



Electronic Money Association

68 Square Marie-Louise

Brussels 1000

Belgium

www.e-ma.org

Jan Ceysens
Head of Unit,
Fintech Unit, European Commission,
Rue de Spa 2
Brussels,
Belgium

6 December 2023

Dear Jan

Re: EMA response to EC consultation on draft “COMMISSION DELEGATED REGULATION (EU) .../... ... supplementing Regulation (EU) 2023/1114 of the European Parliament and of the Council by specifying certain criteria for classifying asset-referenced tokens and emoney tokens as significant”

We welcome the opportunity to provide input on the European Commission draft Delegated Regulation specifying certain criteria for classifying asset-referenced tokens and emoney tokens as significant” (“The Delegated Act” or “Act”). 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.

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. A full list of our members can be found here: <https://e-ma.org/our-members>

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

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Thaer Sabri', with a long horizontal flourish extending to the right.

Dr Thaer Sabri
Chief Executive Officer
Electronic Money Association

EMA response

The EMA participated actively in the EBA's work on the Technical Advice ("Advice") to the EC regarding The Delegated Act now submitted by the EC for consultation. The proposed Act follows closely the EBA's Advice on the matter. We therefore include below the EMA's response to the EBA consultation on its draft Advice in full. The concerns expressed in this earlier response extend to the proposed Act, and remain valid.

We note that the EBA's statement in its Advice that "*the outcome of the significance assessment should ultimately be subject to a holistic/collective assessment of core and ancillary indicators*" has not been reflected in the proposed Act. As set out in more detail in the [EMA response to the EBA consultation](#), the supervisory discretion needed for the MiCA significance assessment should extend well beyond the limited discretionary leeway proposed by the EBA. Supervisory discretion, its proper exercise and related standards and guidance are needed across the three dimensions (discussed below), warranting further work on the proposed level 2 delegated act and eventually the level 1 MiCA significance concept laid down in Article 43.

The exercise of this discretion will have to respond to the ultimate objective of the significance concept as specified in recital 4 of the draft Act: to capture those ARTs/EMTs that are "*most likely to pose risks to financial stability, monetary policy transmission and monetary sovereignty of the Union*".

Impact versus probability

The "... *most likely to pose risk to financial stability* ...", referred to in recital 4 of the proposed Act, is, as any other risk, unanimously understood in risk management as the product of "probability x impact". The indicators in the proposed draft Act address impact, but there is little, if anything, on probability. Assessing probability and the related considerations should, in our view, be left to proper and proportionate exercise of supervisory discretion. Additional guidance is not warranted. The proposed Act should however explicitly acknowledge that probability considerations should form part of the discretionary element of the significance assessment, in other words, how likely it is that risks will materialise, should be taken into account.

Dual purpose

Whatever room is left for supervisory discretion, even if it were excluded entirely, the fundamental problem with the significance assessment under Article 43 of MiCA resides in the dual purpose of this assessment. Unlike other significance concepts in EU and global financial sector regulation (e. g. under the SSM Regulation and the ECB's SSM Framework Regulation and under the FSB/BCBS G-SIB assessment) the MiCA significance assessment not only triggers transfer of supervisory responsibility for issuers of significant ARTs/EMTs from the national competent authority to the EBA as the corresponding European regulatory body, but it also results in the application of significantly more demanding prudential requirements. These include a 50% increase of own funds requirements, supervisory

discretion for firm-specific, potentially major additional own funds requirements, additional liquidity requirements combined with demanding liquidity stress testing requirements, and more. Reconciling these two distinct purposes of the significance assessment will pose problems. The key considerations that may well suggest a transfer of supervisory responsibilities to the EBA are different from the type of considerations that could give rise to the dramatic increase of prudential requirements referred to before. The size of the cliff-edge effect associated with the increase of prudential requirements that issuers of significant ARTs/EMTs are facing is unprecedented in financial sector regulation.

As a matter of principle, a significance assessment triggering increased prudential requirements, even if much more modest than in the case of MiCA, would need to take into account requirements of proportionality and risk-sensitivity. In contrast, such considerations are much less relevant, if at all, for a significance assessment that simply entails the transfer of supervisory responsibilities to a European supranational regulatory body. The latter may well be justified by nothing more than the need for a coherent and fully harmonised regulatory approach, possibly just to ensure a coherent assessment of systemic risks by the EBA as that one EU supranational regulatory body.

