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Rūta Bilkštytė
Vice-Minister
Vaida Česnulevičiūtė
Vice-Minister
Ministry of Finance of Republic of Lithuania

Letter submitted by email to finmin@finmin.lt
Copy vmi@vmi.lt, frpt@lb.lt

4 May 2021

Dear Ms Bilkštytė, dear Ms Česnulevičiūtė,

Re: The Common Reporting Standards ("CRS") and US Foreign Account Tax Compliance Act ("FATCA") in Lithuania

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, and several are authorised in Lithuania. A list of current EMA members is provided at the end of this document.

We would like to raise three issues of concern in relation to implementation of the CRS and FATCA in Lithuania, specifically the scope of the law as it applies to Electronic Money Institutions ("**EMIs**"), Payment Institutions ("**PIs**"), and electronic money ("**e-money**") and unregulated payment products issued by Credit Institutions ("**CIs**"), which we consider to be out of scope of the CRS and FATCA.

Legal position in Lithuania

Although EMIs and PIs may be considered "financial market participants" under the Law on the Bank of Lithuania of the Republic of Lithuania, we consider they are not 'relevant financial institutions' for the purposes of CRS or DAC reporting: they do not fall within the scope of the 'reporting financial institutions' definition for the purposes of the Lithuanian Order[1] on Adoption of the Rules for the Provision of Information Necessary for International Cooperation Obligations Regarding Automated Exchange of Information. Our reasoning is set out in detail in the appendix to this letter.

Administrative burden and competitive disadvantage for Lithuanian EMI issuers:

The administrative burden and impact on business activity of reporting all e-money accounts for CRS purposes is far higher for e-money than for bank accounts. Funds held in e-money accounts are for the purposes of making or accepting payments and not for the ongoing holding of funds, as no interest is applied to the funds in an e-money account. The value of funds held in e-money accounts is usually very low, at an average of €30. Whilst requesting the Tax Identification Number (TIN) may be possible when opening a bank account, it is unlikely to be regarded as reasonable or proportionate when signing up to a single use payment product. Most e-money or payment institution accounts are specific in nature, and users are not likely to contemplate a lengthy sign-up process, or to be minded to share such information. This results in a reduction in the number of new customers willing to complete the onboarding process, as well as an increased onboarding cost where the TIN must be verified.

In addition, Lithuanian EMIs who passport to other EU Member States and attempt to collect the TIN from customers outside Lithuania face challenges, as many customers may not have their TIN readily available, or even accessible, depending on the local taxation system. This places Lithuanian EMIs at a disadvantage in comparison to other EMIs, who do not have to collect the TIN when onboarding new customers.

Finally, a proportion of e-money accounts lie dormant or are abandoned with trivial amounts of e-money, as customers may often test out the product briefly before deciding they will not use it. Collecting the TIN and reporting on these accounts places a hugely disproportionate administrative burden on EMIs, much higher than the income derived from such business, and again places Lithuanian EMIs at an economic disadvantage in comparison to EMIs authorised in other EU member states who do not have to collect the TIN for these accounts.

OECD and European Commission position on e-money and CRS:

The OECD's Tax Working Party 10 ("WP10") are currently discussing proposals to bring e-money into the scope of CRS; this indicates that it is not currently considered to be in scope. The EMA participated in a Virtual Business Consultation with members of WP10 on 29 April

[1] ORDER ON THE ADOPTION OF RULES FOR THE PROVISION OF INFORMATION NECESSARY FOR INTERNATIONAL COOPERATION OBLIGATIONS REGARDING AUTOMATIC EXCHANGE OF INFORMATION ON FINANCIAL ACCOUNTS 2015 November 25 No.VA-102.

2020 to discuss the inclusion of e-money in the scope of CRS; it was clearly considered by participants at this meeting, as well as by the OECD, to be outside of the scope of the current CRS. We expect e-money to fall within the scope within three years, so we request that e-money products are not captured until that time when the conditions for the inclusion of e-money products are clarified.

