The EMA's response to the Law Commission's Consultation *Anti-Money Laundering: the SARS Regime*

4 October 2018

1. Preface

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.

In what follows below, we provide a response to relevant questions from the Law Commission's consultation *Anti-Money Laundering: the SARS Regime*. We hope that you will be able to take our response into account, and are available to discuss any comments or questions you might have.

This response may be publically disclosed.

Comments, questions or requests for further details should be addressed to:
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2. Response

Consultation Question 1: Do consultees agree that we should maintain the "all crimes" approach to money laundering by retaining the existing definition of "criminal conduct" in section 340 of the Proceeds of Crime Act 2002?

EMA Response: The EMA supports the retention of the "all crimes" approach in section 340 of the Proceeds of Crime Act 2002. EMA member firms primarily report money laundering with a predicate offence of fraud against consumers, such as credit card fraud. This type of crime may not be caught by a "serious crimes" definition (according to the current penalty on summary conviction, it would not be included under article 3(4)(f) 4MLD), but often involves substantial amounts of money and a significant number of victims. Fraud networks may only be visible through links in SAR reports submitted by several financial institutions, which would be missed if institutions no longer reported this type of money laundering. Fraud is also often connected to more serious crimes in that it may finance the activities of criminal networks, and fraud-related SARs may therefore present a valuable source of intelligence. This does not mean, however, that EMA member firms would not benefit from a minimum threshold for reporting suspicious transactions externally. In this respect, see our answer to question 13 below.

Consultation Question 3: We provisionally propose that POCA should contain a statutory requirement that Government produce guidance on the suspicion threshold. Do consultees agree?

EMA Response: The EMA would not be in favour of guidance on the suspicion threshold. EMA members do not perceive the meaning of suspicion as a problem, and it is felt that guidance on this term would introduce unnecessary complexity into the reporting process. In any case, we would urge the Government and the NCA to conduct trials of any changes introduced following this consultation before rolling them out to the financial sector as a whole. This is to limit any adverse impacts on firms in practice, which are difficult to foresee at the point of setting out general plans and principles.

Consultation Question 5: We would welcome consultees' views on whether there should be a single prescribed form, or separate forms for each reporting sector.

EMA Response: It is unclear why a separate form for each reporting sector would be required or what the benefit of different forms would be. It is also unclear what would constitute a reporting sector for this purpose. One improvement EMA members would, however, like to see is the ability to report via an API from their systems or use a report they can create automatically from their systems. The current approach of logging into the NCA website to file reports is slow and prone to human error.

Consultation Questions 6 - 9:

6) We provisionally propose that the threshold for required disclosures under sections 330, 331 and 332 of the Proceeds of Crime Act 2002 should be amended to require reasonable grounds to suspect that a person is engaged in money laundering. Do consultees agree?

7) If consultees agree that the threshold for required disclosures should be amended to reasonable grounds for suspicion, would statutory guidance be of benefit to reporters in applying this test?

8) We provisionally propose that the suspicion threshold for the money laundering offences in sections 327, 328, 329 and 340 of the Proceeds of Crime Act 2002 should be retained. Do consultees agree?

9) We provisionally propose that it should be a defence to the money laundering offences in sections 327, 328 and 329 if an individual in the regulated sector has no reasonable grounds to suspect that property is criminal property within the meaning of section 340 of the Proceeds of Crime Act 2002. Do consultees agree?

EMA Response:

The EMA supports introducing the need for objective evidence to support any subjective suspicion. This would prevent banks, for instance, from reporting a suspicion merely on the basis that cryptocurrencies are involved in a transaction. However, we do not support the issuance of guidance in this respect. It is firms, not the NCA, who are at the forefront of developments in financial crime, and any guidance specifying what amounts to objective evidence would therefore be at risk of being out of date already when issued or would constantly need to be updated. There is also the risk that guidance would unintentionally widen the reporting requirement by including factors that would not always give rise to a suspicion. If guidance is issued, this should not create strict parameters for reporting and should allow firms to deviate if the activity is either not suspicious or if a suspicion arises in relation to activity not covered by the guidance.

Consultation Questions 10-11:

10) Does our summary of the problems presented by mixed funds accord with consultees' experience of how the law operates in practice?

