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13 May 2021

Dear Nick

Re: EMA response to FCA CP21/3: Changes to the SCA-RTS and to the guidance in 'Payment Services and Electronic Money – Our Approach' and the Perimeter Guidance Manual

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. They also include a growing number of Payment Initiation Service Providers (PISPs). A list of current EMA members is provided at the end of this document.

I would be grateful for your consideration of our concerns.

Yours sincerely

Dr Thaer Sabri
Chief Executive Officer
Electronic Money Association

EMA response to consultation

Q1: Do you agree with our proposal to create a new SCA exemption for when customers access customer information through a TPP and add a new requirement for TPPs to check customers' consent every 90 days? If not, please explain why.

SCA Exemption (Art 10A)

1. The EMA supports the proposed new SCA exemption that applies when PSUs access their account information through an authorised third-party provider (TPP), and we agree with the FCA's objective of removing regulatory barriers in order to promote growth and competition in the emerging Open Banking sector.

2. We strongly agree that the existing SCA-RTS requirement to re-apply SCA every 90 days has created friction in the user experience and in some cases deterred the uptake and on-going use of open banking services. EMA members offering TPP services have confirmed the validity of the assessment of customer losses highlighted in the FCA's consultation; some reporting up to 50% of PSUs failing to re-authenticate at the 90-day reauthentication point.

3. We also note that this exemption will be important for supporting the funds' 'sweeping' use cases envisaged by the CMA in its Retail Banking Market Investigation Report[1], where permitting AISPs to receive continuous, unattended access to payment account information, without the need for the PSU to provide re-authentication to the bank every 90 days, will be fundamental to developing new service propositions.

4. Nonetheless, the decision to apply any of the exemptions in Article 10 of the SCA-RTS still ultimately remains with the ASPSP, and whilst we recognise that ASPSPs can - and should continue to - deny a TPP access to a customer account for reasonably justified and duly evidenced reasons relating to unauthorised or fraudulent access, the EMA is concerned that an inconsistent industry-wide application of the Article 10A SCA exemption could add to the already variable PSU authentication experience, and possibly continue to undermine the development of open banking applications.

[1] https://assets.publishing.service.gov.uk/media/57ac9667e5274a0f6c00007a/retail-banking-market- investigation-full-final-report.pdf

5. We therefore consider the proposed Article 10A exemption a welcome first step in a longer journey to fully removing regulatory barriers to the successful operation of the open banking ecosystem. We urge the FCA, along with HMT, to consider the optionality of the proposed Article 10A being applied by ASPSPs as other provisions of the PSRs and of the SCA-RTS mitigate against the risk of unauthorised access to customer data.

<u>90-day reconsent with AISP (Art 36(6))</u>

6. The EMA supports the concept of a TPP re-consent model, and agrees that the proposed 90-day re-consent model will help to ensure that PSUs must actively engage with AISPs to re-confirm their consent for them to continue to access their account(s) data.

7. However, the FCA's suggested reconsent model may not remove the possible PSU detriments that are currently present with the 90-day SCA reauthentication model. The FCA states that if a customer fails to re-confirm consent every 90 days "..*the TPP will be required to disconnect access and stop collecting data from the customer's account provider*." (paragraph 3.13, CP21-3). Where open banking applications use AIS data to assist PSUs to actively manage their financial risk - personal finance apps, accounting software, etc – there are many cases where the customer's basic requirement from the TPP is that the data should continue to be collected on an ongoing basis until they ask for it to stop. The possible failure to re-consent at 90 days, and the TPP's subsequent cessation of data collection, could still result in PSU harm - unintended overdrafts, missed payments, etc. Hence the length of consent that a PSU considers appropriate is strongly linked to the data being accessed and the TPP product or service.

8. We therefore suggest that the FCA consider a more flexible approach that enables TPPs to emphasise to PSUs that their consent can be revoked at any time, rather than prescribing a specific 90-day period for capturing reconsent for account information access.

<u>Operational impact of new SCA exemption and TPP reconsent model</u>

9. Whilst the technical and operational implementation of the proposed new SCA exemption and re-consent model is outside the scope of the SCA-RTS, the EMA notes some possible practical consequences that may arise from the changes, namely:

- Article 10 currently only allows ASPSPs to apply SCA exemptions when an AISP is accessing a limited set of account data: balance and most recent 90-day transaction history. However, in line with the FCA's expectations, ASPSPs must make the same information available to PSUs via an AISP as if they have accessed their account online directly with the ASPSP (paragraph 17.32 AD). The ASPSP will not be able to apply the Art 10A SCA exemption if the AISP is accessing data other than balance and transaction history. This limits the possible practical benefit of this SCA exemption for some TPP propositions. For example, we note that 'Sweeping' propositions[2] will rely on the TPP having automated access to data about the PSU's regular payments (Standing Orders, DDs, etc) in order to determine whether funds are sufficient to perform a 'sweep' transfer and also cover regular payments.
- The timescales that the FCA will put in place to implement the Art10A SCA exemption, have not been specified. If the timeline is 18 months, as per the proposal to mandate the use of dedicated interfaces, any objective of reducing harm to competition from 90-day re-authentication may not be achieved as the affected AISPs may have already left the market by that point.

10. To ensure an industry-wide consistent interpretation of the proposed SCA-RTS changes to Articles 10 and 36, we request that the FCA add further guidance and clarifications in Chapter 17 of the AD. This will mitigate against the risk of the introduction of operational issues that run counter to the objectives of the new SCA exemption and reconsent model. For instance, Paragraphs 17.57 and 17.133 of the AD could be updated to reinforce that ASPSPs should not seek confirmation that AISPs have conducted re-consent in accordance with Art 36(6). Paragraph 17.77 could be expanded to explain the FCA's expectation on the form of re-consent that the AISP captures (i.e. does reconsent have to be in the same form as the initial consent).

Q2: Do you agree with our proposal to mandate the use of dedicated interfaces for TPP access to retail and SME customers' payment accounts and with our proposed timeline for doing so? If not, please explain why.