The European Commission Roadmap to amend the EU Directive on Administrative Cooperation[2] ("DAC"), which sets out the framework of the CRS in the EU, was published on 23 November 2020. The roadmap states "*The existing provisions of the DAC provide for an obligation for financial intermediaries to report to tax administrations and for an exchange of information between Member States. For crypto-assets and e-money,* ***there is no such obligation to report as crypto-assets and e-money as well as the relevant intermediaries for these assets are not currently fully covered by the Directive*** *and hence national tax authorities cannot get this information from each other.*" On this basis it can be inferred that e-money is not currently intended to be captured by the CRS or DAC. The DAC is currently under review, and the Commission are consulting on extending the scope to include e-money and crypto assets.

Conclusion:
We have written to the State Tax Authority under the Ministry of Finance (hereinafter STI) to raise the points set out in the appendix to this letter, but they were not fully addressed in the response we received. We therefore wish to raise them once again, along with the additional evidence set out above to support our view that e-money is currently not intended to be captured by the CRS or the DAC.

Our view is that e-money institutions, payment institutions and e-money accounts do not fall within the scope of definition of a 'reporting financial institution' for the purposes of the Lithuanian Order[3] on Adoption of the Rules for the Provision of Information Necessary for International Cooperation Obligations Regarding Automated Exchange of Information. We suggest the Ministry of Finance may wish to consider amending the Order No VA-102 to clarify this position - until an EU approach has been agreed under the revised DAC.

We would very much welcome an opportunity to discuss this issue further, and if necessary see if there are alternative solutions that may reduce the burden on EMIs, whilst at the same time meeting the objectives of the Ministry of Finance and the STI.

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

Yours sincerely

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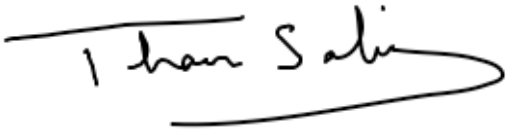
[2] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

[3] ORDER ON THE ADOPTION OF RULES FOR THE PROVISION OF INFORMATION NECESSARY FOR INTERNATIONAL COOPERATION OBLIGATIONS REGARDING AUTOMATIC EXCHANGE OF INFORMATION ON FINANCIAL ACCOUNTS 2015 November 25 No.VA-102.



Dr Thaer Sabri
Chief Executive Officer
Electronic Money Association

1. Introduction

In Lithuania relevant financial institutions are obliged to report under the CRS and FATCA.

The DAC directs all EU member states to share certain information for taxable periods starting on or after 1 January 2014. Subsequent amendments to DAC allowed for the CRS to be imported from EU legislation.

The DAC was implemented into Lithuanian legislation by way of the Law on Tax and Administration of the Republic of Lithuania[4], as amended ("**the Law**"), while the Ruling[5] of September 2015 (as amended) ("**the Ruling**") identifies the categories of data collection and reporting entities, the list of data to be collected and other procedures related to the collection, submission and exchange of data. The criteria for reporting financial institutions, the information on the account to be reported and the due diligence procedures applicable are set out by the Order[6] on Adoption of the Rules for the Provision of Information Necessary for International Cooperation Obligations Regarding Automated Exchange of Information ("**the Order**").

The 'reporting financial institution' is defined in the Annex 7 of the Order as:

*"1. **Reporting financial institution** means a financial institution of a Member State (including the Republic of Lithuania) that is not a non-reporting financial institution. Financial institution of a Member State (including the Republic of Lithuania): a financial institution resident in a Member State, except for a branch of such a financial institution operating in a non-Member State, and a branch of a financial institution not resident in a Member State, if such a branch is located in that Member State.*

*3. "**Financial institution**" means a custodian, a depository, an investment firm or a designated insurance company.*