The criteria and associated quantitative thresholds in Article 43, as well as the related indicators suggested in the proposed Act (if subject to quantitative thresholds commensurate with those in Article 43) may well be suitable and properly calibrated for a significance assessment that merely triggers a transfer of supervisory authority to the EBA. They appear to be broadly aligned to, and broadly of the same order of magnitude as, the criteria and thresholds for the significance assessment under the ECB's SSM Framework Regulation, which is just about the transfer of regulatory and supervisory responsibilities for significant credit institutions from the national competent authority to the ECB. In contrast, "significance" in terms of systemic risks, risks to EU financial stability, EU monetary sovereignty and proper transmission of EU monetary policy is a completely different matter.

We hope that the interim report the EC is tasked to produce according to Article 140 MiCA will be able to address this issue, which, in our view, amounts to a fundamental conceptual flaw of the significance assessment under Article 43 of MiCA. We note in this regard, that the EC's report will not only have to provide an assessment of the appropriateness of the quantitative thresholds but also an *"assessment of whether the thresholds should be evaluated periodically"*. We do support periodic evaluations of these thresholds, but believe that the difference between the two purposes of the MiCA significance assessment and the need for a decoupling and a differentiated approach becomes immediately obvious when considering the adequate periodicity for any (re-)evaluation of the applicable thresholds. Whilst the key criteria may well be the same or similar, related thresholds meant to reflect the significance of systemic risks posed by ARTs/EMTs - at this stage largely uncharted territory - are a completely different matter from thresholds designed to determine whether regulatory responsibilities should be transferred from the national competent authorities to the EBA. If at all possible, the latter should remain stable and be subject to revision only under exceptional circumstances.

Accordingly, if the business of a regulated firm falls below a set threshold, transferring supervisory responsibility back to the national competent authority may well become

necessary. However, any transferring back of regulatory responsibilities is harmful for the effectiveness of supervision as it puts an end to an established regulatory relationship, and is most likely to result in the loss of firm-specific regulatory expertise built up over time and virtually impossible to be transferred back, together with the supervisory responsibility, to the national competent authority that is taking over again. Such harm to the effectiveness of regulation should be avoided by all means and should surely not be dependent upon periodic evaluations of set thresholds.

In contrast, evaluations of criteria and thresholds triggering significantly increased prudential requirements should be much more frequent. Their periodicity should be such as to allow for timely adjustments reflecting the evolving systemic risks as posed by ARTs/EMTs and - at least as importantly - be informed by the hopefully rapidly evolving understanding, assessment and, if at all possible, measurement of these systemic risks.

As emphasised earlier in this response, a decoupling of the dual-purpose significance concept, and instead the introduction of a separate significance assessment solely to inform heightened prudential requirements, is in our view compelling. If eventually pursued, the relevant criteria may be largely the same but the applicable thresholds triggering increased prudential requirements, hopefully proportionate to the heightened systemic risks posed by ARTs/EMTs, should be significantly higher. Combined with lower thresholds for the transfer of supervisory responsibilities to the EBA, the approach would also ensure that the “border control”, that is the assessment whether a given ART/EMT poses, or not, systemic risks is, as it should be, in the hand of one capable EU supervisory authority, the EBA. This decoupling would also eliminate a possible conflict of interest since the EBA’s analysis and assessment of systemic risks as posed by ARTs/EMTs would have no bearing on the transfer of supervisory responsibilities to the EBA.

The indicators

Finally, the proposed indicators in the draft Act need to be assessed against this overarching objective of capturing those ARTs/EMTs as significant that are “*most likely to pose risks to financial stability, monetary policy transmission and monetary sovereignty of the Union*”, Accordingly, the significance assessment under Article 43 MiCA in its present form, whether aimed at significance in terms of systemic risks or in terms of transfer of regulatory responsibilities must be such as to indicate **EU**-related systemic risks and the need or desirability of transfer of regulatory responsibilities to the EBA. Accordingly, the assessment should be based exclusively upon **EU**-related considerations in particular the specific **EU impact** of a given ART/EMT and related EU-specific numbers informing the significance assessment.

