

EBA/Op/2025/02

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Opinion of the European Banking Authority on the European Commission's amendments relating to the final draft Regulatory Technical Standards on conflicts of interests for issuers of asset-referenced tokens supplementing Regulation (EU) 2023/1114 in accordance with Article 32(5)

Introduction and legal basis

The European Banking Authority's (EBA) competence to deliver an opinion is based on the fifth subparagraph of Article 10(1) of Regulation (EU) No 1093/2010¹ (EBA Regulation), as the specification of the requirements for the policies and procedure on conflicts of interests for issuers of asset-reference tokens under Regulation (EU) 2023/1114 on Markets in Crypto-assets² ('MiCAR') relates to the EBA's area of competence and is an area where the EBA has been entrusted to develop draft regulatory technical standards.

In accordance with Article 14(7) of the Rules of Procedure of the Board of Supervisors³, the Board of Supervisors has adopted this opinion which is addressed to the European Commission.

¹ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

² Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets (OJ L 150, 9.6.2023, p. 40–205).

³ Decision adopting the Rules of Procedure of the European Banking Authority Board of Supervisors of 22 January 2020 (EBA/DC/2020/307).

General comments / proposals

1. On 5 June 2024, the EBA submitted to the European Commission the final EBA draft Regulatory Technical Standards ('RTS') on conflicts of interests for issuers of asset-reference tokens (ARTs) in accordance with Article 32(5) MiCAR.
2. The draft RTS specified the requirements for policies and procedures on conflicts of interest for issuers of ARTs under the MiCAR as well as the details and methodology for the content of the disclosure. In developing the draft RTS, the EBA took into account recent reports of governance failures, specifically regarding failures to identify and manage effectively conflicts of interest, within the crypto-asset market globally, and to requirements applicable within the traditional EU financial sector addressed at mitigating conflicts of interest.
3. With its letter of 29 November 2024, the European Commission informed the EBA of its intention to endorse, with amendments, the draft technical standards submitted by the EBA and sent to the EBA a modified version of the standards with setting out the envisaged changes.
4. Recital (23) of Regulation (EU) No 1093/2010 (EBA Regulation) specifies that the draft regulatory technical standards 'should be subject to amendment only in very restricted and extraordinary circumstances, since the Authority [the EBA] is the actor in close contact with the market and knowing best the daily functioning of financial markets'. The recital specifies that 'draft regulatory technical standards would be subject to amendment if they were incompatible with Union law, did not respect the principle of proportionality or ran counter to the fundamental principles of the internal market for financial services as reflected in the acquis of Union financial services legislation'.
5. The EBA considers as substantive the amendments envisaged by the European Commission listed below in the subsection 'substantive changes' concerning the reduction of the scope of personal transactions, the specification that the scope of some provisions of the RTS applies to certain categories of connected persons and as regards the contractual arrangements, and the deletion of the content of the elements to be reported by the person responsible for the identification, prevention, management and disclosure of conflicts of interest to the management board in Article 7. The EBA is of the view that, while of a substantive nature, these amendments, as further specified in substantive changes 1, 2 and 4 below, increase the proportionality of the affected provisions and do not alter their purpose. Consequently, the EBA has no concerns as regards those proposed amendments.
6. Additionally, the EBA considers as 'substantive' the deletion of the reference to 'risk alignment mechanisms' for remuneration in Article 5 (as further specified in substantive change 3). However, the EBA takes note that the European Commission has agreed, during written exchanges with EBA staff in November and December 2024, to reinstate the reference to the 'risk alignment mechanism' in the adopted version of the RTS. The EBA considers that this deletion would have otherwise altered the draft technical standards submitted by the EBA in a significant manner from a policy perspective. In addition, this provision is also included in the

RTS on conflicts of interest for CASPs (developed by ESMA under Article 72(5) MiCAR) and therefore the EBA notes the benefit of consistency in the obligations to which ART issuers and CASPs are subject.

