



Electronic Money Association

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FATF

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8 March 2019

Dear Sir/Madam,

Re: EMA comments on paragraph 7(b) of the Draft Interpretive Note to FATF Recommendation 15

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, mobile payment instruments and virtual currency-related services. 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 welcome the opportunity to provide comments on paragraphs 7(b) and 7(a) of the Draft Interpretive Note to FATF Recommendation 15. While we note that paragraph 7(a) is not being consulted on, we would be grateful for your consideration of our comments and proposals on both paragraphs.

Yours sincerely,

A handwritten signature in black ink, reading 'Thaer Sabri', with a long horizontal line extending from the end of the signature.

Dr Thaer Sabri
Chief Executive Officer
Electronic Money Association

Paragraph 7(b)

'R.16 – Countries should ensure that originating VASPs obtain and hold required and accurate originator information and required beneficiary information on virtual asset transfers, submit the above information to beneficiary VASPs and counterparts (if any), and make it available on request to appropriate authorities. It is not necessary for this information to be attached directly to virtual asset transfers. Countries should ensure that beneficiary VASPs obtain and hold required originator information and required and accurate beneficiary information on virtual asset transfers, and make it available on request to appropriate authorities. Other requirements of R.16 (including monitoring of the availability of information, and taking freezing action and prohibiting transactions with designated persons and entities) apply on the same basis as set out in R.16.'

THE EMA's Comments

It is clear to industry that the application of Recommendation 16 to VASPs and virtual assets is associated with numerous, significant difficulties that negate the associated benefits of Recommendation 16 in the prevention and detection of financial crime. We therefore have concluded that it would not be appropriate to apply Recommendation 16 to VASPs and virtual assets and urge the FATF to re-think its approach. Alternatives to the application of Recommendation 16 should be considered, particularly in light of the unique technical opportunities afforded by blockchain technology.

Specifically, the difficulties we identified are:

1. The FATF definition of virtual assets is broad and includes asset and utility tokens in addition to payment tokens. This means that some of the transfers that would be captured by the extension of Recommendation 16 to virtual asset transfers would be captured unintentionally, as these transfers are not in the contemplated scope of Recommendation 16. Furthermore, if made in a non-virtual asset format, these transfers are currently not captured at all, so this would result in a distorted playing field between similar financial products. While it is difficult (both theoretically and practically) to categorise virtual assets according to their intended use, the blanket application of Recommendation 16 to all virtual asset transfers is not a solution, as it would result in over-inclusivity and thus impose unnecessary burdens on transfers that are not equivalent to fund transfers.
2. The requirements of Recommendation 16 are proposed to apply to VASPs when making virtual asset transfers, but virtual asset users also have the possibility of making such transfers directly through non-custodial wallets. These can be held locally by users, there are no VASPs involved and the transfers could not be made subject to Recommendation 16 provisions. This could be an obvious means of moving assets by both legitimate users seeking additional privacy and criminals seeking to conceal such transfers from law enforcement. The application of Recommendation 16 to VASPs would create a two-tier system in which only transfers between two VASPs would be subject to the requirements of Recommendation 16, with all illegitimate use migrating to the non-regulated, private tier.

