Digital Currencies
Governance Group

European Banking Authority (EBA) Draft Guidelines on redemption plans under Articles 47 and 55 of Regulation (EU) 2023/1114 (MiCAR)

Consultation Response by the Digital Currencies Governance Group

About DCGG

Digital Currencies Governance Group (DCGG) is a trade association that represents digital assets issuers and service providers in the European Union and the United Kingdom. Our mission is to facilitate an open dialogue and encourage communication between policymakers and digital asset experts to support the design of a sound and proportionate regulatory framework that ensures safety for all market participants.

Our Members include Tether - a global stablecoin issuer, Ledger - a security technology provider for self-custody, Bitfinex - a centralised crypto-assets exchange, ZKValidator (ZKV) - a proof-of-stake validator, and Iden3 - a solutions provider for self-sovereign identity management. Our team of former government officials, lawyers, and cryptoasset experts regularly engage with policy-makers and regulators both at the national and international level. For any general enquiries or to request further information, please do reach out to info@dcgg.eu.

Questions for consultation

Question 1: Do you consider that the scope of the GL on redemption plans is sufficiently clear and takes into account the differences regarding the obligation to hold a reserve of assets set out in Regulation (EU) 2023/1114 applicable to the different types of ART or EMT issuers?

DCGG views the proportionality considerations outlined in the draft Guidelines as overall clear and reflective of the classifications and requirements related to different scenarios of ART or EMT issuance (including for entities not required by the Regulation to hold a reserve of assets) set out in the MiCAR Level I text.

Notwithstanding, from our perspective the scope of the EBA guidelines falls short in the consideration of the nuances and complexity of the various business models in the cryptoasset sector and risks becoming too oversimplified. For instance, the MiCAR definition suggests that asset-referenced tokens (ARTs) can be pegged to a basket of various fiat currencies, rather than commodities or other assets. Under this consideration, issuers of such ARTs and issuers of e-money tokens (EMTs) would be maintaining stability in a very similar way, based on the fiat currency backing assets. Therefore, it remains unclear why the scope of these draft Guidelines captured issuers of non-significant ARTs backed by fiat currencies, considering issuers of non-significant EMTs are not in scope. **We urge the EBA to allow for more flexibility for various business models that exist in the market to avoid an umbrella approach that may harm innovation with regard to these products.**

We would also welcome further clarity as to the reasoning behind the distinction in the approach to significant and non-significant EMTs with regard to the scope of these guidelines, and factors (beyond technological distinction) that have been considered to ensure this decision-making is proportionate. Otherwise this would mean that this caveat seems to be going against the principle of technological neutrality set out in the MiCAR text.

Question 2: Do you consider that the GL on redemption plans are sufficiently clear and comprehensive and that they cover all aspects of the mandate?

DCGG agrees that the proposed redemption plan guidelines are overall clear and reflect the mandate set out in the MiCAR Level I text.

Question 3: Do you consider that the redemption process as described herein provides adequate operational guidance to token holders about the actions and steps relating to the redemption claim?

While the draft guidelines concerning the redemption process should be sufficiently effective, as well as informative to token holders for understanding the steps associated with redemption claims, it is important that the requirements for issuers under the EBA's proposal are reflective of the various business models that exist in the sector, as well as fully aligned with the principles laid out in MiCAR, in order to ensure the applicable framework is sufficiently proportionate to businesses authorised under the Regulation. In particular, our reasoning relates to the following:

- ***Equitable treatment and no undue economic harm***

While we agree with the principle under this section of the guidelines, we disagree with the seemingly umbrella approach in relation to the redemption process of all MiCAR-regulated issuers, and instead suggest that the redemption process is tailored to the white paper specifics of individual issuers to account for the variety of business models that exist on the market. Importantly, we suggest this approach would prove more effective, especially when it comes to the issuance and redemption minimum requirements as outlined in paragraphs 17 and 18, in order to ensure alignment with MiCAR's Article 39[1].

This would prove highly relevant for issuers that only issue ARTs and EMTs to qualified investors or CASPs, which are primary market participants that could then offer the asset to a retail user base. Furthermore, the benefits we see in such a *primary and secondary* market structure is that MiCAR-regulated CASPs that are market makers for the secondary market would be able to fulfil the AML/KYC requirements in a compliant way. Therefore, AML/KYC requirements for such issuers should apply to their primary market customers, as they do

[1] Issuers shall establish a policy on such permanent right of redemption setting out:
(a) the conditions, including thresholds, periods and timeframes, for holders of asset-referenced tokens to exercise such right of redemption;
(b) the mechanisms and procedures to ensure the redemption of the asset-referenced tokens, including in stressed market circumstances, as well as in the context of the implementation of the recovery plan set out in Article 46 or, in the case of an orderly redemption of asset-referenced tokens, under Article 47.

not have the control or technical capability to fulfil such obligations once the token enters the secondary market.

- ***Critical activities***

Referencing paragraph 42 of the draft Guidelines, DCGG welcomes the possibility for ART issuers to involve intermediaries to perform anti-money laundering and counter-financing of terrorism (AML/CFT) checks, including Customer Due Diligence checks, on the token holders; however, we believe that this should also apply to EMT issuers with a primary and secondary market structure, i.e. AML/KYC requirements of EMT issuers would only apply to qualified investors or supervised entities (CASPs), consistent with their white paper, while the intermediaries (CASPs) would perform the AML/KYC requirements for their retail customers and token holders.