11. The EMA supports the intention of the proposed changes to the SCA-RTS to mandate the use of dedicated interfaces to facilitate TPP access to payment accounts, and we

[2] As defined by the CMA in https://assets.publishing.service.gov.uk/media/57ac9667e5274a0f6c00007a/retail-banking-market- investigation-full-final-report.pdf

agree that the existing provision of MCI interfaces by some ASPSPs has proved challenging for TPPs, and therefore affected the customer experience of open banking. Looking towards the future benefits of Open Finance, we agree that the FCA should facilitate the emergence of a robust, fit-for-purpose payment account access ecosystem so that third-party providers (TPPs) can rely on interfaces provided by ASPSPs to deliver new products and services.

Payment accounts in scope

12. The EMA welcomes the FCA proposal to limit the type of payment accounts - that are required to be made accessible through a dedicated interface - to accounts which fall within the Payment Account Regulations 2015 such as personal and SME 'current accounts' and credit card accounts held by consumers or SMEs.

Definition of Modified Customer Interface (MCI)

13. The definition of MCI is unclear. We understand the FCA's definition of an MCI to be referring to ASPSPs providing TPP access to accounts via an existing customer interface such as online banking. In light of the FCA's reference to the reduced security of accessing payments accounts in this manner (paragraph 3.19), we also construe that the FCA may be referring to TPP use of 'screen-scraping' access to accounts when an MCI is deployed.

14. Similarly, we note the FCA's assumption that dedicated interfaces are typically API-based (paragraph 3.18). However, there are instances where ASPSPs have implemented APIs for their customer interfaces; and their MCI is in fact an adapted API. In this case, the MCI would meet the general obligations for a TPP access interface (Art 30, SCA-RTS), but would not be 'dedicated' for TPP-only access.

15. We would welcome clarification from the FCA on whether the updated Art. 31of the SCA-RTS is intended to introduce the requirement for ASPSPs to always provide ***separate*** interfaces for TPP access. Given that the original intent was that the SCA-RTS would "*ensure technology and business model neutrality*" (PSD2, Art 98 (2)(d)), we would suggest that it would not be proportionate for ASPSPs to have to provide stand-alone TPP access interfaces if they were already providing API-based MCI access for TPPs (with good availability, stability, and performance). We also note that API-based MCI interfaces are inherently reliable access interfaces as they provide the primary business interface that services all users and customers, not just TPPs.

16. Instead, we assume the FCA's intention is to move UK ASPSPs towards standardised programmatic account access interfaces to reduce the operational complexity and cost for TPPs in maintaining multiple different types of technical connections across all account providers. We therefore suggest that the FCA further elaborate on the intended meaning of a 'dedicated interface' to clarify how an ASPSP (with in-scope accounts) can comply with Article 31(2).

17. One approach the FCA could take is to define a minimum set of requirements for account access interfaces (for accounts within the scope of Art 31(2)), regardless of whether they are classified as 'dedicated' or 'MCI'. These could include criteria that would address some of the issues with current MCIs that TPPs have identified, such as ensuring that the interface supports TPP access without PSU re-authentication (where an exemption applies).

Time to implement changes

18. With regards to the proposed 18-month implementation period for ASPSPs to migrate from MCIs to dedicated interfaces, we agree that this is likely to be sufficient for large ASPSPs. However, the capacity of small to medium ASPSPs to implement IT change has been significantly impact by the COVID-19 pandemic; a focus on maintaining operational resilience has resulted in a backlog of changes to implement in 2021. We would therefore suggest that the FCA increase the implementation period to 2- 3 years (from the point at which the guidance is published).

19. To further ensure continuity of live-services to PSUs during the transfer to new account access interfaces, we also suggest that ASPSPs transitioning from MCIs ensure adequate resource is available to support TPP migration during the implementation phase and before MCI access is decommissioned. Otherwise, TPPs and PSUs could be faced with a cliff-edge with a number of ASPSPs preventing MCI access before PSUs have migrated to the new interface.

20. As experience within the UK's OBIE programme has illustrated, any technical migration has to be managed collaboratively by both the ASPSPs and TPPs to minimise the impact on PSUs.

Cost benefit analysis

21. We note the estimates of one-off/ongoing costs incurred by ASPSPs that transition from MCIs to dedicated payment account access interfaces that are detailed in Annex 2 of the CP (Cost Benefit Analysis). According to the CP, the source of cost estimate data is the Open Banking Implementation Entity (OBIE) rather than ASPSPs that are currently exposing an MCI to satisfy payment account access requirements. In this context, it is not clear to us that the cost estimates listed here reflect the total costs incurred by such ASPSPs to address related activities (development costs, maintenance/certification, migration/transition to a dedicated interface, dedicated TPP support service framework, Contingency/fallback Mechanism exemption application).

Q3: Do you agree with our proposals to only require ASPSPs to make the technical specifications and a testing facility available at market launch of the interface, and to delay the need for a fallback interface for six months from the point of launch? If not, please explain why.

Technical Specifications and Testing Facility (Art 30 (3) and (5))

22. The EMA agrees that the requirement for ASPSPs to release technical specifications and provide a testing facility for TPPs 6 months in advance of launching a product or service may have impacted account providers' ability to operate in a rapidly evolving ecosystem.

23. In any case, from the TPP perspective, the length of time that technical documentation and testing facilities are available is less of a challenge at present than the usefulness of the testing facilities that are provided by ASPSPs. The experience of EMA Members suggests that often testing facilities do not fully replicate live production environments, rendering them inappropriate for TPP testing purposes.

24. As TPPs frequently rely on testing in a live environment, testing can only be undertaken effectively once a product or service has been launched in the market. Unfortunately the FCA's proposed change to Art 30(5) does not address this underlying issue by requiring fit for purpose testing facilities and removes any opportunity for TPPs products and services to remain aligned with new account product or service launches. This gives ASPSPs that also provide TPP services a distinct competitive advantage in being able to launch a new payment account-based

product at the same time as their AIS/PIS services based on those accounts, whilst TPPs will always have to lag behind in launching their AIS/PIS services that access those accounts.

