Electronic Money Association
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By email to fintech@eba.europa.eu

08 February 2024

Dear Sir/Madam

Re: EMA response to EBA Consultation Paper on Draft Regulatory Technical Standards to specify the procedure and timeframe to adjust its own funds requirements for issuers of significant asset-referenced tokens or of e-money tokens subject to the requirements set out in Article 45(5) of Regulation (EU) 2023/1114 on markets in crypto-assets

We welcome the opportunity to provide input on the EBA's Consultation Paper on Draft Regulatory Technical Standards to specify the procedure and timeframe to adjust its own funds requirements for issuers of significant asset-referenced tokens or of e-money tokens.

The EMA represents payments, crypto-asset and FinTech firms engaging in the provision of innovative payment services, including the issuance of e-money, stable coins (including e-money tokens as covered by the EU's MiCAR), open banking payment services, and crypto-asset-related services. A full list of our members is provided in the appendix to this document.

The EMA was established some 20 years ago and has a wealth of experience in regulatory policy relating to payments, electronic money and more recently crypto-assets.

We would be grateful for your consideration of our comments, which are set out below.
Yours faithfully,

Dr Thaer Sabri
Chief Executive Officer
Electronic Money Association

EMA responses

The ESAs face an enormous challenge of producing a complex, comprehensive and highly technical body of MiCAR level 2 regulatory instruments and related guidelines within a tight timeframe. We are grateful for the staggered consultation process launched several months ago, but remain concerned that each instrument, the interdependencies between, and the consistency across, these instruments cannot be given the required full and holistic consideration. We therefore urge the EBA to keep the instruments that are now being developed under review well beyond the consultation phase and to engage in a close ongoing dialogue with national competent authorities who will be implementing the instruments in their evolving supervisory practices. This ongoing dialogue would also have to include the crypto- asset industry in order to benefit from the wealth of insight that industry efforts to comply with all aspects of this new rulebook will generate and from direct and first line feedback the industry can offer on the still rapidly evolving crypto-asset markets. The objective would have to be not only to translate the rulebook into effective and EU-wide fully harmonised supervisory practices, but also to provide assistance for the analysis needed to inform the review and reform of the MiCAR level 1 text wherever needed.

We note that according to Article 140 the European Commission will have to present by 30 June 2025 a report to the European Parliament and the Council on the application of MiCAR accompanied as appropriate by a legislative proposal. EBA and ESMA will be consulted, and we urge the EBA to engage in a dialogue with the industry to help identify and shape necessary amendments as early as possible.

That said, we welcome the opportunity to comment on this specific Consultation Paper on Draft Regulatory Technical Standards to specify the procedure and timeframe to adjust its own funds requirements for issuers of significant asset-referenced tokens or of e-money tokens ("CP" and "RTS") and would be grateful if our following comments were considered. We stand ready to engage in dialogue with the EBA and national competent authorities well beyond the close of this consultation.

Before addressing the questions put forward in the EBA's CP we would like to highlight that for this draft RTS the issue of interdependencies between the different level 2 instruments is particularly problematic. The parallel EBA consultation on "Draft Regulatory Technical Standards to further specify the liquidity requirements of the reserve of assets under Article 36(4) of Regulation (EU) 2023/1114" acknowledges that the classification as significant triggers the application of prudential requirements resulting in an increase of issuers' credit and liquidity risks with, as a consequence, increased interconnectedness and, hence, increased financial stability risk. In para 22 and 23 of that consultation paper the EBA states:

> "*22. Point (d) of Article 36(4), together with Article 58(1) and (2), of MiCAR establishes that the amount of deposits with credit institutions cannot be lower than 30% of the amount referenced in each official currency, in the case of issuers of ARTs that are not significant or e-money institutions issuing EMTs that are not significant if required by the relevant competent authority. This percentage is 60% for the cases of issuers of ARTs or EMTs that are significant.*

> *23.The EBA considers that an amount of bank deposits in the reserve of assets higher than those percentages of the amount of assets referenced in tokens might trigger concerns from the perspective of the liquidity of the reserve assets overall and their exposure to credit risk. The EBA considers that it is key to keep a relevant amount of the reserve of assets as susceptible to be liquidated in the market and not just with specific counterparties. Furthermore, the interconnectedness between the banking system and crypto-asset sector should be well controlled to avoid reciprocal contagion effects in case of distress of one of them. Therefore, the EBA considers that the minimum amount of bank deposits in the reserve assets should not be set at a higher default level than those percentages of the amount referenced in each official currency*."

We have commented in much detail on the EBA's interpretation of the reference chain resulting in the EBA's conclusion that the increase of the de minimis threshold from 30% to 60% for bank deposits would also have to apply to EMTs in our response to the EBA's Consultation Paper on Draft RTS to further specify the liquidity requirements of the reserve of assets under Article 36(4) of Regulation (EU) 2023/1114. As set out there, we believe this interpretation is impossible to reconcile neither with the wording nor with the objective of MiCAR. If that interpretation and, hence, application of the increased de minimis threshold of 60% to EMTs were retained, issuers of EMTs turning significant and, subject to national discretion (Article 58 (2) for EMTs, Article 35 (4) for ARTs), non-significant issuers, were facing a triple impact on their own funds requirements:

1. As discussed in this CP they have to adjust to the **50%** increase in own funds requirements since according to Article 45 (5) the percentage referred to in Article 35 (1) (b) is set at 3% instead of 2%;
2. As discussed in the CP quoted above the increased liquidity, credit, interconnectedness and financial stability risks resulting from the application of the increased prudential requirements are most likely to give rise to additional discretionary own funds requirements of up to **20%** under Article 35 (3), finally
3. The increased liquidity and credit risks will inevitably be reflected in the outcomes of their stress testing and may well give rise to further additional discretionary own funds requirements of between another **20% to up to 40%** under Article 35 (5).

