Draft Guidelines on recovery plans under Articles 46 and 55 of the Regulation (EU) 2023/1114

Q1. Is the approach to the application of the principle of proportionality adequate for the purposes of recovery planning?

In our opinion the current approach to the application of the principle of proportionality is created highly complex. In order to monitor all the aspects, issuers would need to implement large operational structures, especially within the risk management and compliance department. Credit institutions do have these structures in place, but issuers being CASPs but no credit institutions, building up these structures will put a huge burden in the CASPs which involve high additional costs.

In addition, we would appreciate further clarification in regards to the following letter and events:

- Letter d): What happens if the size of assets increases? How does an issuer know that the principle of proportionality is not applicable anymore or recovery plans need to be adjusted?
- Letter d): What happens if the concentration or composition of assets change? How can an issuer evaluate the impact of the respective changes? Does an issuer have to adjust the recovery plans with every trade in the portfolio of the reserve assets?
- Letter e and g): How does an issuer know that in view of an authority, the risk profile of a crypto asset service provider has changed? How does an issuer know that it needs to be accounted in the principle of proportionality? Is there any guidance for proportionality if more than one Crypto Asset Service Provider is used?
- Letter f): Is there any official guidance about the significance and risk profiles of the several DLT networks? How is this impacted if issuers issue multi-chain token?

Therefore, in our opinion, it should be considered if it is more appropriate to reduce the complexity of when the principle of proportionality is used. For instance, one could only base it on the absolute value of tokens issued as well as volatility of the underlying portfolio. Furthermore, a distinction between issuers being also credit institutions and issuers not being credit institutions seem to be reasonable.

Q2. Do you have any comments on the need to exchange information between the issuer and the relevant third party provider to avoid delays in the activation of the recovery plan in case the issuer has entered into an agreement pursuant to point (5)(h) of Article 34 of Regulation (EU) 2023/1114?

In our opinion, it is reasonable to exchange information between the issuer and relevant third parties taking into account relevant data protection laws. However, in our opinion, it might be even more required for a “redemption plan” in accordance with Article 47 of Regulation (EU) 2023/1114 rather than Recovery plans in accordance with Article 46 of Regulation (EU) 2023/1114. It therefore would be worthwhile to have a separate consultation Article 47.

Q3. Do you have any comments on the categories of recovery plan indicators and on the recovery plan indicators listed in Annex I? Is the list of categories and recovery plan indicators clear? Is there any additional indicator or category of indicators that should be added?

From our understanding, in accordance with Article 46 (1) of Regulation (EU) 2023/1114, the recovery plan's purpose is to restore compliance with the requirements applicable to the reserve of assets in cases where the issuer fails to comply with those requirements. Even though we understand that Annex I is an illustrative list with example indicators, for some of the indicators given, we do not see, how these are related to a failure of no compliance with the requirements. We therefore would appreciate more guidance on how the indicators are connected and why a failure of these indicators means non-compliance (for instance in form of a table). In addition, we would appreciate if the indicators could be more measurable. Some of the indicators are based on a very qualitative view and it is not clear, when the indicators are already fulfilled and a recovery plan needs to be initiated and when there are not yet fulfilled (for instance indicators 2 c, or 8 a of Annex I).

In addition, once more we want to highlight the necessity to distinguish between issuers being credit institutions and issuers not being credit institutions as issuers not being credit institutions can hardly fulfill these monitoring requirements as operational processes will create huge costs putting the whole business model at risk.

Q4. Is the section on recovery options and recovery scenarios appropriate and sufficiently clear, also when read together with Annexes II and III?

We have concerns about the operational feasibility of the provided provisions. Annex III for instance is showing recovery plan options in which an issuer is highly dependent on third parties. Therefore, the description requirements according to Annex II can hardly be fulfilled for some of the options. In addition, most of the recovery plans will take a long period of time, therefore it would be appreciated on criteria, when a transition to a redemption plan needs to take place in accordance with section 45. Furthermore, in our opinion, the recovery options given in Annex III are not sufficient to restore operations for all indicators listed in Annex I for the initiation of a recovery plan (please also see our answer to question 3 regarding our doubts of failure of compliance given some indicators in Annex I). It would be reasonable to have indicators which can actually be cured with respective recovery plans.