7. The EBA agrees with the changes summarised in the subsection 'Non-substantive changes' due to their non-substantive nature and given their usefulness in clarifying the text. Among them, the regrouping of some provisions and the consequent reduction of the number of Articles from 11 to 9.

Specific comments

Substantive changes

Substantive change 1: reduction of the scope of 'personal transactions' for proportionality reasons to specific categories of connected persons

8. Articles 5 and 6 of the draft RTS submitted by the EBA contained provisions on the '*scope of personal transactions*' and '*the policies and procedures on personal transactions in relation to conflicts of interest*'. Those types of transactions could be a significant source of conflicts of interest and the EBA considers it is key for the RTS to contain provisions on those conflicts of interest created by such transactions.
9. While the EBA had not received comments during the public consultation on a lack of proportionality of the provisions on personal transactions, it excluded '*shareholders or members*' from the scope of the personal transaction in the [final Report](#) as it appears it would be potentially too demanding and challenging for issuers to identify such transactions. As result, the scope of draft RTS was drafted as follows: "*a connected person other than the connected persons under point (a) of Article 32(1) of Regulation (EU) 2023/1114*".
10. In the European Commission's version of the RTS, the scope of the provisions has been further narrowed with the exclusion of some additional categories of connected persons from the scope '*((b) any shareholder or member, whether direct or indirect, that has a qualifying holding in the issuers*' and '*(f) any third party providing one of the functions as referred in Article 34(5), first subparagraph, point (h)*'. The scope of this provision is now limited to "*a member of the management body of the issuer or an employee who can negotiate or sign contracts on behalf of the issuer*" as set out in Article 2 (4) (a) of the Commission's version of the RTS.
11. In order to reflect this change, reference is now made in Article 4(11) (b), in the European Commission's version of the RTS, to '*employees and members of the management body*' instead of '*connected persons*' and the provisions in Article 6 of the draft RTS submitted to the Commission that was referring to the situation of the provisions by a third party have been deleted.
12. The EBA considers that this modification is a substantive change. Nevertheless, the EBA considers that, as regard the business model of issuers of ARTs, the key element is to include in

scope, for those types of transactions, the members of the management body and the employees who can negotiate or sign contracts on behalf of the issuer. This encompasses the group of persons who could, with a high likelihood, be affected by conflicts of interests in the context of transactions with the issuer, while staff that cannot take such decisions are not likely to be conflicted by such transactions. Therefore, this modification does not affect the policy objective of those provisions, while increasing the proportionality of the affected provisions. As a result, the EBA has no concerns with this proposed amendment.

Substantive change 2: specification that the scope of some provisions applies to certain categories of connected persons and clarification as regards the contractual arrangements to be taken into account

13. Similarly to the limitation of scope mentioned above, the scope of some provisions has been further specified in some Articles of the RTS in particular to refer to specific categories of connected persons:

- in Article 2(3) of the European Commission's version of the RTS (previously Article 2), specification that for the purpose of the economic interest, issuers of asset-referenced tokens shall take into account situations where the connected person '(...) is a member of the management body or an employee of the issuer';
- In Article 3(2) of the European Commission's version of the RTS (previously Article 2), replacement of the reference to the issuer by a reference to the issuer '*or a member of their management body or one of their employees*'.
- Similarly, in Article 3(2), among the situations to be taken into account for the identification of an economic interest, the draft RTS submitted to the European Commission was referring to '*any kind of contractual arrangement (...)*' while the Commission's version of the RTS now refers to those '*related to the activities regulated under Regulation (EU) 2023/1114*'.

14. The EBA considers that these modifications are substantive changes. Nevertheless, as regards the connected persons, as the modifications clarify further the affected provisions and increase their proportionality while not altering the policy objective of the RTS, the EBA agrees with the proposed amendments. As regards the contractual arrangements, the EBA underlines that the scope is now more restrictive and could accept this change for proportionality reasons.

