Association des Banques et Banquiers, Luxembourg
The Luxembourg Bankers' Association
Luxemburger Bankenvereinigung

ABBL's response to the EBA-ESMA consultation paper on

Draft joint EBA and ESMA Guidelines on the suitability assessment of members of management body of issuers of asset-referenced tokens and of crypto-asset service providers, and

Draft Joint EBA and ESMA Guidelines on the suitability assessment of shareholders and members, whether direct or indirect, with qualifying holdings in issuers of asset-referenced tokens and in crypto-asset service providers

EBA/CP/2023/20
ESMA75-453128700-506

Date: 22 January 2024
EU Transparency register: 3505006282-58

Question 1: Are the sections on subject matter, scope, definitions, addressees and implementation of the draft joint EBA and ESMA Guidelines on the assessment of the suitability of the members of the management body of issuers of ARTs and CASPs appropriate and sufficiently clear?

Yes, we are of the view that the sections on subject matter, scope, definitions, addressees and implementation are appropriate and sufficiently clear.

However, we do have some observations regarding the « definitions » section:

(1) The guidelines definition for "Management body in its management function" correctly identifies the entities concerned ("the issuer of ARTs or CASP").

This is not the case for the definition of "Management body in its supervisory function": this definition does not identify the entities concerned. We suggest to harmonise the two definitions on this specific point for consistency reasons.

Please also note that the acronyms CASP and ART, although commonly used, are neither defined by MiCA nor by the guidelines that use them. We suggest defining these acronyms within the guidelines, providing the full terms with a referral to their applicable definition as per the MiCA terminology.

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(2) "Member": We would suggest to clarify whether this term may refer both to a natural and/or a legal person (in this latter case, it should then be clarified on whom the suitability assessment should be carried out, i.e. the legal person and/or the natural person representing it, and how). If a different approach must be adopted in that respect for the management body in its supervisory function and the management body in its management function, this should also be further specified in the guidelines in our view to avoid any confusion and diverging interpretations by competent authorities in the various EU Member States.

Question 2: Are the provisions on the application of the proportionality principle appropriate and sufficiently clear?

Partially.

As a matter of principle, we are of the view that the sections on the application of the proportionality principle are appropriate and clear.

However, in respect of paragraph 10, we believe that it could be useful to have further guidance regarding the impact of the class of a CASP (as per Annex IV of MiCA) on the necessity to have more sophisticated suitability policies and assessments or, a *contrario*, the possibility to have lighter policies and assessments (in line with what has been done in paragraph 31). This would also mitigate the risk of divergent interpretations by competent authorities and therefore the risk of forum shopping.

Concerning paragraph 12.e.ii, the term used by MiCA is not 'volume' but 'size' (Art. 36-4 and Art. 36-11(c) MiCA). 'Reserve of assets' are the defined terms by MiCA (Art. 3-1(32) MiCA), not 'reserve assets'.

Concerning paragraph 12.e.iii and iv: the complexity term is not defined and may be subject to divergent interpretations by competent authorities. It could be useful to further clarify this concept. This may be especially important considering that ARTs are, by definition, complex tokens: they may reference a value or a right, or a 'combination' of values and rights, including one or more official currencies (Art. 3-1(6) MiCA). That being said, the 'nature' of the reserve could also be added as a criterion to be considered (cf. Art. 36-4 MiCA), provided that this term is itself adequately defined.

Regarding the current paragraph 12.f.i *"in the case of a CASP the following additional criteria: the type and volume of services provided and their criticality for the functioning of markets in crypto assets",* we are of the opinion that the notion of "criticality for the functioning of markets in crypto assets" remains too vague and therefore requires further guidance.

However, the risks associated with the outsourced services and activities to third-parties, and the complexity of their respective written outsourcing agreements, may be an additional criteria to be considered.

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Furthermore, we believe that the following paragraph should become a separate point f. in paragraph 12: "*in the case of an issuer of ARTs the following additional criteria:*

i. the volume and number of ARTs issued,

ii. the volume of reserve assets held by issuers of ARTs,

iii. the complexity of the assets a token is referenced to,

iv. the complexity of the instruments in which the reserve assets are in-vested in,".

The current point f. should then become a new point g..

Question 3: Are the provisions on the notion of sufficiently good repute appropriate and sufficiently clear?

Partially.

As a matter of principle, we are of the view that the provisions on the notion of sufficiently good repute are appropriate and clear.

However, since we understand from paragraph 2, that the intention is to have two sets of separate guidelines on the suitability of the members of the management body of issuers of ARTs and CASPs, namely one for credit institutions and investment firms carrying out such activities (the existing joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive 2014/65/EU – the **Existing Guidelines**) and the other for all other types of issuers of ARTs and CASPs (the guidelines which are the object of the present consultation), we believe that any cross-reference to the Existing Guidelines (as this is done in paragraph 15) should generally be avoided. Regarding specifically paragraph 15, we note that this cross-reference could be a source of confusion since certain of the elements in paragraph 13 are also dealt with in the Existing Guidelines and the articulation between the respective provisions is not clear.

