is being discussed as part of the ongoing revision of the PSD2. The European Parliament has already proposed some amendments to the PSD3/PSR proposals in this regard, and the Council is also currently discussing this issue as part of its review of the PSD3/PSR proposals. However, even if PSD3/PSR were to address this question, their date of application is expected to be still a few years away. Therefore, solutions should be found for the period preceding this.

In light of these considerations and the Commission’s objective of reducing administrative burden⁽³⁾, I would appreciate if the EBA, in close coordination with ESMA, could explore the possibility of issuing an opinion pursuant to Article 9c of Regulation (EU) No 1093/2010 (“No action letter”), with regard to the enforcement of the requirements on

⁽²⁾ Custodial wallets provided by CASP can qualify as a “*payment account*”, as defined in Article 4, point (12) of PSD2, where they allow to transfer EMTs to and from third parties. This takes into account the CJEU’s ruling in [Case C-191/17](#) and the clarifications provided in Q&A [2018_4272](#), according to which the main criterion for determining whether an account is a “*payment account*” is whether the account allows to send and receive funds, including to and from third parties

⁽³⁾ See for example the [Commission Communication on long-term competitiveness](#)

authorisation in PSD2 as regards services with EMTs provided by CASPs (or by entities benefiting from the transitional period under Article 143(3) of MiCA) that may be inadvertently covered by the PSD2, e.g. where EMTs are not used as a means of payment or for P2P payment transactions, but rather for investment or trading purposes.

The Commission services stand ready to support the EBA and ESMA in this work. Such no action letter should take effect until the application date of the PSR/ transposition deadline of the PSD3 and should be reassessed three years after the no action letter is published in case the application date of the PSR/ transposition deadline of the PSD3 will be later than 3 years after the publication of the no action letter.

As regards cases where a dual authorisation would nevertheless be required, for example where EMTs are used as a means of payment for goods or services or for P2P payment transactions, I invite the EBA, in close coordination with ESMA, to explore whether the authorisation process under PSD2 could be streamlined in order to reduce the operational burden that institutions would face as a result of a dual authorisation requirement. Finally, I also welcome your suggestions as to potential legislative changes to address any of the issues identified above, that we could take into account in the ongoing negotiations of the PSD3/PSR.

My services and I remain at your disposal for further discussions, if necessary.

Yours sincerely,

Electronically signed

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