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Mr Aldo Farrugia,
Director General of the International Tax Unit
Inland Revenue
Block 4
Vincenzo Dimech Street
Floriana
Malta

13 September 2016

Dear Mr Farrugia

Re: Implementation of the Common Reporting Standards (“CRS”) and the US Foreign Account Tax Compliance Act (“FATCA”) in Malta

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 European Union (“EU”), most frequently on a cross border basis. A list of current EMA members is provided at the end of this document.

In Malta relevant financial institutions are obliged to report under FATCA and CRS, which was introduced in to EU law introduced via Council Directive 2011/16/EU¹ (“DAC”) as amended by Council Directive 2014/107/EU² (“DAC2”), and became effective on 1 January 2016. In Malta, the CRS obligations were introduced by way of [LN 384 of 2015, the Cooperation with Other](#)

¹ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

² Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation. We will refer to DAC as amended by DAC2 as DAC for convenience.

[Jurisdiction on Tax Matters \(Amendment\) Regulations, 2015](#), (“**LN 384 of 2015**”) and associated [Guidelines](#).³

We would like to raise three issues of concern in relation to the scope of LN 384 of 2015 as it applies to Electronic Money Institutions (“**EMIs**”), Payment Institutions (“**PIs**”), payment accounts and e-money issued by Credit Institutions (“**CI**s”), and unregulated payment products. We will address the issues in terms of DAC, which sets out the framework of the CRS in the EU, but we believe the approach can be applied to the CRS and FATCA more generally.

2. Financial Institution: definition of Depository Institution

Depository Institutions are Financial Institutions⁴ for the purposes of the reporting regime under the DAC and therefore subject to its reporting obligations. The DAC states:

“The term ‘Depository Institution’ means any Entity that accepts deposits in the ordinary course of a banking or similar business.”⁵

We note that the term ‘deposit’ is not defined in the DAC nor in the relevant directive⁶ (“**CRD IV**”) that deals with CIs.

We understand this to mean that CIs (i.e. banks and building societies) are clearly identified as Depository Institutions because they are authorised to accept deposits.

2.1 Issue 1: Electronic Money Institutions (“EMIs”)

Recital 13 and Article 6(3) of the Second Electronic Money Directive⁷ (“**EMD2**”) provide that the issuance of e-money does not constitute a deposit-taking activity under the Directive 2006/48/EC⁸. Therefore EMIs do not accept deposits in the ‘ordinary course of a banking business’ but instead accept funds for the purpose of purchasing e-money, which is used for making payments.

³ Maltese Inland Revenue (2014) *Guidelines for the implementation of the EU Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (DAC2) in Malta and the Common Reporting Standard (CRS) issued in terms of Article 96(2) of the Income Tax Act (Chapter 123 of the Laws of Malta)*. Version 1.1 Floriana: Maltese Inland Revenue. Available from: ird.gov.mt/downloads/guides/crs_guidelines.pdf. [Accessed: 12 September 2016].

⁴ Section VIII.A.3 Annex I DAC.

⁵ Section VIII.A.5 Annex I DAC.

⁶ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

⁷ Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC.

⁸ Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (“**BCD**”). The BCD was replaced by CRD IV.

EMIs, whose authorisation, prudential and conduct of business rules are set out in the relevant domestic implementations of EMD2⁹ and the Payments Services Directive (2007/64/EC)¹⁰ (“**PSDI**”), are not considered ‘deposit-takers’ for the purposes of the DAC or CRS.

We note that the Guidelines state that “An Entity is considered to be engaged in a “banking or similar business” if, in the ordinary course of its business with customers, the Entity accepts deposits or other similar investments of funds and regularly engages in one or more of the following activities:

- a) makes personal, mortgage, industrial, or other loans or provides other extensions of credit;
- b) purchases, sells, discounts, or negotiates accounts receivable, installment obligations, notes, drafts, checks, bills of exchange, acceptances, or other evidences of indebtedness;
- c) issues letters of credit and negotiates drafts drawn thereunder;
- d) provides trust or fiduciary services;
- e) finances foreign exchange transactions; or
- f) enters into, purchases, or disposes of finance leases or leased assets.

