

Single Rulebook Q&A

Question ID	2021_5818
Status	Final Q&A
Legal act	Directive (EU) 2015/849 (AMLD)
Topic	Central Contact Points (AML/CFT)
Article	45
Paragraph	9
Subparagraph	-
COM Delegated or Implementing Acts/RTS/ITS/GLs/Recommendations	Regulation (EU) 2018/1108 - RTS on CCP to strengthen fight against financial crime
Article/Paragraph	N/A
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Disclose name of institution / entity	No
Type of submitter	Competent authority
Subject matter	Establishment and appointment of a CCP
Question	Do the agents and distributors who are operating in a Member State (MS) or other MSs under the right of establishment based on Article 28 and 29 of PDS2 also fall under the scope of the Delegated Regulation (EU) 2018/1108 and are considered to be establishments (regardless of the way of the operation, distribution, e.g. tied agent or independent distributor, etc.) under the AML regulation including the Delegated Regulation (EU) 2018/1108?
Background on the question	Based on Article 45 (9) of the Directive (EU) 2015/849 (AMLD) the Commission Delegated Regulation (EU) 2018/1108 determines that “Host Member States may require electronic money issuers and payment services providers that have establishments in their territory in forms other than a branch, and whose head office is situated in another Member State, to appoint a central contact point where any of the following criteria is met: a) the number of such establishments is 10 or more; (b) the cumulative amount of the electronic money distributed and redeemed, or the cumulative value of the payment transactions executed by the establishments is expected to exceed EUR 3 million per financial year or has exceeded EUR 3 million in the previous financial year; (c) the information necessary to assess whether or

not the criterion in point (a) or (b) is met is not made available to the host Member State's competent authority upon request and in a timely manner.” Based on Article 28 (1) of the Directive (EU) 2015/2366 of the European Parliament and of the Council (PSD2): Any authorised payment institution wishing to provide payment services for the first time in a Member State other than its home Member State, in the exercise of the right of establishment or the freedom to provide services, shall communicate the following information to the competent authorities in its home Member State: (a) the name, the address and, where applicable, the authorisation number of the payment institution; (b) the Member State(s) in which it intends to operate; (c) the payment service(s) to be provided; (d) where the payment institution intends to make use of an agent, the information referred to in Article 19(1); (e) where the payment institution intends to make use of a branch, the information referred to in points (b) and (e) of Article 5(1) with regard to the payment service business in the host Member State, a description of the organisational structure of the branch and the identity of those responsible for the management of the branch. We would appreciate it if you could help us interpreting the right of establishment under the scope of the Delegated Regulation (EU) 2018/1108. We are aware of the expectations of the EBA opinion on the nature of passport notifications for agents and distributors of e-money (EBA-Op-2019-03) and on the CCPs by the Delegated Regulation (EU) 2018/1108.

Final answer

The Delegated Regulation (EU) 2018/1108 only applies where an electronic money issuer (EMI) or a payment services provider (PSP) has establishments in the territory of a Member State in forms other than a branch, and whose head office is situated in another Member State.

Article 3.1 of the Delegated Regulation (EU) 2018/1108 provides that, in such cases, the host Member State may require the EMI/PSP to appoint a central contact point (CCP) where:

- The number of establishments set up in the host Member State is 10 or more (article 3.1(a));
- The cumulative amount of the electronic money distributed and redeemed, or the cumulative value of the payment transactions executed by the establishments set up in the host Member State is expected to exceed EUR 3 million per financial year or has exceeded EUR 3 million in the previous financial year (article 3.1(b));
- The information necessary to assess whether or not the criterion in point (a) or (b) is met is not made available to the host competent authority upon request and in a timely manner (article 3.1(c)).

From this article, it follows that the host competent authority is responsible for determining whether one of the three criteria mentioned above is met or not. To do so, however, the host competent authority needs to know which of

the agents and/or distributors appointed by a EMI/PSP qualify as establishments of this EMI/PSP, and which of these agents and/or distributors do not.

The notion of establishment is not defined in the Delegated Regulation (EU) 2018/1108, Directive (EU) 2015/2366 (PSD2), and Directive (EU) 2015/849 (AMLD) are also silent on this point.

In the absence of a definition of the notion of establishment in the aforementioned legal texts, the Delegated Regulation (EU) 2017/2055 (article 10(1)(d) and Annex III point 6 and article 3(3) and Annex IV point 6) provides that it falls to the home competent authority responsible for the sending of the passport notification to the competent authority of the host member state to assess whether the engagement by an EMI or payment institution (PI) of an agent or distributor in a host Member State amounts to the setting up of an establishment.

In addition, the EBA provided further guidance on the criteria that should be taken into account when carrying out such assessment. These criteria include, for instance:

- (a) Whether the agent or distributor has been empowered to carry out a specific task on behalf of the PI/EMI performed on an occasional basis (which may be an indication that those services fall under free provision of services) or, on the contrary, has been mandated to provide the services on behalf of the PI/EMI on a regular or continuous basis (which may be an indication that those services fall under the right of establishment).
- (b) The overall duration of the contractual relationship or arrangements between the PI/EMI and the agent or distributor.
- (c) Whether or not the activities carried out through the agent or distributor enable customers in the host Member State to take advantage of the services offered by the PI/EMI in the host Member State.

In line with the above, the EBA is of the view that an agent or distributor should qualify as an establishment where the home competent authority has assessed that it does based on the criteria mentioned in the EBA's aforementioned opinion and communicated its assessment to the host competent authority.

Pursuant to article 28(2) of PSD2 and the Delegated Regulation (EU) 2017/2055, the host competent authority may nevertheless convey to the home competent authority any concerns it may have with regard to the home competent authority's assessment.

Link

https://www.eba.europa.eu/single-rule-book-qa/qna/view/publicId/2021_5818