25. We therefore suggest a compromise, where technical documentation and testing facilities are provided by ASPSPs 3 months in advance of a product or service market launch. Thus, aligning with the requirements in Art 30(4) where specification changes to access interfaces are made available 3 months in advance of the change, whilst allowing TPPs the opportunity to offer their services on a par with an ASPSP who also offers TPP services. We recognise that the success of this measure is contingent on ASPSP's testing facilities aligning with live environments.

26. Hence we also urge the FCA to take appropriate supervisory action where TPPs report poor quality testing facilities provided by ASPSPs.

Provision of fallback interface – Art 33(5)

27. The EMA agrees that it is reasonable to require ASPSPs to provide a fallback interface 6 months after the market launch of a product or service. However, the EMA observes that if the FCA's proposal that documentation and testing facilities are only available from market launch of an ASPSP's products or service, it may be difficult for ASPSPs to achieve the 'widely used' test (Art 33 (6(c)) required to gain an exemption from providing a contingency mechanism within a 6-month period.

Q4: Do you agree with our proposal to treat exemptions from setting up the contingency mechanism fallback interface granted by home state competent authorities, to ASPSPs with temporary authorisation, as though they were granted by the FCA? If not, please explain why.

28. The EMA welcomes the efforts by the FCA to closing a regulatory gap that has existed following the end of the Brexit transition period (31 December 2020), where exemptions from the requirement to provide a contingency mechanism (Art 33(6) SCA-RTS) granted to EEA-ASPSPs by their home state regulator have become ineffective if they are operating in the UK within the temporary permissions regime (TPR) or supervised run-off (SRO) regime.

29. We also understand the practical benefits of continuing to deem EEA-ASPSPs operating in the UK as having been exempted by the FCA, and that the FCA will exercise its supervisory powers over firms within the TPR or SRO if it identifies issues with a dedicated interface.

30. However, we note that the previous practice in some EU members states of granting exemptions to all ASPSPs providing a dedicated interface to payment accounts has resulted in some EEA-ASPSPs gaining an exemption which may not have been granted had it been sought from the FCA in the UK.

31. In some cases, the exemption has led to EEA-ASPSPs preventing UK TPP access to accounts via the PSU interfaces when dedicated interfaces are unavailable. As a result, some UK TPPs have experienced barriers to accessing accounts at EEA-ASPSPs, when poorly performing dedicated interfaces are not supported by adequate fallback interfaces.

32. We urge the FCA to monitor TPP notifications of sub-optimal performance/availability of the dedicated payment account access interfaces of EEA-ASPSPs that operate in the UK under the TPR or SRO regimes and to take appropriate supervisory action, when appropriate.

Q7: Do you agree with the proposed changes to SCA? If not, please explain why.

33. We agree with the FCA proposed changes to SCA.

34. In addition, we would also recommend that the FCA allow the use of SCA implementations that leverage the delivery of a One-Time Password (OTP) via email as a fall-back option for customers that are not able to receive an OTP via SMS. Such a mechanism could be leveraged in Use Cases where customers have poor network reception, or do not have access to a mobile phone. It can also offer a useful alternative for completing SCA for corporate card users that may not have access to a company-issued mobile phone.

35. We would also support a wider interpretation of “users” of corporate payment processes under SCA-RTS Article 17 (Secure corporate payment processes and protocols), than set out in paragraphs 20.62 – 20.68. Paragraph 20.63 limits the users of such an exemption to “legal persons”. This limitation will disrupt the business operations of EMA members that offer access to corporate payment processes to unincorporated entities (e.g. government departments, NHS Trusts, partnerships such as solicitors who pay suppliers, cooperative corporations etc.). We suggest this limitation should undergo further review.

Q8: Do you agree with our proposal to incorporate our temporary guidance in our AD to make the guidance permanent? If not, please explain why.

36. We welcome the updated guidance, but have a number of issues that we would like to raise as set out below.

37. Paragraph 10.29 states that where funds paid in using a payment instrument, and benefitting from the 5 day allowance, have not yet been received from a customer, but e- money is issued, safeguarded funds should not be made available to a card scheme.

    We do not support this interpretation; as an EMI’s safeguarded funds are fungible, and the rules must not distinguish card scheme obligations from obligations to other e-money holders. Furthermore, it is not possible to A request for redemption from a card scheme should be treated no differently from the request for redemption from another type of customer. The five-day allowance is always a factor influencing the size of the asset pool, irrespective of the manner in which the redemption requests arises and irrespective of the identity of the redeeming customer. In other words, payment instrument funding will always result in a shortfall pending settlement, and this is contemplated by the drafters of the legislation. The redemption obligation is one that needs to be met immediately, and the 5 day allowance did not restrict the ability to redeem from the asset pool. It is also doubtful that the daily request for redemption from a card scheme could be traced back to specific funding transactions for specific products. This obligation is disproportionate and impractical and we urge the FCA to reconsider.

38. Paragraph 10.48 introduces the requirement for a letter from the CI at which an EMI or PI's funds are safeguarded to acknowledge that the funds are held as trustee. An alternative is offered where the firm can demonstrate that the CI or custodian has no right, interest or recourse over the funds, and is aware that the funds are held on trust. We have previously argued and do so again here that funds safeguarded by an EMI are the property of the EMI, that the claim against the issuer is a claim against it in person and is not a proprietary claim against the funds, Whilst the FCA disagrees with this view, it is important that the validity of this interpretation be recognised, and some allowance be provided for firms that do adopt this approach. To this extent, the text that was set out in the FCA's Feedback and guidance response to the consultation (paragraph 3.5) did not require the word 'trust' to be used, and we urge the FCA to revert to that position.
    We will address the FCA again on this issue in the coming weeks.

