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By email to fintech@eba.europa.eu

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Dear Alain

Re: EBA's draft response to European Commission's CfA on Delegated Acts under MiCAR concerning certain criteria for the classification of ARTs and EMTs as significant and the fees that are to be charged by EBA to issuers of significant ARTs and EMTs

We welcome the opportunity to provide input on the EBA's draft response to the Commission's CfA on Delegated Acts under MiCAR. 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 sincerely,

Dr Thaer Sabri
Chief Executive Officer
Electronic Money Association

Introduction

We welcome the opportunity to comment on the EBA's consultation on its draft response to the Commission's CfA ("Draft") regarding

- The significance criteria in Article 43 (1) (e) and (f) (part 1 of the CfA), and
- The supervisory fees the EBA will be charging under Article 137(1) MiCAR (part 2 of the CfA).

We appreciated the open and constructive debate in the two workshop sessions EBA had arranged and would be grateful also our following, more general comments addressing specifically the EBA's draft response to part 1 of the CfA were considered.

Comments

In responding to the EBA's Draft we would like to focus in particular on a question raised for both indicators in the square brackets added to the first column of the table. It asks for views whether the indicators should be "calculated or framed differently". In our view rather than framing the indicators and their calculation differently they need a properly and clearly articulated frame to begin with.

There are two important angles to this issue, a known and an unknown one.

1. As yet unknown are the quantitative thresholds that will apply to the proposed indicators. However, without knowing these thresholds it is difficult to comment on these indicators, on what they are meant to indicate and whether they deliver on their purpose. It is and start indicating what they are meant to indicate it is difficult to comment on them. The still missing thresholds are key to understanding the frame in which the indicators and their calculation applies.

   In banking regulation size, interconnectedness and the extent of international activities are criteria used in the context of assessing the systemic relevance of, and the potential for systemic risks caused by, a credit institution. It's about assessing whether its operation presents systemic risks that call for heightened regulatory scrutiny and potentially an increase of prudential requirements to contain and mitigate these risks.

   In contrast, the low level of thresholds set for the quantitative indicators in Article 43 (1) (a), (b) and (c) does not suggest classification of ARTs or EMTs as significant is about capturing systemic risk, let alone at the European or Euro area level. A credit institution with, for instance, a balance sheet around the size of the EUR 5.000.000.000 of reserve of assets referred to in Article 43 (1) (b) is unlikely to be anywhere close to systemic relevance. We cannot see how ARTs/EMTs of comparable size and subject to safeguarding could present relevant systemic risks.

   If quantitative indicators for the significance criteria under Article 4 (1) (e) and (f) were subject to thresholds in a corresponding order of magnitude, they would filter out as significant ARTs and EMTs of a size highly unlikely to present systemic risks. The indicators would capture tokens and issuers with business activities giving rise to exposures of a limited number of regulated financial institutions most likely representing only a small portion of their overall risk portfolio. Application of MiCAR provisions targeted at significant tokens including transfer of supervisory responsibility to the EBA would be triggered, however, without contributing much, if at all, to better regulatory control of systemic risks. The much tighter regulation may just mitigate some of the engaged financial institution's exposure, however, only if issuers were able to adjust their business models to the dramatic increase of prudential requirements applicable to significant tokens.

If this is the frame for the proposed indicators we would emphasis as paramount for their application the EBA's suggestion that "the outcome of the significance assessment should ultimately be subject to a holistic/collective assessment of core and ancillary indicators". In cases where the criteria under Article 43 (1) (e) and (f) in combination or each alone are decisive for the classification as significant ample room for supervisory discretion should be provided to allow for a more comprehensive case-by-case assessment taking into account the actual risks associated with the given token in particular whether any related systemic risks warrant much increased prudential requirements and transfer of supervisory responsibility to the EBA.

2. Known and most obvious are the consequences of a classification as significant to which we referred already before. It is not just about the transfer of supervisory responsibility from a national competent authority to the EBA as the relevant European regulatory body. This aspect of regulatory significance is well-known from the classification of credit institutions as significant under Article 6 (4) of Council Regulation (EU) No 1024/2013[1] and the resulting transfer of supervisory responsibility to the ECB/SSM. More importantly, and in stark contrast to the unchanged prudential regime applicable to significant credit institutions the classification of ARTs/EMTs as significant under Article 43 MiCAR

    - Triggers for EMTs and their issuers the transfer into a different prudential regime (Article 58 (1) MiCAR provides for Article 5 and 7 of EMD2 to be replaced by MiCAR requirements applicable to significant ARTs), and
    - Implies for both, significant ARTs and EMTs (and their issuers), application of much more demanding prudential requirements (as compared to MiCAR requirements applicable to non-significant ARTs and EMD2 requirements applicable to non-significant EMTs).