Substantive changes 3: deletion of the reference to risk alignment mechanisms for variable remuneration in Article 5

15. Article 7 of the draft RTS submitted to the European Commission (now Article 5) contains provisions on policies and procedures in the context of remuneration. The policy objective has been to make sure that remuneration procedures, policies and arrangements do not create a conflict of interest. Variable remuneration can potentially be an important source of conflicts of interest in cases where it would provide for incentives to take decisions in a way that can be

detrimental to the issuer or other stakeholders such as the holders of asset-referenced tokens, while improving the financial position of the staff member who takes the decision. Remuneration policies should therefore ensure that no such adverse effects can occur, including in issuers of asset referenced tokens that are not significant. Such framework safeguards in particular the interests of consumers and other holders of those tokens.

16. Those provisions on remuneration are consistent with the provisions contained in the draft under Article 45(7)(a) of MiCAR that specify the minimum contents of the governance arrangements on the remuneration policy that apply to issuers of significant asset-referenced tokens, issuers of significant e-money tokens and to issuers of e-money tokens that are not significant, where required by the competent authority under Article 58(2) of MiCAR. As such, the provisions secure a level playing field.
17. The draft RTS submitted to the European Commission underlines that issuers of asset-referenced tokens need to identify and mitigate any potential conflicts of interest that could be caused by the award of variable remuneration and underlying key performance indicators and risk alignment mechanisms, including the pay out of instruments to employees or management body as part of the variable or fixed remuneration.
18. The European Commission's version of the RTS maintains the principle contained in the draft RTS submitted by the EBA but omits the reference to the 'risk alignment mechanisms' while this provision has been kept in the Commission's version of the RTS applicable to CASPs. The EBA considers this deletion constitutes a substantive change of the version of the RTS submitted to the Commission.
19. The risk alignment mechanism, i.e. ex post performance adjustments in the form of malus and claw back and price changes to the instruments awarded as part of the awarded mechanisms, is an important tool to expose staff after the award of variable remuneration to the risk that their decisions might also retroactively lead to reductions of their remuneration. As such, the mechanism is an effective tool to reduce the risk that variable remuneration could provide for incentives that may lead to conflicts of interests.
20. The EBA takes note that the European Commission has agreed, during written exchanges with EBA staff in November and December 2024, to reinstate the reference to the 'risk alignment mechanism' in the adopted version of the RTS for the reasons given above. To be noted that the EBA had not received comments on this point during the public consultation.

Substantive changes 4: deletion of the content of the elements to be reported by the person responsible for the identification, prevention, management and disclosure of conflicts of interest to the management board in Article 7

21. Article 9 of the draft RTS 'Adequate resources' submitted to the European Commission (now Article 7 'Policies and procedures on resources') contains provisions in paragraph 2 explaining that the person responsible for the identification, prevention, management and disclosure shall:

“access and report directly to the management body on at least an annual basis, as well as, where material deficiencies are identified, on an ad hoc basis, on the management of the conflicts of interest including:

(a) a detailed description of the situations referred to in Article 9 paragraph 1;

(b) the measures taken to prevent and mitigate conflicts of interest arising or which may arise from the situations referred to in Article 9 paragraph 1;

(c) the deficiencies identified in the issuer of asset-referenced token's conflicts of interest policies, procedures and arrangements and the measures taken to remedy them.”

22. These provisions have been deleted in the European Commission's version of the RTS. The Commission's version has nevertheless retained the requirement in that Article that *“the person responsible for the identification, prevention, management and disclosure of conflicts of interest shall have the authority necessary to discharge its responsibilities appropriately and independently and that it shall report directly to the management body.”*

23. The EBA considers that the deletions constitute a substantive change of the version of the RTS submitted to the Commission. The EBA would have preferred to have the details of the reporting requirement to be set out in the RTS for clarity and consistency of approaches (thus securing a level playing field) but accepts that this can be replaced it with a high-level requirement that does not enter into the details of the content of the reporting for proportionality reasons and in particular to accommodate all possible different legal forms of under the national company law. The EBA considers important the fact that the independence of the person responsible for the identification, prevention, management and disclosure of conflicts of interest has been kept in the RTS. As a result, the EBA agrees with the proposed amendments.