Wind-down planning

39. We support the proposed new guidance on wind-down planning, but suggest further clarification and possibly review would be welcome. In particular we noted the lack of proper distinction between the wind-down *plan*, which documents the final outcome of the planning process, and the overall wind-down *framework*, which includes the related governance, processes, and the reporting of relevant wind-down metrics underpinning timely decision-making based on realistic wind-down (and insolvency) triggers.

Wind-down plan contents (Paragraphs 3.73 – 3.75)

40. We support paragraph 3.73, and would only comment that it does not appear to complement in any substantial manner existing FCA guidance.
41. We welcome the FCA's emphasis on proportionality in paragraph 3.74 of the Annex, including in relation to the annual and any ad-hoc reviews.

42. In relation to section 3.75 we agree that risks related to a firm being part of a group should be addressed and reflected in a wind-down plan. However, the FCA guidance should also acknowledge that the analysis should be properly balanced and also take into account the considerable financial and operational strength that can be gained from being part of a group. Given the FCA's objective of reducing harm to UK customers and the UK system we suggest the Guidance calls on firms to take account of this throughout a wind-down and/or insolvency process.

43. When reviewing this section, we would also encourage the FCA to clarify what is meant by “resolution risk”, which remains undefined in the FCA’s wind-down planning Guide (WDP-G) and Final Guidance on Adequacy of Financial Resources (AFR).

44. Finally, the first sentence of section 3.75 refers to the need for wind-down plans to "*consider ... liquidity, operational and resolution risk in a solvent and insolvent scenario*". That same reference to solvent and insolvent scenario recurs in CP 21/3 section 5.17 and 3.73. The relevant sentence reads: *“The wind-down plan should consider the winding-down of the firm’s business under different scenarios, including a solvent and an insolvent scenario.”* This reference and sentence appear to blur the distinction between two concepts that are clearly distinguishable in the FCA’s Wind-down planning guide (WDP-G) and in its final guidance on Adequacy of Financial Resources (AFR).

    The first requirement i.e. that “(*t)he wind-down plan should consider the winding-down of the firm’s business under different scenarios*” should not be confused with the requirement to develop and analyse firm-specific wind-down scenarios. The latter is a key element of wind-down planning and discussed as such in section 3.3 of the WDP-G on “Wind-down scenarios; what would make a firm no longer viable?” These wind-down scenarios are scenarios leading to the firm no longer being viable, and as a consequence being forced into wind-down. In contrast, the winding-down scenarios referred to in the quoted sentence are about a firm’s wind-down process possibly failing to deliver an orderly (i.e. solvent) wind-down, resulting in the firm being forced to launch insolvency proceedings.

45. The FCA’s use of similar terms (wind-down scenario and winding-down scenario) for these two fundamentally different matters, processes and phases in the life-cycle of a firm, is unhelpful.

46. In addition, the sentence specifying that the winding-down scenarios under consideration should include a “*solvent and insolvent scenario*” is even more confusing. According to the FCA’s WDP-G it is the very objective of a wind-down plan to ensure an orderly (i.e. solvent) wind-down and hence avoiding an insolvent wind-down; this is the purpose of a wind-down plan. It seems unnecessary to

reiterate that wind-down plans should consider what they are already designed to deliver.

47. Accordingly, we would urge the FCA to drop any reference to winding-down scenarios (as opposed to wind-down scenarios) as well as any references to solvent and insolvent (winding-down) scenarios. If a firm has produced a proper wind-down plan, and if a proper wind-down planning framework with the required processes for developing and reviewing the wind-down plan, the necessary governance, and reporting of wind-down metrics is in place, then the firm is prepared for an orderly (i.e. solvent) wind-down, and for drawing on the insights gained from the wind-down planning for insolvency, should that occur.

Q9: Do you agree with our proposal to consolidate in our AD, our guidance on safeguarding insurance as set out in our letter of December 2019 to firms' compliance officers and that we also apply that guidance to the guarantee method of safeguarding? If not, please explain why. 31 CP21/3 Annex 1 Financial Conduct Authority Changes to the SCA-RTS and to the guidance in 'Payment Services and Electronic Money – Our Approach' and the Perimeter Guidance Manual

48. Paragraph 10.59 Adds wording on conditions of policy: must pay out under all conditions, including fraud or negligence by PI/EMI, employees or directors or something outside of its control. We are very doubtful that any insurer would contemplate underwriting a policy with such unreserved conditions that would include fraud and negligence by the firm. Given that that these risks are features of the segregation approach to safeguarding, we do not see why the insurance method should be required to insure for these risks.

49. Given the barriers this creates for the adoption of the insurance method, and given that the legislator had provided for this method to be a valid approach, we do not believe that it is proportionate or reasonable for the FCA to place such restrictions on the choices available to issuers. We urge the FCA to reconsider this provision, and to align the insurance risk exposure with that for segregated safeguarding.

Q10: Do you agree with the proposed changes to the sections in chapter 6? If not, please explain why.

50. We agree with the proposed changes to the sections in Chapter 6. However, we would welcome further guidance or clarity in the following areas:

PRIN

51. References to the Principles for Business are limited in the revised version of the AD. We consider it would be helpful for the FCA to create a chapter in the AD dedicated to the Principles. This would be helpful to EMIs and PIs as these entities are recently subject to the Principles.
52. We would welcome further guidance, clarification and examples with respect to the Principles in the AD as follows:

Principle 1: A firm must conduct its business with integrity.

53. Does 'integrity' have its ordinary meaning? Or does this principle result in addition obligations by the firm?
54. At paragraph 3.27 of CP18/21, the FCA stated that no additional requirements (in addition to those requirements set out in the PSR and EMR) were intended; however, the application of this principle gives the FCA the ability to better supervise and enforce.
55. Accordingly, it would be helpful if the AD could confirm this position (i.e. that firms do not incur any additional obligations as a result of the application of this principle).

Principle 2: A firm must conduct its business with due skill, care and diligence.