Furthermore, in our opinion, the level of recovery plans is not consistent. For instance, "change of composition and/or reduction of the riskiness of reverse assets" should be part of the general risk management of an issuer rather than a recovery plan. The same applies to "Purchase of financial guarantees from a credit institution or an insurance company covering the value of the reserve of assets". Therefore, it would be appreciated if there is more guidance on when actions are really classified as "recovery plan" and when they do rather be general risk management or operational processes due to the requirements to be fulfilled by recovery plans.

In addition, we are concerned about the timelines given in paragraph 31 regarding the timeframe for a decision if a recovery plan is initiated. 24 hours do seem a very short time for the decision given that an activation of a recovery plan will have a large impact in the issuer, the token holders, and the markets (please also see our answers to question 6). We therefore recommend a longer timeframe for the decision. In addition, could you please clarify if there are any consequences if a decision was taken not to initiate the recovery plan which afterwards might have been the wrong decision and if it is possible to initiate the recovery plan at a later point in time if one decided not to be started?

Q5. Do you have any comments on the interaction between different recovery planning obligations? Are there any other operational efficiencies that can be achieved? Please describe them.

In our opinion, issuers of several token should not be required to have different recovery plans in place, for token which are involving multi-chain issuances (here we are referring to the requirements of Article 3 of the Draft Regulatory Technical Standards to specify the minimum contents of the liquidity management policy and procedures under Article 45(7)(b) of Regulation (EU) 2023/1114). This means tokens, which are identical in of all their characteristics (e. g. currency) apart of the blockchain to be issued and apart of the differences in the smart contracts in order to address the other blockchain. All token holders, independently of the underlying blockchain, will have the same rights. This means, the other blockchain shall only be a different way of distributions, but as stated, leaving everything else equal (e.g. the same euro denominated e-money token once issued on the Ethereum blockchain and once issued on the Solana blockchain). In these cases, in our opinion, it should be possible to only have one recovery plan for the tokens. This furthermore should include the possibility of combined reserve assets and the criteria when a recovery plan needs to be initiated and announced. Otherwise, the advantages of a multi-chain issued token is even reversed to disadvantages created by the parallel setup of operational as well as legal and regulatory processes creating extremely high operational complexity and costs.

In addition, we would appreciate more guidance on the communication plan with external parties – especially token holders. We see here the following problems or have the following questions respectively:

- From the perspective of the authority, is it sufficient to just announce the initiation of the recovery plan on e. g. the website of the issuer? How should the notification take place if the holders of token might not be known to the issuer? (e.g. if token are sold via exchanges). Is there a requirement to implement notifications into the smart contract? In our opinion, these factors are even more relevant to a potential redemption plan, therefore (especially for the fact of repaying the token), more guidance and a separate consultation for redemption plans would be highly appreciated.
- We are concerned about an adverse effect created by an announcement of the recovery plan to the token holders. Even if redemptions can be limited or suspended, the trust by holders into the token will be deteriorated. In an extreme scenario this might even create a “firesale” in the point in time the “recovery” was successful and the period of the recovery plan is terminated. Therefore, it might be more reasonable to not be forces to give announcements at direct initiation of the plans, especially due to the concerns we have raised regarding Annex I and Annex III (please see the previous questions). Besides that, an announcement might even have contingency effects on token of other issuers as holders might become afraid that also other holders will also initiate actions such as a redemption stop.

In addition, once more we want to highlight the necessity to distinguish between issuers being credit institutions and issuers not being credit institutions as issuers not being credit institutions can hardly fulfill the current requirements for recovery plans as operational processes will create huge costs putting the whole business model at risk.