



Electronic Money Association e. V.

Eingetragener Verein, Amtsgericht Düsseldorf, VR 10723

c/o Retailo AG Kaiser-Wilhelm-Ring 13

50672 Köln, Germany

Vorsitzender: Dr Thaeer Sabri

Telephone: +44 (0) 20 8399 2066

Email: thaer.sabri@e-ma.org

www.e-ma.org

Hans Martin-Lang

Leitender Regierungsdirektor

Stellvertretender Leiter der Abteilung Geldwäscheprävention

Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)

Bonn

Germany

Konsultation-05-18@bafin.de

11 May 2018

Dear Mr Martin-Lang

Re: BaFin Konsultation 05/2018 - Entwurf: Auslegungs- und Anwendungshinweise gemäß § 51 Abs. 8 Geldwäschegesetz

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 that provide 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.

We have reviewed the draft interpretation and application guidance, and we have set out our comments below.

Our comment relates to the following sentence on page 60 of the consultation document:

‘Soweit risikoerhöhende Faktoren vorliegen, kommt eine Anwendung vereinfachter Kundensorgfaltspflichten nicht in Betracht’ (‘in so far as there are higher risk factors, the application of simplified due diligence is not an option’).

Read strictly, this sentence would imply that the presence of any one higher risk factor should prevent the application of simplified due diligence (‘SDD’) measures. If, for example, the product in question employed any ‘new or developing technologies’ (Annex 3(2)(e) 4MLD), it could not operate under the SDD provisions even if the use of these technologies were mitigated by, for example, a low transaction threshold or the fact that the product was only made available to existing customers.

Such a reading, however, contradicts the approach adopted by article 18(3) 4MLD, which presents the higher risk factors in Annex 3 as ‘factors of *potentially* higher risk situations’ (emphasis added) rather than factors that always indicate a higher risk. Furthermore, article 18(3) 4MLD makes clear that these risk factors are merely to be taken into account as part of an active determination of risk by the obliged entity. In doing so, obliged entities are expected to use a holistic approach to risk, as set out in recital 22 4MLD:

The risk of money laundering and terrorist financing is not the same in every case. Accordingly, a holistic, risk- based approach should be used. The risk-based approach is not an unduly permissive option for Member States and obliged entities. It involves the use of evidence-based decision-making in order to target the risks of money laundering and terrorist financing facing the Union and those operating within it more effectively.

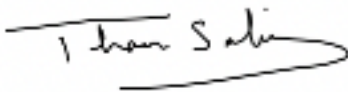
A holistic approach to risk thus means assessing the product’s overall risk by reference to higher as well as lower risk and mitigating factors, without giving undue weight to any one risk factor present. This is also reflected in the EBA’s Risk Factor Guidelines¹ (paragraph 10, page 11):

¹ JC 2017 37 Joint Guidelines under Articles 17 and 18(4) of Directive (EU) 2015/849 on simplified and enhanced customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions.

Firms should gather sufficient information to be satisfied that they have identified all relevant risk factors, including, where necessary, by applying additional CDD measures, and assess those risk factors to obtain a holistic view of the risk associated with a particular business relationship or occasional transaction. Firms should note that the risk factors listed in these guidelines are not exhaustive, and that there is no expectation that firms will consider all risk factors in all cases.

For these reasons, we ask you to revise the above-cited sentence in your guidance, either by deleting it or by re-drafting it to more closely reflect the risk-based approach as set out in the Directive and EBA Guidelines.

Yours sincerely,



Dr Thaer Sabri

Chief Executive Officer

Electronic Money Association

List of EMA members as of May 2018

[Advanced Payment Solutions Ltd](#)
[Airbnb Inc](#)
[Allegro Group](#)
[American Express](#)
[Azimo Limited](#)
[Bitstamp](#)
[BlaBla Connect UK Ltd](#)
[Blackhawk Network Ltd](#)
[Boku Inc](#)
[CashFlows](#)
[Citadel Commerce UK Ltd](#)
[Clearsettle](#)
[Coinbase](#)
[Corner Banca SA](#)
[Ebanx](#)
[eBay Europe Sarl](#)
[Euronet Worldwide Inc](#)
[Facebook Payments International Ltd](#)
[First Rate Exchange Services](#)
[Flex-e-card](#)
[Flywire](#)
[GoCardless Ltd](#)
[Google Payment Ltd](#)
[IDT Financial Services Limited](#)
[Imagor SA](#)
[Intuit Inc.](#)
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[Merpay Ltd.](#)
[MuchBetter](#)
[Nvayo Limited](#)
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[Optal](#)
[Park Card Services Limited](#)
[Paybase Limited](#)
[Payoneer](#)
[PayPal Europe Ltd](#)
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[PrePay Solutions](#)
[R. Raphael & Sons plc](#)
[Remitly](#)
[SafeCharge UK Limited](#)
[Securiclick Limited](#)
[Skrill Limited](#)
[Starpay Global Ltd.](#)
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[Syspay Ltd](#)
[Transact Payments Limited](#)
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[TransferWise Ltd](#)
[TrueLayer Limited](#)
[Trustly](#)
[Uber BV](#)
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