11) We provisionally propose that sections 327, 328 and 329 of POCA should be amended to provide that no criminal offence is committed by a person where:

> **(1) they are an employee of a credit institution;**
>
> **(2) they suspect [or if our earlier proposal in Chapter 9 is accepted have reasonable grounds to suspect] that funds in their possession constitute a person's benefit from criminal conduct;**
>
> **(3) the suspicion [or if our earlier proposal in Chapter 9 is accepted reasonable grounds to suspect] relates only to a portion of the funds in their possession;**

(4) the funds which they suspect [or if our earlier proposal in Chapter 9 is accepted have reasonable grounds to suspect] constitute a person's benefit from criminal conduct are either:

(a) transferred to an account within the same credit institution; or

(b) the balance is not allowed to fall below the level of the suspected funds;

(5) they conduct the transaction in the course of business in the regulated sector (as defined in Schedule 9 of the Proceeds of Crime Act 2002); and

(6) the transfer is done with the intention of preserving criminal property.

Do consultees agree?

EMA Response: The EMA supports the proposals. However, we propose that a minimum value should apply to accounts in relation to which the proposals are to be implemented, as for smaller values the putting in place of systems in this respect would not be proportionate.

Consultation Question 12: We provisionally propose that statutory guidance should be issued to provide examples of circumstances which may amount to a reasonable excuse not to make a required and/or an authorised disclosures under Part 7 of the Proceeds of Crime Act 2002. Do consultees agree?

EMA Response: EMA members would welcome guidance that provides examples of circumstances which may amount to a reasonable excuse not to make a required and/or an authorised disclosure. Guidance would give reporters the confidence not to report transactions whose intelligence value may be low. This would mean resources could be re-directed to higher-risk areas of the AML/TCF operation.

Consultation Question 13: It is our provisional view that introducing a minimum financial threshold for required and authorised disclosures would be undesirable. Do consultees agree?

EMA Response: We think that it *would* be desirable to introduce a minimum threshold for financial institutions in order to avoid reports being made concerning low-value transactions that have little intelligence value. This threshold should apply to external, but not internal, reporting. Internally, all transactions should continue to be monitored and reported to the nominated officer if suspicious. The nominated officer can then decide not to report the transaction externally if it is below the threshold. In this respect, the threshold should also apply only to single and not to linked transactions or transactions which exhibit a certain pattern that may of interest to law enforcement (such as the emergence of a new type of fraud) or are otherwise associated with valuable intelligence. This would prevent criminals from carrying out small transactions below the threshold in

order to avoid detection. Furthermore, the threshold should not apply to any transactions where the suspicion is one of terrorist financing rather than money laundering. We think that in light of the fact that the USA have set a $2,000 threshold for single or linked transactions for MSBs, £1,000 could form a minimum reference point for setting a reporting threshold. At the very least, the existing £250 exemption threshold should apply to all reporting entities and not be restricted to banks.

Consultation Questions 16-17:
16) Do consultees agree that there is insufficient value in required or authorised disclosures to justify duplicate reporting where a report has already been made to another law enforcement agency (in accordance with the proposed guidance)?
17) We provisionally propose that statutory guidance be issued indicating that a failure to make a required disclosure where a report has been made directly to a law enforcement agency on the same facts (in accordance with proposed guidance on reporting routes) may provide the reporter with a reasonable excuse within the meaning of sections 330(6)(a), 331(6) and 332(6) of the Proceeds of Crime Act 2002. Do consultees agree?

EMA Response: EMA members agree that there is insufficient value in duplicate reporting and would welcome the introduction of a relevant excuse in this respect. The majority of suspicious activity members encounter relates to fraud, which means the volume of duplicate reports to the NCA could be reduced by requiring credit and financial institutions to only report to Action Fraud. We would also like to draw attention to the duplicate reporting that currently happens between financial institutions in relation to the same transaction/customer. In that case, the party bearing the loss should be required to report. However, as the other party may have better intelligence to report, 'memorandum' reporting of additional intelligence may be beneficial.

Consultation Question 21: We provisionally propose that reporters should be able to submit one SAR for:
(1) multiple transactions on the same account as long as a reasonable description of suspicious activity is provided; and/or
(2) multiple transactions for the same company or individual.
Do consultees agree?

EMA Response: We are in general agreement with the proposal, but note the uncertainty as to what a 'reasonable description of suspicious activity' would involve. Providing an overall narrative would be the preferred option, while having to upload/detail all suspicious transactions should be avoided.

Consultation Question 22: Do consultees agree that banks should not have to seek consent to pay funds back to a victim of fraud where they have filed an appropriate report to Action Fraud?

EMA Response: EMA members support an exemption from the requirement to seek consent where a repayment to a victim of fraud is concerned. This exemption should not only apply to banks but also to other financial institutions for which this is a common issue.

Consultation Question 25: We provisionally propose that statutory guidance be issued indicating that where a transaction has no UK nexus, this may amount to a reasonable excuse not to make a required or authorised disclosure. Do consultees agree?