On this point, we suggest the following rewording:

"42. Issuers of ARTs ***and EMTs*** *which are not obliged entities under Directive 2015/849/EU13 should always explain in the redemption plan how they will involve intermediaries subject to that Directive so that these intermediaries:..."*

- ***Process for orderly redemption***

DCGG notes that paragraph 52 under this section should also foresee the possibility to allow for third-party providers of critical activities or intermediaries to provide the identification of token holders. Issuers with a primary and secondary market structure may only issue to intermediaries (e.g., CASPs), who in turn are responsible for the AML/KYC checks and identification of token holders. Issuers should therefore be able to delegate the responsibility for the identification of token holders to these third party providers, as primary market issuers have no direct contact with any secondary market token holders, nor are able to identify them.

We suggest the following amendment to this section:

"52. For this purpose, the redemption plan should describe the processes, the measures to identify and address money laundering and terrorism financing (ML/TF) risks applied by the issuer, ***or their intermediaries or third-party providers of critical activities,*** *and technical facilities adopted or envisaged to be in place to process: i. the identification of token holders and their entitlement to the redemption of the tokens; …"*

We share the same reasoning for paragraph 53 and reiterate that AML/KYC/CDD requirements should be a responsibility of intermediaries or third-parties, especially considering the more different business models in the market, such as the one outlined above.

Finally, paragraph 55 outlines the requirements for specifying how the mechanism of delivery of the token against the payment will be implemented in the redemption process, and its

removal from circulation. Issuers with large user bases that operate a primary and secondary market structure may not be able to collect the tokens from all retail holders, and we believe this should be the responsibility of the CASP.

Question 4: Do you consider that the information to be contained in the draft public notice is adequate and covers the necessary information to be conveyed to the token holders and for a sound redemption process?

DCGG notes that the requirements laid out by the EBA with regard to the communication plan and information contained in the draft public notice for token holders are indeed adequate and would be beneficial for informing concerned parties and facilitating the redemption process overall. We have no further comments to suggest.

Question 5.1: Do you consider that the aspects to be assessed by the competent authority for purposes of assessing whether the issuer is unable or likely to be unable to fulfil its obligations under Regulation (EU) 2023/1114 envisaged in the Guidelines appropriately complement those set out in Article 47(1) of Regulation (EU) 2023/1114?

According to the MiCAR Level I text, insolvency, resolution and withdrawal of authorisation are the main triggers that would help competent authorities determine whether an issuer is unable or unlikely to fulfil their obligations. Based on our understanding of the mandate given to the EBA by the Level I text, the additional triggers developed should complement the above sufficiently well to anticipate adverse scenarios to prevent consumer protection risks, but should also, crucially, be consistent with that logic.

While we welcome the EBA's proposals on the consideration of significant decreases in the capital position (i.e., own funds held) and liquidity position of the issuer as potential triggers in the determination of inability or likely inability to fulfil MiCAR obligations and subsequent implementation of the redemption plan, we do not agree with the principle of considering counterparty failure as equally important to the above and a liability of the issuer (as part of the *"significant deterioration of the market perception of the issuer"*).

In particular, we are referencing paragraph 83 (ii) of Section 4.4. of the draft Guidelines. We find the proposal of determining inability or likely inability of an issuer based on the deterioration in the solvency profile of the credit institution holding the issuer's deposits as counterintuitive; that is because the requirement to hold deposits with multiple credit institutions was set out both by the MiCAR Level I text and the subsequent draft regulatory technical standards consulted on by the EBA earlier his year, which in itself as a requirement is outside of the issuer's control and increases the likelihood for potential financial instability,. A very recent example of the negative implications of such a structure is the run on Silicon Valley Bank in the United States.

Under this consideration, we strongly disagree that issuers should activate a redemption plan or be held liable for the implications of a requirement that was set out by the Regulation itself. This specific proposal is unfortunately not consistent with the logic of the triggers set out in the Level I text.

Overall, our position is that the proposed list of triggers is not entirely consistent, and non-quantifiable and highly subjective provisions such as *"loss of confidence of the token holders"* (as stipulated in paragraph 83 (iii)) should be revisited to promote fairness for MiCA-regulated entities and, crucially, legal clarity. Under the same consideration, paragraph 86 on the number of factors that should be considered for the competent authority's determination of the issuer's inability to fulfil their obligations appears too broad and would lead to legal uncertainty. We would welcome further clarity on the prioritisation and severity of each of the proposed triggers to support a more objective case-by-case assessment by competent authorities.

Question 5.2: Do you agree that in case of credit institutions and the other entities subject to Directive 2014/59/EU or of central counterparties subject to Regulation (EU) 2021/23, the competent authority should not trigger the redemption plan without prior consultation and coordination with the relevant prudential or resolution competent authorities under that Directive or Regulation, in case of commencement of crisis prevention measures or crisis management measures under such sectoral acts?

DCGG agrees with the principle of having sound coordination based on prior consultation between competent authorities supervising credit institutions and central counterparties and relevant prudential and resolution authorities. In our view, this approach is a crucial factor to underlie the decision of commencing crisis management measures.

In line with the proportionality objectives of the current Guidelines, we suggest that the same principle should be extended to other entities supervised in the EU market, in this case MiCAR-authorised issuers of ARTs and EMTs.

From DCGG's perspective, not enabling the same level of coordination for these issuers (including via intra-authority consultation prior to a decision), or any other EU-regulated entities (e.g., e-money institutions under the Payment Services Directive) in the case of crisis management and crisis prevention, would result as highly discriminatory toward certain sectors, while being more favourable to incumbent/traditional financial institutions.