56. Please note that EMIs and PIs are already subject to authorisation and registration conditions that impose similar requirements such as the firm has robust governance arrangements [PSR 6(6)(a)], that responsible persons (like directors) are fit and proper [PSR 6(7)(a)] and that the firm has a business plan in place to operate soundly [PSR 6(7)(c)].
57. It would be helpful if the AD could clarify whether this principle will result in in additional obligations on EMIs and PIs (in addition to those obligations set out in the paragraph above that arise from the conditions of their authorisation).

Principle 3: A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems

58. A firm is already required under the PSR to have in place the following as conditions of authorisation:

(a) robust governance arrangements for its payment service business, including a clear organisational structure with well-defined, transparent and consistent lines of responsibility;

(b) effective procedures to identify, manage, monitor and report any risks to which it might be exposed;

(c) adequate internal control mechanisms, including sound administrative, risk management and accounting procedures, which are comprehensive and proportionate to the nature, scale and complexity of the payment services to be provided by the institution. [PSR 6(6)]

59. Additionally, a firm is also required under the PSRs to carry out audits [PSR 24], comply with the list of conditions with respect to its outsourcing arrangements as well as notifying the FCA of an outsourcing arrangement [PSR 25], keep records for 5 years [PSR 31] and remain ultimately liable for the conduct of any entity to which they outsource activities [PSR 36].
60. Paragraph 3.29 of CP18/21 provides: *The application of Principle 3 to PIs, EMIs and RAISPs articulates a requirement around the reasonable care that firms must take, including when carrying on activities that are connected to the provision of payment services and issuing of e-money, but outside the scope of the PSRs and EMRs*.
61. It would be helpful if the AD could clarify if any additional obligations are placed on EMIs and PIs as a result of this principle (in addition to the conditions of authorisation set out above). It would also be helpful if the AD could elaborate on paragraph 3.29 of CP18/21, especially the phrase in bold, as well as giving practical examples.

Principle 4: A firm must maintain adequate financial resources

62. An EMI and PI are subject to capital requirements in the EMR and PS respectively and are required to maintain at all times, own funds equal to or in excess of certain amounts. [PSR 22 and EMR 19]
63. In paragraph 3.31, CP18/21, the FCA stated that by extending the application of Principle 4 to EMIs and PIs, it does not propose to impose any additional capital requirements above those contained in the PSR and EMR.
64. It would be helpful if the AD could confirm this position (i.e. that no addition requirements with respect to maintaining adequate financial resources arise due to this principle).

Principle 5: A firm must observe proper standards of market conduct

65. Paragraph 3.3 of CP18/21 provides: We would expect firms to observe relevant legislation, as well as EBA Guidelines with which they are already required to comply, and to take into account other accepted market practice or agreed industry guidance.
66. It would be helpful if the AD could give (i) examples of such accepted market practice and agreed industry guidance; and (ii) examples of the FCA's expectations in terms of what is considered non-compliance. In other words, to what extent does the FCA consider accepted market practice / agreed industry guidance to be a requirement or basis for enforcement?

Principle 7: A firm must pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair and not misleading

67. Firms are already aware as to their regulatory obligations with respect to communicating with customers, such as the following requirements from the PSR:
    - Contractual information must be provided to the customer in good time before the customer is bound by the framework contract. [PSR 48]
    - Contractual information and the terms of the framework contract must be provided upon the customer's request during the term. [PSR 49]
    - A PSP must give a customer two months' notice of a change to the framework contract with an immediate termination right in favour of the customer if they do not agree to the changes. [PSR 50]
    - A PSP must provide certain information to the payer / payer on individual payment transactions [PSR 53 and 54]
    - Any information provided to a customer must be (i) in an easily accessible manner, (ii) on paper or another durable medium (iii) in easily understandable language and in a clear and comprehensive form and (iv) in English or in the language agreed between the parties. [PSR 55]
68. It would be helpful if the AD gave some examples of what the FCA considers to be misleading, other than straightforward examples that firms are already familiar with. For example, firms are familiar with previous examples such as advertising e-money accounts as bank accounts or advertising products and services as 'free'. It would therefore be helpful to understand from the AD what types of representations the FCA considers to be fall below the standard required by principle 7 (in addition to familiar examples).

Principle 8: A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client

69. It would be helpful if the AD could clarify whether EMIs and PIs should follow the rules and guidance set out in SYSC 10 or, alternatively, if EMIs and PIs are held to a different standard with respect to managing conflicts of interest.
70. It would also be helpful if the AD set out some strategies that EMIs and PIs could employ to manage conflicts of interest including strategies the FCA consider effective.

Principle 9: A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely on its judgment

71. Paragraph 3.40 of CP 18/20 provides that the advising on payment services or e-money is not a regulated activity under the PSR or EMR and there are no requirements on the suitability of advice. Principal 9 has been applied to EMIs and PIs to address this gap.
72. As set out in the same paragraph, we further note that this principal does apply to an EMI / PI giving product recommendations and is not limited to investment-related advice.
73. It would be helpful if the AD could clarify what risk the FCA seek to mitigate by applying principle 9. Understanding the rationale behind the principle will enable firms to better comply. E-money does not have the same risk profile as investments (i.e. its value does not fluctuate and can be redeemed at par value, at any time); it is not clear in what context a customer could be negatively affected by relying on a firm's advice in relation to obtaining an e-money product. If the AD could elaborate on how this principle applies in practice – that would be helpful to firms.

Principle 10: A firm must arrange adequate protection for clients' assets when it is responsible for them

74. Paragraph 3.14 of CP 18/21 provides that by extending the application of the Principles to PIs and EMIs, the FCA do not propose additional requirements to the PSRs and EMRs, particularly in relation to the safeguarding of customers' funds. It would be helpful if this position could be confirmed in the AD.