In addition, and more specifically on the individual indicators proposed in the draft Act, we note:

(Article 2, point (1) (a) and (b)):

- Regarding Article 43 (1) (e) referring to “*the significance of the activities of the issuer of the asset-referenced token on an international scale*”, the EU-specific relevance of this criterion is not apparent, and is further obscured by the related core indicators

proposed in **Article 2, point (1) (a) and (b)** of the draft Act. Both indicators refer to an issuer's **market share in cross-border transactions**. However, market share as such is not a suitable metric for impact, let alone systemically relevant impact. It only measures a given issuer's relative part in a given market, in this case the market of ART/EMT-based cross-border transactions. However, whatever an issuer's market share, if the overall size of the market is such that it poses no EU-specific systemic risks, the market and an issuer's share in that market must remain irrelevant for the significance assessment. Regulatory monitoring of this market may become warranted, but we do not think that at this stage nor in the foreseeable future the size of this market is anywhere close to posing EU-specific systemic risks. Moreover, even if this market would grow rapidly, any related systemic risks would need to be assessed taking into account the substitutability of ART/EMT-based services by competing payment services. Systemic risks may well be mitigated due their substitutability by traditional payment services provided by competitors and, as the case may be, by the digital € should it be implemented and allow for cross-border transactions.

Only once it has been established that this market *does* pose EU-specific systemic risks, would information on a given issuer's share in that market shed light on the systemic risks originating from that issuer. Until that time, the issuer's market share, whatever its size, in no way can be taken as indicative of any degree of EU-specific systemic risks.

Moreover, the nature of a market share indicator is such that no quantitative threshold, be it 20, 30 or 100%, can be set as the relevant trigger point beyond which the issuer poses systemic risks. If the overall size of the market for ART/EMT-based cross-border transactions is small, as it currently is, even a 100% market share does not pose systemic risks. As proposed in Article 2, point (1) (a) and (b) of the draft Act, that is on a stand-alone basis, market share indicators are misleading and must not inform the significance assessment. We acknowledge, however, that under the conditions set out above (i.e. the market of ART/EMT-based cross-border transactions has grown to a systemically relevant size) market share information can assist supervisory discretion. However, that discretion must not be directed by associated binding quantitative thresholds. In the words of the EBA, discretion must be exercised in a holistic fashion based upon supervisory judgement rather than strictly binding criteria and quantitative thresholds.

- We also note that the calculation of indicators aimed at measuring the importance of cross-border transactions would have to be based exclusively upon available EU-related data drawing, as needed, on data gathered and reported by EU-based and EU-authorized CASPs. Transactions between non-custodial wallets or transactions for which for some other reason data on the location of the payer or payee is not available will have to remain outside the calculation since it cannot be established

whether or not they contribute in any way to EU-specific systemic risks, which the significance assessment is meant to capture.

- Regarding the core indicator and the related sub-indicators specified in **Article 3 (1) (a), and (2) (a) – (c)** respectively, all based upon the **share of (different categories of) non-deposit reserve assets** in relation to the total reserve, we have, in principle, the same reservations as set out above with regard to market share as an indicator. By definition, metrics measuring the share of something in relation to the total are relative and therefore not suitable as an indicator of the absolute impact, in this case the interconnectedness, of the total or any part of it. If the total of an ART issuer's reserve assets amounts to 800bn, of which 80bn are non-deposit assets, one may come to the conclusion that the 80bn of non-deposit assets give rise to a degree of interconnectedness justifying classification of that ART as significant. If, however, the total of the reserve assets amounts to only 20 million, of which 2 million are non-deposit assets, the degree of interconnectedness is surely negligible. In both cases the share of non-deposit assets is 10% and in both cases this share-based indicator does not provide any relevant information that could or should be taken into account for the significance assessment under Article 43 MiCA.
- Finally, regarding the sub-indicators, ancillary indicators and other relevant aspects specified in **Article 3 (4) to (7)** of the draft Act for consideration where *“the assessment of the core indicators referred to in paragraph 1 does not lead to a conclusive determination with regard to the interconnectedness”* we urge the Commission to respond to the EBA's demand and state explicitly that *“the outcome of the significance assessment should ultimately be subject to a holistic/collective assessment of core and ancillary indicators”*. We acknowledge that the different aspects of potential **interconnectedness** as captured by the range of indicators and the additional further considerations are relevant for the assessment. However, these provisions suggest that, based upon an exhaustive list of relevant considerations combined with mathematical formulas for the calculation of the different indicators, the assessment of interconnectedness can be undertaken as a quasi-scientific exercise based upon a defined methodology and numerical outcomes that can be directly compared across the ARTs/EMTs subject to a significance assessment.
- However, these provisions, the apparently exhaustive list of required considerations in combination with the mathematical formulas for the calculation of the different indicators suggest that the assessment of interconnectedness can be undertaken as a quasi-scientific exercise based upon a defined methodology and numerical outcomes for indicators that can be directly compared across the ARTs/EMTs subject to the assessment. This is not the case. The reality of interconnectedness is far more complex and, accordingly, its proper assessment presupposes some degree of supervisory discretion and expert-based judgment. It requires the holistic assessment requested by the EBA, which will have to include a critical reading of the numerical