In addition, in line with our answer to question 5 in our response to the Consultation on Draft Regulatory Technical Standards on information for application for authorisation to offer to the public and to seek admission to trading of asset-referenced tokens and Draft Implementing Technical Standards on standard forms, templates and procedures for the information to be included in the application, under Article 18(6) and (7) of Regulation (EU) 2023/1114, it would be worth clarifying certain elements regarding the criminal records to be provided as part of the suitability assessment, namely:

- the jurisdictions from which criminal records should be provided in respect of proposed members of the management body (jurisdiction in which the relevant issuer of ARTs/CASP is authorised or nationality(ies) or places of residence of the proposed members) and a reasonable maximum reference period to that effect (for instance, country(ies) of residence of the proposed member for the last 5 years);

- in case of residence in a federal State a criminal record should only be obtained in the State in which the person is residing and not in all the States constituting that federal State;
- criminal records, when available, do not have to be supplemented by other types of background checks (such as FBI checks).

Question 4: Are the provisions on the notion of individual and collective appropriate knowledge, skills and experience appropriate and sufficiently clear?

Partially.

As a matter of principle, we are of the view that the provisions on the notion of individual and collective appropriate knowledge, skills and experience are appropriate and clear.

However, since we understand from paragraph 2 that the intention is to have two sets of separate guidelines on the suitability of the members of the management body of issuers of ARTs and CASPs, namely the Existing Guidelines for credit institutions and investment firms carrying out such activities and the guidelines which are the object of the present consultation for all other types of issuers of ARTs and CASPs, we believe that any cross-reference to the Existing Guidelines (as this is done in paragraph 23) should generally be avoided. The list of relevant skills set out in Annex II of the Existing Guidelines should be duplicated in the guidelines which are the object of the present consultation.

Furthermore, in section D.2.2, it could be useful to add a provision similar to paragraph 58 of the Existing Guidelines, that will be applicable to any issuer of ARTs or CASP that is subject to the internal organisation requirements set out in directive 2015/849/EU, as amended. This paragraph 58 reads as follows:

"*Without prejudice to the national transposition of Directive 2015/849/EU, the member of the management body identified as responsible for the implementation of the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2015/84922 should have good knowledge, skills and relevant experience regarding ML/TF risk identification and assessment, and AML/CFT policies, controls and procedures. This person should have a good understanding of the extent to which the institution's business model exposes it to ML/TF risks.*"

Question 5: Are the provisions on the sufficient time commitment of a member of the management body appropriate and sufficiently clear?

Partially.

As a matter of principle, we are of the view that the provisions on the sufficient time commitment of a member of the management body are appropriate and clear.

However, to mitigate the risk of divergent interpretations by competent authorities in various Member States, it could be useful to have a kind of benchmarking available, as contemplated under paragraph 41 of the Existing Guidelines.

Furthermore, in respect of paragraph 30, the assessment of a directorship in a non-EU entity should not automatically be considered as not equivalent to an EU directorship. Here, we would like to highlight the extension to Switzerland and the UK that should be considered. The member's geographical presence and the travel time required for the job do not seem to be relevant criteria for this sector either.

Question 6: Are the provisions in section D.3 and subsections D3.1 and D.3.2. on the suitability assessment appropriate and sufficiently clear?

Partially.

As a matter of principle, we are of the view that the provisions in section D.3 and subsections D3.1 and D.3.2. on the suitability assessment are appropriate and clear.

However, to mitigate the risk of divergent interpretations by issuers of ARTs and CASPs as well as by competent authorities in various Member States, it could be useful to provide also for a basic suitability matrix template, as set out in Annex I to the Existing Guidelines.

Furthermore, in paragraph 27, the meaning of the phrase "*The adequate consideration of the interest of their clients and the integrity of the market*" remains unclear and requires further precision.

Question 7: Are the provisions in section D.4 on corrective measures appropriate and sufficiently clear?

We are of the view that the provisions in section D.4 on corrective measures are appropriate and sufficiently clear.

Question 8: Are the provisions in section D.5 and D.6 on the assessment and decisions by competent authorities appropriate and sufficiently clear?

Partially.

We believe that section D.5 does not sufficiently distinguish between the suitability assessment process (including applicable timeframe) applicable when there is a change in the management body of an already authorised issuer of ARTs or CASP and the suitability assessment process (including applicable timeframe) of the management body for an applicant issuer of ARTs or applicant CASP. A clarification should be inserted to that effect.

Irrespective of the above comment, we note that the concept of "without undue delay" in paragraph 64 could give rise to divergent interpretations by competent authorities in various

Member States and therefore could trigger a risk of forum shopping. To mitigate this risk, an harmonised delay should be provided for.

We also note that in paragraph 66, the maximum period to carry out the suitability assessment should not exceed 6 months while paragraph 179 of the Existing Guidelines provides for a maximum period of 4 months. We believe that there is no specific justification for such a distinction and therefore the applicable delays should be harmonised to ensure a level playing field between the various types of actors that may operate as issuers of ARTs or CASPs. In this context, we would be in favour of setting a maximum period of 2 months.

Question 9: Are the draft Joint Guidelines on the assessment of the suitability of the shareholders or members, whether direct or indirect, with qualifying holdings in issuers of ARTs or of CASPs appropriate and sufficiently clear?

While we understand the reasons why the draft Joint Guidelines on the assessment of the suitability of the shareholders or members, whether direct or indirect, with qualifying holdings in issuers of ARTs or of CASPs have been developed on the basis of cross-references to other applicable guidelines, this approach makes it more difficult, in our view, to read the text and apprehend the exact rules applicable at once.

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