Principle 11: A firm must deal with its regulators in an open and co-operative way, and must disclose to the FCA appropriately anything relating to the firm of which the FCA would reasonably expect notice

75. We note that PRIN 1.1.5 and 1.1.6 provides that principle 11 extends to a firm's world-wide activities and takes into account the activities of the firm's group. It would be helpful if the AD set out the FCA's expectations with respect to the extent of this principle. In relation to 'worldwide activities', does this extend to unregulated service outside the ambit of the FCA? In relation to taking into account the activities of the firm's group, does this extend to other group entities' dealings with their respective (non-UK) regulators? If so, what is the expected level of FCA involvement in those dealings? We would welcome clarification in this respect.
76. Please note that EMIs and PIs have existing reporting obligations such as:
    - Duty to notify changes with respect to a firm's authorisation [PSR 20]
    - Duty to notify a change in circumstances [PSR 37]
    - Major operational or security incident reporting [PSR 99]
    - Reporting requirements [PSR 109]
77. Paragraph 3.42 of CP 18/21 provides that the application of this principle to EMIs and PIs does not result in any additional reporting or notifications (above those existing obligations set out in the PSR / EMR). It would be helpful if this position was confirmed in the AD.

BCOBS

78. We note the amendments to paragraph 8.19 and 8.24 in the revised version of the AD, which confirms that EMIs and PIs fall within the scope of BCOBS2, and sets out, at a high level, to what the BCOBS rules relate. There are few other additions relating to BCOBS.
79. EMIs and PIs are aware of the extended scope of BCOBS2 (applicable as of August 2019). In addition, it would be helpful to include practical guidance and examples of the FCA's expectations of EMIs and PIs with respect to their obligations under BCOBS2. For example, some more obscure examples of representations the FCA considers to be non-compliant with 'fair, clear and not misleading'.

Reporting requirements

80. In relation to the development of separate FIN060 reports, members have raised a number of issues with the reporting form FIN060:

- It is unclear how an EMI who also carries out AIS and PIS as unrelated payment services should deal with Section 4 on capital requirements for unrelated payment services. AIS and PIS services are covered by professional indemnity insurance rather than ongoing capital requirements. We assume this means that the calculations should not be completed where the only unrelated services are AIS and PIS. However, neither the form nor the guidance notes provide clarity on this point.
- The process of validating the form is extremely burdensome. Many of the data items will only accept specific figures based on previously entered figures. However, the form does not auto-populate these data items. Instead, the firm is required to calculate the figures based on validation rule prompts. The form should be updated to auto-calculate the figures and input them.
- The form still requires entry in Euros for the majority of value data items. This should be changed now the post-Brexit transition has completed.

Information sharing from ASPSPs to TPPs

81. In relation to the sharing of data from ASPSP to TPP, we strongly support the provision of guidance to ASPSPs that they are required to share the name of the account holder with TPPs. We do not consider that this fundamental requirement should be contingent on whether the ASPSP provide that data to the customer in their online account. The FCA should require ASPSPs to provide the full name they have on file (and have verified as correct) to the TPP. This will unlock a range of innovative services that can be provided by TPPs in the verification, identity and AML sector.

Q11: Do you agree with proposed Brexit-related changes to our AD? If not, please explain why.

82. The EMA welcomes the new Chapter 6 in the AD, aimed at providing guidance to EEA PSPs that are operating in the TPR or FSCR and providing payment services and/or issuing e-money in the UK. Please find our specific comments on chapter 6 below. In general, we would urge the FCA to ensure that all guidance for firms with temporary permission is consistent across all FCA channels, in particular, direct communications to firms and through the FCA website. We have noted a number of instances where the FCA's guidance in the AD would appear to vary from previously issued policy and guidance for TA firms.

83. In addition, we seek further clarification from the FCA regarding the interpretation and application by TPR and SRO firms of some of guidance in several chapters of the AD. Our comments are set out below against the table in paragraph 6.18 of the AD for cross referencing.

Chapter 6

Notifications to the FCA (Paragraphs 6.24 – 6.29)

84. We note that TA firms must refer to Chapter 13 for additional notification requirements and understand that TA firms have access to Connect. Chapters 6 and 13 do not provide clarity regarding when TA firms should be using Connect to notify the FCA, or the dedicated email address to use to for Exit SI notifications, or indeed whether firms should go via the FCA contact centre. In addition, it unclear whether TA firms should submit duplicate notifications to the FCA when informing their home-state regulator under EMD or PSD2; particularly,

- Notification of major operational or security incidents
- NOT003 – AIS/PIS denial
- NOT005 - Problems with a dedicated interface (SCA-RTS Article 33(3))

85. To assist TA firms to navigate the FCA's notification process, we suggest that Chapter 6 provides a clear mapping of each type of notification required and the route (email/Contact Centre/Connect) for submission.

Safeguarding (Paragraph 6.30)

86. The Exit SI requires that TA firms may have to provide the FCA with evidence that they comply with home state safeguarding requirements. (Sch 3 Exit SI Art 6 (3) and Art 18 (3)). Previous FCA policy statements explained that that this evidence requirement could be met, for instance, by providing a letter from the PI/EMI's bank providing their safeguarding account, and further explained that PIs and EMIs will not be restricted to holding a safeguarding account (or having equivalent arrangements) in the UK, provided they meet the requirements of the amended PSRs/EMRs. (Para 5.8 and 5.9, in FCA CP18/29).
87. We would welcome inclusion of previous safeguarding guidance to TA firms in the updated AD.

Exiting the TPR - Entering the SRO at point of authorisation (Paragraph 6.43)

88. The FCA previously communicated that when firms gain full UK authorisation they will leave the TPR regime at the point at which the FCA has determined the application (the day before the date stated in the written notice provided to the firm). (Para 7.48, PS19/05). We note that paragraph 6.43 of the AD would appear to enhance this policy and offer firms establishing a subsidiary in the UK, after gaining full authorization, the option to transition to the SRO in order for the subsidiary to become fully operational. The EMA supports the flexibility this affords to firms, but requests that the AD guidance sets out all options available to firms when exiting the TPR.