    These increases amount to a major cliff-edge effect on several accounts. Once classified as significant MiCAR provides for capital requirements to increase by 50% and for the obligation to deposit funds with credit institutions to double from 30% to 60%. This enormous jump in prudential requirements does not in any way reflect a corresponding increase of risk, neither firm-specific nor systemic.

[1] COUNCIL REGULATION (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions

Whatever the timeframe the future EBA RTS under Article 45 (7) MiCAR will allow for adjusting to the increased capital requirements (and only these) issuers of EMTs and ARTs that have turned significant will most likely have to rebuild their entire business model. Due to the cliff-edge effect the economic fundamentals, the risk profile, profitability, and hence the conditions for issuers viability and sustainability will change significantly.

What we have set out above on the cliff-edge effect is nothing more than a summary of the well-known MiCAR level 1 legislative text. However, as the frame for the proposed quantitative indicators and their calculation it is important to keep in mind the consequences this text and the setting of additional quantitative indicators may trigger.

In addition, it is worth in this context to draw on another well-known example of classification of credit institutions' systemic importance based upon size, interconnectedness and international activities and the corresponding increases in prudential requirements. We're obviously referring to the approach to G-SIBs (and G-SIIs) as developed and maintained by the FSB. The key differences in the FSB approach and methodology compared to the classification as significant under Article 43 MiCAR are:

- The amount of discretion built into the assessment,
- The FSB bucketing allowing a layered much more risk-adjusted increase of prudential requirements, and
- The much more moderate steps of additional CET 1 capital requirements credit institutions are facing when moving through the FSB buckets. These staggered increases are no-where close to what ARTs/EMTs and their issuers are facing when classified as significant. Moreover, responding to market expectations and in line with their business model G-SIBs tend to comply with these heightened requirements anyhow.

Accordingly, drawing on the example of the FSB approach to G-SIBs, we would highlight again that building as much as possible supervisory discretion into the significance assessment is of utmost importance. We acknowledge that the legislative text of Article 43 MiCAR sets narrow limits and cannot be changed at this stage, but for the qualitative criteria of Article 43 (1) (e) and (f) one should avoid as much as possible reliance upon firm quantitative indicators with a corresponding decision-binding automatism. Since this is the legislative frame for the application and calculation of the proposed indicators we would reiterate and re-emphasis the importance of the EBA's suggestion that "the outcome of the significance assessment should ultimately be subject to a holistic/collective assessment of core and ancillary indicators".

3. One final remark: Issuers of ARTs and EMTs will not be able to wait with adjustments to their business model until the business approaches the set thresholds including those as yet unknow for the quantitative indicators inform the assessment for the criteria under Article 43 (1) (e) and (f). Issuers will have to steer the business across all relevant indicators in order to avoid as long as possible the issued token to turn significant. These indicators will provide potentially strong intended or unintended incentives and are most likely to

significantly change the reality they are meant to measure. At the same time, as alluded to already before, we doubt that the impact of the most likely adjustments of business models (before and after an ART or EMT turns significant) on the issuer's risk profile, its profitability and eventually its viability and sustainability will in any way mitigate risks for token holders or the financial system. To the contrary, these adjustments are very likely to be such as to put issuers' viability and hence the financial and non-financial interests of their retail and wholesale clients and creditors at risk.

In summary: We urge the EBA and the European Commission to consider the proposed quantitative core and ancillary indicators very carefully in particular if the intention is to set the related thresholds at a level corresponding with the thresholds in Article 43 (1) (a) to (c). The language in Article 43 (1) (e) and (f) does allow to build ample room for supervisory discretion into the significance assessment under these criteria. We hope we have been able to set out that, given the rigid legislative frame, including in particular the enormous cliff-edge effects tokens are facing when turning significant, supervisory discretion is of utmost importance to manage and, if needed, curb possibe unintended consequences of the legislative text.

Members of the EMA, as of August 2023

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