Non-substantive changes

24. The European Commission has also provided several drafting amendments meant to ease the reading of the draft RTS or to make more explicit the link of some provisions with the legal mandate. The EBA considers that such changes do not imply a change in policy and represent non-substantive changes.

25. The drafting amendments include:

- A change of order between Articles 2 and 3. The RTS now starts with the *‘Conflicts of interest potentially detrimental to the issuer of asset-referenced tokens’* as the general case and continues with the specific case of the holder the *‘Conflicts of interest potentially detrimental to the holders of asset-referenced tokens’*;
- In Article 3 of draft RTS submitted to the European Commission (now Article 2), the provisions on personal, professional and political relationships have been grouped together to simplify the drafting. A Recital has been added to introduce those concepts (Recital 9);

- In Article 4 (9) of the draft RTS, the addition of a retention period of 5 years for the record. Article 4 of the draft RTS submitted by the EBA sets out that the conflicts of interest policies and procedure referred to in Article 32(1) of MiCAR shall require issuers of asset-referenced tokens to keep records and document the types of activities or situations giving rise or which may give rise to the conflicts of interest as described in the RTS as well as the measures to mitigate them. The European Commission's version of the RTS maintains this principle and clarifies in addition that the record shall be kept for a retention period of 5 years. This addition clarifies further the data protection provisions already contained in the two Recitals of the RTS.
- Articles 5 and 6 of the draft RTS in relation to the '*scope of personal transactions*' and '*the policies and procedures on personal transactions in relation to conflicts of interest*' submitted by the EBA have been deleted and the provisions moved to the new Article 2(4) and Article 4(9), (10) and (11) to make the link with the mandate clearer. Apart from the modification in the scope of the transactions which is a substantive change described above in 'substantive change 1', this reorganisation of the Articles is non-substantive.
- In Article 7 '*Remuneration*' (now Article 5), the change of the title to '*Policies and Procedures in the context of remuneration*' to make more explicit that obligations specified with regard to remuneration policies and procedures relate to the requirements applicable in the context of policies and procedures on conflict of interest, and do not represent standalone obligations.
- In Article 8 (now Article 6) '*Arrangements with third parties providing of the functions as referred in Article 34(5), point (h) of Regulation (EU) 2023/1114*' and Article 9 (now Article 7) '*Adequate resources*', a change of the titles to respectively '*Policies and procedures on arrangements with third party service providers*' and '*Policies and procedures on resources for the management of conflicts of interest*' to make more explicit the link with the legal mandate and some improvement of the wording. Indeed, these obligations are to be considered within the identification, prevention and management of conflicts of interests and therefore as part of the policies and procedures on conflicts of interest.
- In Article 9 (now Article 7) some provisions detailing the need to ensure an efficient allocation and management of the resources dedicated to the management of conflicts of interest have been moved to a Recital 11 while the principle has been kept in the Article.
- In Article 10 (now Article 8) '*Disclosures of the general nature and source of conflicts of interest and the steps taken to mitigate them*', the provisions linked with the ability, where the asset-referenced tokens are also offered in a Member State other

than the home Member State, for the disclosure to be made available also in an official language of the host Member State, have been deleted as they were in any case not creating a binding effect and were therefore not needed.

- Lastly, some changes have been made in the Recitals to align those with the modified Articles. The provisions on personal data contained in Recital 14 and 15 (now 15 and 16) have been further detailed.

Conclusions

For the reasons above, the EBA has endorsed the substantive amendments to the draft technical standards submitted by the EBA, and has accepted the remaining changes on other parts that are not considered substantive. This conclusion is based on the assumption that the important provisions on risk alignment mechanisms will be added in the adopted text as agreed between the European Commission and EBA staff. The EBA submits the amended draft RTS to the Commission in the form set out in the Annex.

This opinion will be published on the EBA's website.

Done at Paris, 24.01.2025

[signed]

[José Manuel Campa]

Chairperson
For the Board of Supervisors