Miscellaneous

89. We note several miscellaneous typos (6.42 & 6.43) with regards to paragraph numbering at the end of the chapter.

Paragraph 6.15 – cross reference with each chapter of the updated Approach Document

Chapter	FCA Comment	EMA Comment
4. Changes in circumstances	This chapter is relevant to TA firms. References to EMIs, PIs and RAISPs in this chapter are deemed to include TA firms except where stated otherwise. Note that some of the notification requirements do not apply to TA firms and that there are additional notification requirements set out in this Chapter 6.	**<u>Notifications</u>** Changes to this chapter are in line with the notification obligations of Exit SI (Reg 6 and 18 of Schedule 3, Exit SI) and obligations for TA firms to notify the FCA about any changes to information provided previously or to the firm's operations. We note: Changes affecting Controllers/Close links, which might affect the conditions of supervision (Para. 4.33), should also be notified to the FCA. We would welcome further clarification on when TA firms should advise the FCA in this regard, and whether this means TA firms have to notify the FCA at the same time as informing their home state regulator. Subsequently, the guidance on the method of notifying (Para.4.35) the FCA, appears to be in the wrong position. It also states that TPR firms should notify the FCA via the contact centre.

Chapter	FCA Comment	EMA Comment
		Please see our previous comments on Chapter 6 about providing a simplified overview of notification obligations and requirements.
5. Appointment of agents and use of distributors	This chapter is relevant to TA firms when appointing new agents. References to EMIs, PIs and RAISPs in this chapter are deemed to include TA firms.	• **Approval** (Para. 5.29) – the updated wording of this paragraph seems out of date as it refers to TA firms registering Agents before the end of transition period.
7. Status disclosure and use of the FCA logo	This chapter is relevant to TA firms. References to EMIs, PIs and RAISPs in this chapter are deemed to include TA firms.	• **Missing guidance** – previous FCA Brexit policy statement (PS19/05) included specific guidance on disclosure requirements for TPR firms (paragraphs 7.60-7.64). It would be useful to confirm if previous disclosure guidance still applies to all TA firms. • **Annex 3 – example disclosure text** - seems to be missing from the draft, but providing example text for TA EMI/PI firms would be helpful.
10. Safeguarding	This chapter is relevant to TA firms. References to EMIs, PIs and RAISPs in this chapter are deemed to include TA firms except where stated otherwise.	• **Previous guidance:** see safeguarding comments on Chapter 6
11. Complaints handling	This chapter is relevant to TA firms. References EMIs, PIs and RAISPs in this chapter are deemed	This chapter provides useful guidance to TA firms that are now included within the compulsory jurisdiction of the FOS for complaints received from eligible UK complainants. One area that would benefit

Chapter	FCA Comment	EMA Comment
	to include TA firms and references to credit institutions are deemed to include those with temporary authorisation.	from further explanation relates to Complaints Reporting requirements. We note that paragraphs 11.23 to 11.26 on Complaints Reporting directions do not exclude TA firms from the complaints reporting requirements (this is also reflected in the FCA Handbook DISP 1.10, 1.10A and 1.10B which also applies to TA firms). Further explanation of the procedures for TA firms to meet these obligations is required; in particular, the method for submitting reports (email or Gabriel/Regdata), when reporting periods will commence, and the date of first submission. We understand that TA firms do not have access to Gabriel/Regdata for the submission of reporting.
13. Reporting and notifications	This chapter is relevant to TA firms. References EMIs, PIs and RAISPs in this chapter are deemed to include TA firms and references to credit institutions are deemed to include those with temporary authorisation.	<u>Regular Reporting</u> The FCA previously stated that a regular reporting regime for firms with temporary permissions would not be created, and TA firms could continue to report or provide information to their home state regulator, subject to Principle 11 (Para 7.15, PS19/05). EEA EMIs or PIs operating in the UK under the right of establishment (Branch passport) with existing FCA reporting obligations would continue. (Para 7.16, PS19/05) The sentence "*References to EMIs, PIs and RAISPs in this chapter are deemed to include TA firms",* and further guidance in the FCA Handbook (GEN 2.2.36 (9)-(13) and *SUP16.13 & 16.15)* does not give a clear statement on which reports are required by TA firms, in particular EEA EMIs and PIs that were previously operating without a branch (cross border services passport). Further clarification in this chapter (13) would aid EEA EMIs and PIs to navigate the regulatory reporting

Chapter	FCA Comment	EMA Comment
		requirements. In particular with regards to Complaints Reporting as discussed in comments under Chapter 11. We note that TA firms do not have access to Gabriel/Regdata for the submission of reporting. <u>Notifications</u> As noted in our comments on Chapter 6, further clarification is required on whether TA firms should submit duplicate notifications to the FCA when informing their home-state regulator under EMD or PSD2; particularly, guidance on when TA firms should submit: • 'Notification of major operational or security incidents' if they affect UK customers; and • NOT003 – AIS/PIS Denial • NOT005 – problems with a dedicated interface (SCA-RTS 33(3), where access to UK customer accounts is provided As stated in Chapter 6 (para. 6.24), TA firms have additional notification requirements depending on which regime they are participating in. Additional explanation in Chapter 6 or 13 on which notification forms apply to each regime would be helpful. As suggested, for ease of reference it may be easier to include the details of TA specific notification obligations and procedures in Chapter 6.
15. Fees	This chapter is not relevant to TA firms, information on fees applicable to TA firms	This Chapter ***<u>is</u>*** relevant to TA firms as paragraphs 15.4 and 15.5 have been updated to refer to the TA firm fee structures. The Chapter 6 (paragraph 6.15) reference table should be updated.