outcomes for the different indicators and consideration, as the case may be, of other aspects even if not reflected in the provisions under Article 3 (4) to (7) of the draft Act.

EMA response to EBA Call for Advice on Significance Criteria and Supervisory Fees under MICA Article 43 and Article 137(l) – submitted on 14 August 2023

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 emphasize 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 1024/2013¹ 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

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

prudential requirements does not in any way reflect a corresponding increase of risk, neither firm-specific nor systemic.

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 I 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 I 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-emphasize 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 unknown 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 possible unintended consequences of the legislative text.

Members of the EMA, as of December 2023

[AAVE LIMITED](#)

[Airbnb Inc](#)

[Airwallex \(UK\) Limited](#)

[Allegro Group](#)

[Amazon](#)

[American Express](#)

[ArcaPay UAB](#)

[Banked](#)

[Bitstamp](#)

[BlaBla Connect UK Ltd](#)

[Blackhawk Network EMEA Limited](#)

[Boku Inc](#)

[Booking Holdings Financial Services](#)

[International Limited](#)

[BVNK](#)

[CashFlows](#)

[Circle](#)

[Citadel Commerce UK Ltd](#)

[Contis](#)

[Corner Banca SA](#)

[Crypto.com](#)

[eBay Sarl](#)

[ECOMMPAY Limited](#)

[Em@ney Plc](#)

[erchantpay Group Ltd](#)

[eToro Money](#)

[Etsy Ireland UC](#)

[Euronet Worldwide Inc](#)

[Facebook Payments International Ltd](#)

[Financial House Limited](#)

[First Rate Exchange Services](#)

[Flex-e-card](#)

[Flywire](#)

[Gemini](#)

[Globepay Limited](#)

[GoCardless Ltd](#)

[Google Payment Ltd](#)

[IDT Financial Services Limited](#)

[Imagor SA](#)

[Ixaris Systems Ltd](#)

[J. P. Morgan Mobility Payments Solutions](#)

[S. A.](#)

[Modulr Finance B.V.](#)

[MONAVATE](#)

[MONETLEY LTD](#)

[Moneyhub Financial Technology Ltd](#)

[Moorwand](#)

[MuchBetter](#)

[myPOS Payments Ltd](#)

[Nuvei Financial Services Ltd](#)

[OFX](#)

[OKG Payment Services Ltd](#)

[OKTO](#)

[One Money Mail Ltd](#)

[OpenPayd](#)

[Own.Solutions](#)

[Park Card Services Limited](#)

[Paymentsense Limited](#)

[Paynt](#)

[Payoneer Europe Limited](#)

[PayPal Europe Ltd](#)

[Paysafe Group](#)

[Paysend EU DAC](#)

[Plaid](#)

[PPRO Financial Ltd](#)

[PPS](#)

[Ramp Swaps Ltd](#)

[Remitly](#)

[Revolut](#)

[Ripple](#)

[Securiclick Limited](#)

[Segpay](#)

[Skrill Limited](#)

[Soldo Financial Services Ireland DAC](#)

[Square](#)

[Stripe](#)

[SumUp Limited](#)

[Swile Payment](#)

[Syspay Ltd](#)

[Transact Payments Limited](#)

[TransferMate Global Payments](#)

[TrueLayer Limited](#)

[Uber BV](#)

[VallettaPay](#)

[Vitesse PSP Ltd](#)

[Viva Payments SA](#)

[Weavr Limited](#)

[WEX Europe UK Limited](#)

[Wise](#)

[WorldFirst](#)

[Worldpay](#)

[Yapily Ltd](#)