*4. **Custodian** - an entity whose essential part of the activity is the management of **financial assets** for the account of other persons. An entity manages financial assets for the account of others and forms a significant part of its operations when the entity's total revenue from the management of financial assets and related financial services equals or exceeds 20 percent of the entity's total revenue over: a three-year period ending in December 31 of the year preceding the year in which the determination is made or the period during which the entity is operating, whichever is shorter.*

*5. **Depository institution** - an entity that accepts deposits in the ordinary course of banking or similar activities."*

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[4] https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.231855/asr

[5] RULING FOR 2011 FEBRUARY 15 D. Council Directive 2011/16 / EU on Administrative Cooperation for Taxation and repealing Directive 77/799 / EEC AND THE REPUBLIC OF LITHUANIA international treaties and agreements on the automatic INFORMATION EXCHANGE IMPLEME

[6] ORDER ON THE ADOPTION OF RULES FOR THE PROVISION OF INFORMATION NECESSARY FOR INTERNATIONAL COOPERATION OBLIGATIONS REGARDING AUTOMATIC EXCHANGE OF INFORMATION ON FINANCIAL ACCOUNTS 2015 November 25 No.VA-102.

While the non-reporting entities are financial institutions, which are:

*"9.1. A **government entity**, an international organization or a central bank, except in the case of a payment arising out of an obligation which in turn relates to a type of commercial financial activity carried on by a specified insurance company, custodian or deposit institution;*

*9.2. a wide-participation **pension fund**, a narrow-participation pension fund, a pension fund of a government entity, an international organization or a central bank, or a qualifying credit card issuer;*

*9.3. another **entity that poses a low risk** of being used for tax avoidance has characteristics substantially similar to those in paragraphs 9.1-9.2 and is included in the national list of entities considered as non-reporting financial institutions, provided that the status of that entity as a non-reporting financial institution does not jeopardize the achievement of the objectives of the Directive and the Common Reporting Standard;*

*9.4. an **exempt collective investment undertaking**, or*

*9.5. the **trust** is insofar as the trustee is the reporting financial institution and shall report all information required to be reported in accordance with Chapter II of these Rules on all accounts to be reported by the trust."*

As detailed in our reasoning below, EMIs, PIs (and CIs in relation to activity of issuing e-money and unregulated payment products) should not be considered depository institutions or custodian institutions. Therefore, whilst these entities may be considered "financial market participants" under the Law on the Bank of Lithuania of the Republic of Lithuania, we consider they are not in scope of the 'financial institutions' definition for the purposes of the Order, and that consequently they do not constitute 'reporting financial institution' in accordance with the definition above.

2. Issues of Concern

We would like to raise three issues of concern in relation to the scope of the CRS and FATCA implementing legislation and rules as they apply to EMIs, PIs, e-money and unregulated payment products issued by CIs.

We address the issues in terms of the DAC, as amended, 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.

2.1. Definition of Depository Institution - Annex 7 para 5 of the Order

Depository Institutions are Financial Institutions 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."[7]

We note that the term 'deposit' is neither defined in the DAC nor in the Capital Requirements Directive[8] ("**CRD IV**") and Capital Requirements Regulation[9] ("**CRR**"), which authorise and regulate CIs. Under article 66(1)(a) CRD IV only a CI is permitted to carry out *"the business of taking deposits or other repayable funds from the public"*. Article 4(1)(1) CRR defines a CI as: *"an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account"*. These articles imply that: (i) a 'deposit' constitutes funds received from a person who retains a right to have the funds repaid to him/her and the deposit taker may use the funds to grant loans to third parties in its own name as the creditor of the loans or to use for its purposes; and (ii) 'taking deposits' is the receiving of deposits and other repayable funds from the public and having the right to use the funds to grant loans to third parties or otherwise use for its own purposes.[10] We understand this to mean that CIs, i.e. banks and building societies, are clearly identified as Depository Institutions because they are authorised to take deposits.