On top of that the shift of reserve assets from low risk, higher yielding investments to deposits with credit institutions will likely have an impact on issuers' profitability and, hence their capacity to build up own funds by retaining profits.

In this context, we also have to note that we believe the MiCAR significance concept to be flawed. Besides triggering this unprecedented cliff-edge effect of much increased prudential requirements it also provides for a transfer of supervisory responsibilities from national competent authorities to the EBA. These two distinct purposes cannot be properly reconciled. The thresholds set in Article 43 (1) may well be suitable for the transfer of supervisory responsibilities to the EBA and in our view are broadly aligned to the thresholds referred to in a similar provision in the SSM Framework Regulation triggering the transfer of supervisory responsibilities for significant credit institutions from national competent authorities to the ECB. In contrast, the thresholds are far too low to justify the enormous increase in prudential requirements the classification as significant entails.

The EBA's CP lacks a proper analysis of the enormous challenges related to the triple impact issuers are facing when turning significant or, if non-significant, when faced with the discretionary application

of increased prudential requirements by national competent authorities. It still concludes that to live up to this major increase in mandatory and most likely additional discretionary own funds requirements competent authorities "*should not grant … more than 3 months to adjust its level of own funds*". A timeframe of not more than 3 months effectively means that issuers will have to anticipate the impact of this enormous cliff-edge effect in advance: well before reaching the low thresholds set in Article 43 (1) they will have to engage in rebuilding their business model based upon a significant increase of required own funds, lower profitability and significantly higher cost to comply with much more demanding risk management and internal control requirements.

As set out before the thresholds set in Article 43 (1) may be appropriate for triggering the transfer of supervisory responsibilities from national competent authorities to the EBA. In contrast, we haven't seen any evidence that issuers reaching these thresholds pose tangible financial stability risks, let alone issuers that are not even there and non-significant issuers subject to the increased requirement as a consequence of national competent authorities exercising the discretion MiCAR affords to them.

We acknowledge that the EBA cannot change the MiCAR level 1 text though, we do believe, it should interprete the relevant chain of references differently. What it can and should do, however, is set standards such as timeframes for the adjustment to the increase in own funds requirements that attenuate as much as possible the major adverse impact resulting from the disproportionate size of the increase and the additional related but unintended and most unfortunate consequences of the MiCAR level 1 text.

That said we reiterate that we believe the application to EMTs of the increased de minimis threshold of 60% for bank deposits in the reserve of assets is misguided. We refer to the related detailed comments in our response to EBA's Consultation Paper on Draft RTS to further specify the liquidity requirements of the reserve of assets under Article 36(4) of Regulation (EU) 2023/1114.

Turning now to the questions in the CP:

Question 1. Is the procedure clear and the timelines for the issuer to submit the plan reasonable?

No (see comments above). Without a proper analysis and understanding of the enormous challenge issuers are facing, it will not be possible to devise a clear and proportionate procedure and set reasonable timelines for issuers to submit a plan.

Question 2. Are the timeframes for issuers to adjust to higher own funds requirements feasible?

No (see comments above). Again, without a proper analysis and understanding of the enormous challenge issuers are facing:

- When turning significant,
- Effectively already well before since according to the timelines set by the draft RTS they will have to anticipate the impact well in advance, and

- If subject to discretionary application of the increased prudential requirements by competent authorities,

it will not be possible to devise a clear and proportionate procedure and set reasonable and proportionate timelines for issuers to submit a plan.

Question 3. During the period when own funds need to be increased by the issuer, should there be more restrictions on the issuer to ensure timely implementation of the additional own funds requirements, for example banning the issuance of further tokens?

Any additional measures can only be considered and imposed by the responsible competent authority on a case-by-case basis. Restrictions must respond to the specific circumstances of the individual issuer, its risk profile, and the risks it actually poses in particular regarding financial stability. As we set out before, classification as significant based upon the thresholds set in Article 43 (1) is not an indication of tangibly increased financial stability risk that could justify restrictions or any additional prudential requirements going beyond those triggered by the classification as such. There may be cases where additional restrictions are needed and proportionate to contain identified risks. However, the competent authority's case-by-case evaluation and risk assessment, which, as the EBA has highlighted, is difficult in the absence of a universal assessment framework, must demonstrate that there are risks warranting additional restrictions.

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Members of the EMA, as of January 2024

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Airwallex (UK) Limited
Allegro Group
Amazon
American Express
ArcaPay UAB
Banked
Bitstamp
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Blackhawk Network EMEA Limited
Boku Inc
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