An Entity is not considered to be engaged in a banking or similar business if the Entity solely accepts deposits from persons as a collateral or security pursuant to a sale or lease of property or pursuant to a similar financing arrangement between such Entity and the person holding the deposit with the Entity.

Savings banks, commercial banks, savings and loan associations, and credit unions would generally be considered Depository Institutions. However, whether an Entity conducts a banking or similar business is determined based upon the character of the actual activities of such Entity.

Entities falling within this definition include entities regulated in Malta as a savings or commercial bank. **Any relevant exclusion contained in the Banking Act** will also apply for the purposes of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations. However in considering whether an entity is conducting banking or similar business, it will be the actual activities that the entity carries out that will finally be determinative.”¹¹

EMIs do not fall under the scope of the Banking Act, so are not subject to the reporting obligations of Depository Institutions set out in LN 384 of 2015. In addition e-money accounts would not fall under any of the accounts described above under points (a) to (f).

2.1 Proposal I

We propose that Section 2.1.1.2 of the Guidelines states clearly that for the avoidance of doubt that EMIs are not Depository Institutions for the purposes of the application of LN 384 of 2015.

⁹ The EMD2 is implemented in the UK by the Electronic Money Regulations 2011.

¹⁰ Directive 2007/64/EU of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC. The PSD1 is implemented in the UK by the Payment Services Regulations 2009. Please note that the PSD1 is in the process of being replaced by the Second Payment Services Directive, Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, (“**PSD2**”). The implementations of PSD2 will become effective in the EU on 13 January 2018.

¹¹ Section 2.1.1.2 Guidelines, p.13.

2.1 Issue 2: Payment Institutions (PIs)

As with EMIs, both LN 384 of 2015 and the Guidelines are silent on the status of PIs, which as Financial Institutions that do not hold customer funds except for settlement purposes. PIs' authorisation, prudential and conduct of business rules are set out in the relevant domestic implementations of the PSDI and are not within the scope of the Banking Act.

Article 16(2) PSDI states:

“When payment institutions engage in the provision of one or more of the payment services listed in the Annex, they may hold only payment accounts used exclusively for payment transactions. Any funds received by payment institutions from payment service users with a view to the provision of payment services shall not constitute a deposit or other repayable funds within the meaning of Article 5 of Directive 2006/48/EC¹²,”

Accordingly, PIs are not Depository Institutions for the purposes of LN 384 of 2015.

2.1 Proposal 2

We propose that Section 2.1.1.2 of the Guidelines states clearly that for the avoidance of doubt PIs are not Depository Institutions for the purposes of the application of LN 384 of 2105.

2 Financial Account: Definition of Depository Account

Financial Institutions that have Financial Accounts held by Reportable Persons must report these accounts under the CRS. There are five types of Financial Account that need to be considered for the purposes of the CRS: (i) a Depository Account; (ii) a Custodial Account; (iii) Equity and debt interests in investment entities; (iv) a Cash Value Insurance Contract; and (v) an Annuity Contract. For the purposes of this letter we only consider the definition of Depository Account.

The DAC states:

“The term ‘Depository Account’ includes any commercial, checking, savings, time, or thrift account, or an account that is evidenced by a certificate of deposit, thrift certificate, investment certificate, certificate of indebtedness, or other similar instrument maintained by a Financial Institution in the ordinary course of a banking or similar business. A Depository Account also includes an amount held by an insurance company pursuant to a guaranteed investment contract or similar agreement to pay or credit interest thereon.”¹³

We understand the term Depository Account to mean a deposit for the purposes of the CRD IV or an account held by an insurance company that provides an investment income in the form of interest. Accordingly, neither an e-money account nor a payment account held by a PI will be a Depository Account because they are not deposits nor are they accounts with an insurance company.

¹² Now article 9 CRD IV.

¹³ Section VIII.C.2 Annex I DAC and Section 2.7.1.1 Guidelines. p. 33,

2.1 Issue 2: E-money accounts provided by CIs

Some CIs do not only provide deposit-taking services to their customers but also provide e-money services, such as prepaid cards (a type of e-money account). There are certain CIs that specialise in providing e-money services in direct competition with EMIs. As EMIs fall outside the scope of the reporting obligations of the CRS (for the reasons given above), CIs would be at an unjustifiable competitive disadvantage against EMIs if their e-money accounts were treated as Depository Accounts and were, therefore, subject to the additional regulatory reporting burden on CIs as Depository Institutions.