2.1.1. Issue 1: EMIs

The authorisation, prudential and conduct of business rules of EMIs are set out in the Law on Electronic Money and Electronic Money Institutions. Article 10 (3) states that *"Any funds received by an electronic money institution from electronic money holders must be exchanged for electronic money without delay, as soon as it is technically possible. Such funds shall not constitute either a deposit or other repayable funds."* Furthermore, Article 10 (5) states that *"An electronic money institution may not conduct the business of taking deposits or other repayable funds from non-professional participants of the market."*

Therefore, EMIs do not accept deposits *"in the ordinary course of a banking or similar business"* but instead accept funds for the purpose of issuing e-money, which are used for making payments, or for the provision of payment services. Accordingly, EMIs should not be considered Depository Institutions for the purposes of the CRS and FATCA.

2.1.2. Issue 2: PIs

PIs are financial institutions that do not hold customer funds except for the purpose of the

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[7] Subparagraph A(5) Section VIII Annex I DAC. This is also the FATCA definition, which can be found in article 1(1)(i) IGA.

[8] 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.

[9] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

[10] This in keeping with the findings of the Court of Justice in paragraph 16 of its judgment in Caixa-Bank France v Ministère de l'Économie, des Finances et de l'Industrie (C-442/02).

settlement of payments. The authorisation, prudential and conduct of business rules of PIs are set out in the Law on Payment Institutions of the Republic of Lithuania. Article 4(3) of the law states that *"funds received by the payment institution from payment service users with a view to the provision of payment services shall not constitute a deposit or other repayable funds and electronic money."*

Therefore, PIs do not accept deposits "*in the ordinary course of a banking or similar business*" but instead accept funds for the provision of payment services. Accordingly, PIs should not be considered Depository Institutions for the purposes of the CRS and FATCA.

2.2. Financial Account: Definition of Depository Account

Financial Institutions that have Financial Accounts held by Reportable Persons must report these accounts under the CRS and FATCA. There are five types of Financial Account that need to be considered for the purposes of the CRS and FATCA: (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 will 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.*"[11]

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. For the reasons argued above, neither an account with an EMI representing funds held by the EMI for the purposes of issuing e-money or the provision of payment services, nor an account with a PI representing funds held by the PI for the provision of payment services will be a Depository Account because they are not deposits nor are they accounts with an insurance company.

2.2.1. Issue 3: E-money accounts provided by CIs

The Law on Electronic Money and Electronic Money regulates not only the conduct of business rules of EMIs but also the conduct of business rules of all *electronic money issuers*, which include CIs[12]. This permits some CIs not only to provide deposit-taking services to their customers but also 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

[11] Subparagraph C(2) Section VIII Annex I DAC. This is also the FATCA definition, which can be found in article 1(1)(t) IGA.

[12] Article 4(1).

the scope of the reporting obligations of the CRS and FATCA (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.

Article 2(1) of the Law on Electronic Money and Electronic Money states:

> *"1. The "electronic money" shall mean a monetary value as represented by a claim on the issuer which is issued on receipt of monetary funds (hereinafter referred to as "funds") by the electronic money issuer from a natural or legal person and has the following characteristics:*
> *1) stored electronically, including magnetically;*
> *2) is issued for the purpose of making payment transactions;*
> *3) is received by the persons other than electronic money issuers."*

Article 7 of the Law on Electronic Money and Electronic Money Institutions §states:

> "*Electronic money issuers shall be prohibited from granting of interest or any other benefit related to the length of time during which an electronic money holder holds the electronic money."*

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 as an investment.

Recital 13 EMD2[13] states:

> "*The issuance of electronic money does not constitute a deposit-taking activity pursuant to 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*[14]*, in view of its specific character as an electronic surrogate for coins and banknotes, which is to be used for making payments, usually of limited amount and not as means of saving. … Electronic money issuers should not, moreover, be allowed to grant interest or any other benefit unless those benefits are not related to the length of time during which the electronic money holder holds electronic money.*"

This supports the view that e-money is not a deposit for the purposes of the CRS and FATCA not only when the funds are held by an EMI but also when the funds are held by any electronic money issuer, including a CI. 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, i.e. a CI or an EMI.