3. An associated difficulty is that VASPs, whether originating or beneficiary, are unable to ascertain whether the originator/beneficiary wallet is held with another VASP or privately. In some cases, it may be possible to distinguish between a wallet held with a VASP and a wallet held privately, but this is only possible for a minority of cases, requires analysis, is both costly and time consuming and may be prone to error. Without this information, however, VASPs cannot comply with the requirements of Recommendation 16. Originator VASPs must not submit information to privately wallet holders, not least because submitting the information to a private wallet holder may be in breach of data protection legislation. Beneficiary VASPs can only monitor for compliance with Recommendation 16 requirements and take appropriate action if they know where an originator's address is held.
4. In any case, however, beneficiary VASPs would not be able to comply with the monitoring obligations under Recommendation 16. They would not be able to refuse or reverse transactions that did not have the necessary originator and beneficiary information. Any such transaction would be a new transaction on the blockchain. While there may be a possibility to freeze funds, this would result in numerous other practical and legal difficulties and would at the very least damage client relationships.
5. In the form proposed, the requirements referred to in paragraph 7(b) would apply to 'originating VASPs' and 'beneficiary VASPs.' According to the definition of a VASP in the Glossary of the FATF Recommendations, a VASP is 'any natural or legal person who is not covered elsewhere under the Recommendations, and as a business conducts one or more of the following activities....' Given that financial institutions, which are not captured by the definition of a VASP as they are covered elsewhere under the Recommendations, may also transfer virtual assets, there is a danger that only some virtual asset transfers would be subject to Recommendation 16, and only some virtual asset transfers could benefit from any exemptions made available to VASPs under paragraph 7(b). If Recommendation 16 were to be extended to VASPs and virtual asset transfers, then this should include such transfers when they are executed by other obliged entities, who should then also be able to benefit from any associated exemptions.
6. Paragraph 4(a) of the Interpretive Note to Recommendation 16 provides for an exemption for 'any transfer that flows from a transaction carried out using a credit or debit or prepaid card for the purchase of goods or services, so long as the credit or debit or prepaid card number accompanies all transfers flowing from the transaction.' It is unclear why virtual asset transfers undertaken in payment for goods and services should not equally benefit from this exemption. To exclude them from this exemption would create a distorted playing field for different means of payment that are directly in competition with each other.

7. The jurisdiction of a beneficiary or that of their custodial wallet provider is not known to the originating VASP. This would affect the application of jurisdiction-specific rules in legislation implementing Recommendation 16, such as the Wire Transfer Regulation (WTR)¹ in the EU, with the result that every VASP would need to be treated as a third-country VASP. This would increase the burden on VASPs as compared to other financial institutions subject to Recommendation 16.
8. It is unclear what entities are meant by ‘counterparts’ of an originating VASP. Clarification would be helpful in this respect.

Paragraph 7(a)

‘For the purposes of applying the FATF Recommendation, countries should consider virtual assets as “property,” “proceeds,” “funds”, “funds or other assets,” or other “corresponding value”. Countries should apply the relevant measures under the FATF Recommendation s to virtual assets and virtual asset service providers (VASPs).’

THE EMA’s Comments

1. Given that in the EU, the legislation implementing Recommendation 16 (The WTR) applies to transfers of funds between ‘payment service providers’ and refers to the Payment Services Directive (PSD)² in this respect, there is a danger that the application of Recommendation 16 to VASPs and virtual assets will lead to the application of the PSD to VASPs and their business.

For instance, funds are defined in Article 4(25) of the PSD, and this term appears in a number of consequent definitions of payment services. If virtual assets were added to the definition of funds, they would come under the definition of ‘money remittance,’ ‘payment transactions,’ ‘payment system’ etc. Requirements placed on payment services are onerous (entailing both authorisation and obligations relating to payment contracts and payment transactions), and their extension to VASPs is not always appropriate nor in many cases possible.

In this respect, the phrase ‘for the purposes of applying the FATF Recommendations’ in paragraph 7(a) above is welcome, but it could be made more explicit that the FATF is solely concerned with money laundering regulation, not the regulation of payment services.

¹ REGULATION (EU) 2015/847

² DIRECTIVE (EU) 2015/2366

2. The EU definition of electronic money states that e-money is ‘issued on receipts of funds’ (Article 2(2) of the Electronic Money Directive (EMD)³). Designating virtual assets as ‘funds’ would allow e-money to be issued directly on receipt of virtual assets. Currently, an exchange is required before virtual assets can be used to purchase e-money. This would make such an exchange unnecessary and allow for direct convertibility between virtual assets and e-money. E-money issuers may thus effectively become virtual currency exchanges. Such possible consequences should be worked through and assessed before any recommendation is made to designate virtual assets as funds.

³ DIRECTIVE 2009/110/EC

List of EMA members as of April 2019

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