It should be noted that the funds held in e-money accounts are for the purposes of making or accepting payments and not for the ongoing holding of funds. The funds held in e-money accounts are small amounts, usually in order of £30, and this tends to be the same, regardless of which type of institution the account is with (a CI or an EMI). Furthermore, e-money is not a deposit and, therefore, should not be treated as such.

Accordingly, e-money accounts issued by CIs are not deposit accounts and it would be helpful if this can be explicitly stated in the FAQs, as already provided for EMIs.

2. Proposal 3

We propose that Section 2.7.1.1 of the Guidelines states clearly that for the avoidance of doubt e-money accounts issued by CIs are not Depository Accounts for the purposes of LN 384 of 2105.

3. Issue 3: Unregulated Payment Products

In addition to the regulated services of deposit taking, issuing e-money and payments services, CIs, EMIs and PIs also provide payment products that fall outside the scope of financial and payment services regulation. These payment products rely on statutory exemptions set out in the EMD2¹⁴ and the PSD I¹⁵, and fall outside the scope of the regulated activity of accepting deposits. A store-branded gift card for use only at that particular store is an example of an unregulated payment product. Please note that because unregulated payment products are by their very nature unregulated, they are also provided by unregulated businesses.

Using the same reasoning for e-money and payment accounts in section 2, unregulated payment products are not Depository Accounts because they are not deposits nor are they accounts with an insurance company.

¹⁴The statutory exemptions are set out in articles 1(4) and 1(5) EMD2.

¹⁵The statutory exemptions are set out in article 3 PSD I.

Furthermore, CIs would be at an unjustifiable competitive disadvantage against EMIs, PIs and unregulated businesses due to the additional regulatory reporting burden on CIs as Depository Institutions if unregulated payment products were treated as Depository Accounts.

4. Proposal 4

We propose that Section 2.7.1.1 of the Guidelines states clearly that for the avoidance of doubt unregulated payment products issued by CIs are not Depository Accounts for the purposes of LN 384 of 2105.

The UK has taken the approach outlined in this letter and implemented it into HM Revenue and Custom's ("HMRC's") [Final Guidance for the International Exchange of Information Manual](#), published in April 2016. In [Guidance Note IEIM400750](#), HMRC confirms that EMIs and PIs are not Depository Institutions for the purposes of reporting under FATCA or the CRS. In [Guidance Note IEIM401540](#), HMRC confirms that e-money accounts are not Depository Accounts for the purpose of reporting under FATCA or the CRS.

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

Yours sincerely,

Dr Thaer Sabri
Chief Executive Officer
Electronic Money Association

List of EMA members as of August 2016:

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|-------------------------------------|----------------------------|
| Advanced Payment Solutions Ltd | Kalixa Pay Ltd |
| Airbnb Inc | MarqMillions |
| Allegro Group | <u>Mercari</u> |
| American Express | One Money Mail Ltd |
| Azimo Limited | <u>Optal</u> |
| Bitstamp | Park Card Services Limited |
| Blackhawk Network Ltd | Payoneer |
| Boku Inc | PayPal Europe Ltd |
| Citadel Commerce UK Ltd | PayPoint Plc |
| ClickandBuy International Ltd | <u>Paysafe Group</u> |
| Clydesdale Bank | PPRO Financial Ltd |
| <u>Coinbase</u> | PrePay Technologies Ltd |
| Corner Banca SA | R. Raphael & Sons plc |
| <u>eBay Europe Sarl</u> | <u>Remitly</u> |
| Euronet Worldwide Inc | Securiclick Limited |
| Facebook Payments International Ltd | Skrill Limited |
| <u>FaceKart</u> | Stripe |
| First Rate Exchange Services | Syspay Ltd |
| Flex-e-card | Transact Payments Limited |
| <u>Flywire</u> | TransferWise Ltd |
| Google Payment Ltd | Valitor |
| <u>Go Cardless</u> | Wave Crest Holdings Ltd |
| iCheque Network Limited | Wirecard AG |
| IDT Financial Services Limited | Worldpay UK Limited |
| Ixaris Systems Ltd | |