EMA Response: For firms passporting their services from the UK to other EEA member states, this proposal would not be workable. These firms rely on the UK FIU to disseminate SAR reports to the relevant EEA authorities, with which they do not maintain direct relationships. Without a direct relationship, the ability to report suspicious activity locally is limited; access to online portals, for example, is usually tied to a firm's license with the local supervisory authority, often not held by passporting firms. The ability of firms to meet local reporting requirements, including language requirements (for example, some FIUs do not maintain English-speaking staff), is also limited. Therefore, firms should continue to have the ability to report all transactions to the UK FIU, although this could be made voluntary to allow firms with direct reporting relationships abroad to report locally.

Consultation Question 28: Based on their experience, do consultees believe that statutory guidance on arrangements with prior consent within the meaning of section 21ZA of the Terrorism Act 2000 would be beneficial?

EMA Response: The absence of a moratorium period where SARs filed under DATF are concerned places reporting firms in a difficult situation with the involved clients, as there is no guidance nor regular updates from the NCA on how to proceed. We propose regular updates as well as guidance on appropriate messaging to those clients whose funds are frozen far beyond the average moratorium period.

Consultation Questions 29-30:
29) Do consultees believe that sharing information by those in the regulated sector before a suspicion of money laundering has been formed is:

- **(1) necessary; and/or**
- **(2) desirable; or**
- **(3) inappropriate?**

30) We invite consultees' views on whether pre-suspicion information sharing within the regulated sector, if necessary and/or desirable, could be articulated in a way which is compatible with the General Data Protection Regulation. We invite consultees' views on the following formulations:

(1) allowing information to be shared for the purposes of determining whether there is a suspicion that a person is engaged in money laundering;
(2) allowing information to be shared for the purpose of preventing and detecting economic crime;
(3) allowing information to be shared in order to determine whether a disclosure under sections 330 or 331 of the Proceeds of Crime Act 2002 would be required; or
(4) some other formulation which would be compatible with the UK's obligations under the General Data Protection Regulation?

EMA Response: EMA members see the ability to share information before a suspicion of money laundering has been formed as necessary for the prevention of fraudulent activity. However, safeguards should be established to prevent bona fide customers from being denied access to financial services.

Consultation Questions 31-33:
31) Do consultees believe that significant benefit would be derived from including any of the following within the JMLIT scheme operating under the gateway in section 7 of the Crime and Courts Act 2013:
(1) additional regulated sector members;
(2) the regulated sector as a whole; or
(3) an alternative composition not outlined in (1) or (2)?
32) Do consultees believe that there would be significant benefit to including other law enforcement agencies within the JMLIT scheme?
33) Do consultees believe that there would be significant benefit to including any other entities within the JMLIT scheme?

EMA Response: Despite repeated attempts by the EMA to engage with the Joint Money Laundering Intelligence Task Force, it is not currently participating as a member. Membership would be welcomed.

Consultation Question 34: Do consultees believe that the consent regime should be retained? If not, can consultees suggest an alternative regime that would balance the interests of reporters, law enforcement agencies and those who are the subject of disclosures?

EMA Response: While most of our members find the current consent regime workable, we would welcome further exploration of alternatives in order to simplify the SAR reporting process, minimise disruption to business and increase the efficiency of law enforcement action. The Australian model may in this respect provide a good example for a suspicion-based approach, where suspicion must be reported as soon as is practicable and liability arises only if suspicion is not reported or there is knowledge or intent that extends beyond suspicion.

3. Annex

List of EMA members as of September 2018

Airbnb Inc
Allegro Group
American Express
Azimo Limited
Bitstamp
BlaBla Connect UK Ltd
Blackhawk Network Ltd
Boku Inc
CashFlows
Circle
Citadel Commerce UK Ltd
Coinbase
Corner Banca SA
Curve
Ebanx
eBay 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.
Ixaris Systems Ltd
Merpay Ltd.
MuchBetter
Nvayo Limited
One Money Mail Ltd
Optal
Ozan
Park Card Services Limited
Paybase Limited
Payoneer
PayPal Europe Ltd
PayPoint Plc
Paysafe Group
PPRO Financial Ltd
PrePay Solutions
QIX Ltd
R. Raphael & Sons plc
Remitly
SafeCharge UK Limited
Securiclick Limited
Skrill Limited
Starpay Global Ltd.
Stripe
Syspay Ltd
Transact Payments Limited
Transact24 (UK) Ltd
TransferWise Ltd
TrueLayer Limited
Trustly Group AB
Uber BV
Valitor
Vitesse PSP Ltd
Viva Payments SA
Wave Crest Holdings Ltd
Wirecard AG
Wirex Limited
Worldpay UK Limited