Accordingly, e-money accounts issued by CIs are not Depository Accounts for the purposes of the CRS and FATCA.

2.2.2. Issue 4: Unregulated Payment Products

[13] The EMD2 is the legal basis for the regulation of e-money under EU law and the Law on Electronic Money and Electronic Money should be interpreted in the light of the EMD2.

[14] Please note that the CRD IV has repealed and replaced Directive 2006/48/EC. All references to Directive 2006/48/EC should be treated as references to the CRD IV.

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 exclusions set out in the EMR[15] and PSR[16], and fall outside the scope of the deposit taking.

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 accounts, unregulated payment products are not Depository Accounts because they are not deposits, nor are they accounts with an insurance company.

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.

2.3. Definition of Custodian Institution - Annex 7 para 5 of the Order

2.3.1. Financial asset

The definition of Financial Asset under the CRS is broad, and is illustrated using examples; the definition concerns investments in the form of equity, debt and other interests, which aligns with the EU law definition of financial instrument ("EU Financial Instrument") as set out in Section C Annex I to Directive 2014/65/EU ("MiFID2"), see Annex III. The examples in Section 10 VIII(A)(7) CRS do not include any means of payment in the definition.

EU E-money is defined as a claim against its issuer. It is not a means of saving, and it is not an EU Financial Instrument, so it cannot be a Financial Asset. As e-money is not a Financial Asset, it cannot be a Custodial Account.

An EMI that is only issuing EU E-money and providing payment services would not have any Financial Assets, and would therefore not be a Custodial Institution as defined above. While a CI could qualify as a Custodial Institution (as well as a Depository Institution) depending on the services it offers to its customers, its issuing of EU E-money would not constitute the offering of Custodial Accounts (or Depository Accounts).

[15] The exclusions are set out in Article 3 of the Law on Electronic Money and Electronic Money. These exclusions have been described as the limited network exclusion and the electronic communication exclusion.

[16] The exclusions are set out in Article 3(5) of the Law on Payments of the Republic of Lithuania.

List of EMA members as of April 2021:

AAVE LIMITED
Account Technologies
Airbnb Inc
Airwallex (UK) Limited
Allegro Group
American Express
Azimo Limited
Bitpanda Payments GmbH
Bitstamp
BlaBla Connect UK Ltd
Blackhawk Network Ltd
Boku Inc
CashFlows
Circle
Citadel Commerce UK Ltd
Contis
Corner Banca SA
Crosscard S.A.
Crypto.com
Curve
eBay Sarl
ECOMMPAY Limited
Em@ney Plc
emerchantpay Group Ltd
ePayments Systems Limited
Euronet Worldwide Inc
Facebook Payments International Ltd
Financial House Limited
First Rate Exchange Services
FIS
Flex-e-card
Flywire
Gemini
Globepay Limited
GoCardless Ltd
Google Payment Ltd
HUBUC
IDT Financial Services Limited
Imagor SA
Ixaris Systems Ltd
Modulr FS Europe Limited
MONAVATE
Moneyhub Financial Technology Ltd
MuchBetter
myPOS Europe Limited
OFX
OKTO
One Money Mail Ltd
OpenPayd
Optal
Own.Solutions
Oxygen
Park Card Services Limited
Paydoo Payments UAB
Paymentsense Limited
Payoneer
PayPal Europe Ltd
Paysafe Group
Plaid
PPRO Financial Ltd
PPS
Remitly
Revolut
SafeCharge UK Limited
Securiclick Limited
Skrill Limited
Snowy Pay Ltd.
Soldo Financial Services Ireland DAC
Square
Stripe
SumUp Limited
Syspay Ltd
Token.io
Transact Payments Limited
TransferMate Global Payments
TransferWise Ltd
TrueLayer Limited
Trustly Group AB
Uber BV
Vitesse PSP Ltd
Viva Payments SA
WEX Europe UK Limited
Wirex Limited
WorldFirst
WorldRemit LTD