Chapter	FCA Comment	EMA Comment
	is **set out in this Chapter 6.**	
17. Payment initiation and account information services and confirmation of availability of funds	This chapter is relevant to TA firms. References EMIs, PIs and RAISPs in this chapter are deemed to include TA firms and references to credit institutions are deemed to include those with temporary authorisation. Note that References to ASPSPs include credit institutions, PIs and EMIs that are TA firms where they are the account provider	We note this chapter has been updated to reflect the proposals that TA ASPSPs (providing in-scope accounts) will be excluded from the UK SCA-RTS requirement to provide a dedicated interface (para.17.81) and can maintain home-state exemption from providing a fallback interface whilst in the temporary regime (para. 17.94). The EMA will provide comments on these proposals under responses to Q 2 and 4 of the FCA consultation.
19. Financial crime	This chapter is relevant to TA firms. References to EMIs, PIs and RAISPs in this chapter are deemed to include TA firms.	We recognise that the application of the UK Money Laundering regime to each TA firm's business will depend on the activities and services offered in the UK. However, a high-level explanation of when the FCA may become the 'supervisory authority' for TA firms, or links to further information would clarify when TA firms will have to apply this chapter to their UK business and would be beneficial.
20. Authentication	This chapter is relevant to TA firms. References EMIs, PIs and RAISPs in this chapter are deemed to include TA firms and references to credit institutions are deemed to include	The EMA will provide comments on this chapter under Q 5, 6, 7 of the consultation response.

Chapter	FCA Comment	EMA Comment
	those with temporary authorisation.	

Q12: Do you agree with our proposed changes to PERG on the scope of the LNE and ECE? If not, please explain why.

90. We have extracted the relevant sections of Q40 and provided our comments underneath each applicable section.

Q40. Which types of payment card could fall within the so-called 'limited network' exclusion (see PERG 15, Annex 3, paragraph (k))?

The "limited network" exclusion forms part of a broader exclusion which applies to services based on specific payment instruments that can be used only in a limited way and –

(a) allow the holder to acquire goods or services only in the issuer's premises;

(b) are issued by a professional issuer and allow the holder to acquire goods or services only within a limited network of service providers which have direct commercial agreements with the issuer;

(c) may be used only to acquire a very limited range of goods or services; or

(d) are valid only in the United Kingdom, are provided at the request of an undertaking or a public sector entity, and are regulated by a national or regional public authority for specific social or tax purposes to acquire specific goods or services from suppliers which have a commercial agreement with the issuer.

It is an overarching requirement for the exclusion to apply that the payment instrument can only be used in a 'limited way'. This means that even if a payment instrument could be said to fall under one of the paragraphs (a) to (d) above, it may not qualify for the exclusion if, on a reasonable view, it is not sufficiently limited.

91. This interpretation is not supported by the legal text of PSD2 (see article 3(k) PSD2) because there is no indication of a broader exclusion or the use of the word "and" in PSD2 to suggest that both the broader exclusion and one of the criteria (a) to (d) must be met.

92. Instead, PSD2 states: "*services based on specific payment instruments that can be used only in a limited way, that meet one of the following conditions:"* This implies that the conditions (a) to (d) decide what is limited rather than "limited" being another limb of the exclusion. Furthermore, each condition (a) to (d) has an explicit limitation, and, for example, (b) and (c) use the word "limited".
93. Our concern is that introducing the idea of a broader concept allows the FCA a discretion not supported by the law and increases uncertainty for the industry. It also undermines the value of the exemption, and increases the operational challenge of providing such a service.
94. If the FCA disagrees, concrete examples should be provided where a service meeting one of the four criteria (a) to (d) would not be limited for the purposes of the LNE. Please note there should be no confusion between the FCA providing guidance on what the criteria (a) to (d) mean in practice, which is helpful, and the FCA reserving the right to reject a service under LNE because they apply additional criteria (i.e. a broader concept of "limited"), which is not supported by the law, as explained above.

95. We understand that the FCA is quoting the PSD2 (e.g. references to the PSD2 recitals) in order to interpret the application of the PSRs 2017.
    In particular the recitals to PSD2 (which the PSRs 2017 implemented) indicate that the following should not be considered 'limited' (see recitals 13 and 14 PSD2):
    - payment instruments that can be used to acquire goods and services within more than one limited network;
    - payment instruments that can be used to acquire an unlimited range of goods and services;
    - specific-purpose instruments which become general-purpose;
    - instruments that can be used in a network of service providers which is continuously growing.
96. The examples from the recitals clarify the meaning of the LNE conditions (a) to (d), which is helpful guidance. They do not mean that there is an overarching principle that an additional "reasonable view" on what is "limited" should be applied.

97. *'Mall cards' may fall within this exclusion if, on the facts, the criteria are met. In our view you will not be able to take advantage of this exclusion unless: it is made clear*

in the relevant terms and conditions of the card that the purchaser of the value is only permitted to use the card to buy from outlets of merchants located within that particular shopping centre with whom you have direct commercial agreements located within a particular shopping centre; and the card is functionally restricted to one shopping centre. A card that can be used at a number of different shopping centres, or where use is restricted only by the terms and conditions that apply to the card and is not functionally restricted is unlikely to fall within this exclusion. There must be direct commercial agreements in place between the issuer and the merchants – this will not be satisfied where the merchant's agreement is with the mall, a programme manager or a different entity in the issuer's group and not the issuer.

What if it is the same shopping centre (e.g. same brand), for example, in two locations in the same city or different cities? We would argue this could also fall within the LNE as long as the merchants have a commercial agreement with the issuer, the functionality of the card is restricted to the shopping centres in question and the terms reflect this.

98. *Outside these cases there may be other situations where a network is sufficiently limited. In these cases, we will consider what factors constrain the growth of the network, and whether these are sufficiently robust and independent to ensure the overarching condition is met.*

The same comment as the first comment above applies to this revised extract from PERG. The factors that should be considered in that case are whether one of the conditions set out under the law (conditions (a) to (d)) are met, subject to interpretation supported by the PSD2 recitals and guidance.

99. *Q401B. I act as an intermediary between suppliers of digital goods and services and network operators. Does the electronic communications exclusion apply to me?*

The response to this question provides: *This may be a particular issue for pre-paid phone services where both originating operators and terminating operators potentially provide payment services to their customers.*

It would be helpful if the response to this question was amended to clarify who the 'originating operator' and 'terminating operator' are and describe their respective roles within in the cascade.

General EMA comments

100. Please note that there appears to be a referencing error in paragraph 6.7. This paragraph refers to Appendix 5 whereas we consider this paragraph should refer to Appendix 4.

List of EMA members as of May 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