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Dear Oleg

Re: EBA's CP on Guidelines on the minimum content of the governance arrangements for issuers of asset-referenced tokens

We welcome the opportunity to provide input on the EBA's Consultation Paper on Guidelines on the minimum content of the governance arrangements for issuers of asset-referenced tokens.

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. Our membership includes 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.

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

Yours faithfully,

Dr Thaer Sabri
Chief Executive Officer
Electronic Money Association

Introduction

The ESAs face an enormous challenge of producing a complex, comprehensive and highly technical body of MiCAR level 2 regulatory instruments and related guidelines within a tight timeframe. We are grateful for the staggered consultation process launched several months ago, but remain concerned that each instrument, the interdependencies between, and the consistency across, these instruments cannot be given the required full and holistic consideration. We therefore urge the EBA to keep the instruments that are now being developed under review well beyond the consultation phase and to engage in a close ongoing dialogue with national competent authorities who will be implementing the instruments in their evolving supervisory practices. This ongoing dialogue would also have to include the crypto-asset industry to benefit from both the wealth of insight that industry efforts to comply with all aspects of this new rulebook will generate and direct, first line feedback the industry can offer on the still rapidly evolving crypto-asset markets. The objective would have to be not only to translate the rulebook into effective and EU-wide fully harmonised supervisory practices, but also to provide assistance for the analysis needed to inform the review and reform of the MiCAR level 1 text wherever needed.

That said, we welcome the opportunity to comment on this specific Consultation Paper on the proposed “Guidelines on the minimum content of the governance arrangements for issuers of asset-referenced tokens” (“**CP**” and “**Guidelines**”) and would be grateful if our following comments were considered. We stand ready for engaging in a dialogue with the EBA and national competent authorities well beyond the close of this consultation.

Comments

We generally agree with the discussion of governance arrangements for issuers of asset-referenced tokens (“**ARTs**”) in the **CP** and also welcome the overall thrust of the proposed **Guidelines** including the emphasis on the need for cross-sectoral consistency. The following comments will focus mainly on more general issues as they relate to questions 1 to 3 of the **CP**.

Question 1: Is the background section providing the needed context with regard to the mandate to issue GL on internal Governance under MiCAR?

We believe the background section to be useful, but that it does not address all relevant issues that should be borne in mind for the supervisory assessment and evaluation of governance arrangements of issuers of **ARTs** given the still early stage of the development of crypto-asset and ART markets.

In the consultation on the “[Draft Regulatory Technical Standards to specify the adjustment of own funds requirements and stress testing of issuers of asset-referenced tokens and of e-money tokens subject to the requirements in Article 35 of Regulation \(EU\) 2023/1114 on markets in cr](#)” the EBA explicitly highlights: “*Given the novelty of asset-referenced and e-money tokens and their issuers, no universal risks assessment framework exists. This makes it difficult for competent authorities to evaluate the risks of and posed by those issuers.*” (recital 3 of the draft RTS) ¹

We therefore suggest that the proposed **Guidelines** should similarly highlight this **absence of a universal risks assessment framework and the resulting significant difficulty for competent authorities to evaluate the risks**. To overcome these difficulties and ensure consistency of supervisory practices and adherence to a consistent application of the proportionality principle across regulators’ sectoral and cross-sectoral portfolios the risk assessment for **ARTs** and their issuers must be undertaken with caution and scrutiny and be based upon a sound and transparent methodology and process. The evaluation of governance arrangements and any related supervisory requirements and expectations must be informed by a thorough understanding of the risks and the risk profiles of the issuer and the issued ART product. An ongoing supervisory dialogue is important and competent authorities should commit to swiftly review their risk assessment and related supervisory expectations and demands as and when needed.

Given the absence of a well-established risk assessment framework, we do not believe that it is possible at this stage to draw a clear line between non-significant and significant **ARTs** and set, as the proposed **Guidelines** do, more demanding governance requirements for the latter. Governance arrangements for **ARTs** classified as significant will obviously have to respond to the much increased prudential and risk management requirements that apply to them. However, we remain unconvinced that the MiCAR significance concept and the associated thresholds provide a reliable indication of significantly heightened (financial stability) risks. The applicable increased prudential requirements, which amount to an unprecedented and most problematic cliff-edge effect for **ARTs** turning significant, are in our view in many cases entirely disproportionate. Accordingly, we believe the difficult task of navigating the transition for a given **ART** and its issuer to compliance with these increased prudential requirements should by no means be further burdened by higher requirements regarding those governance arrangements that are not directly related to the increased prudential requirements triggered by the classification as significant.

¹ See also

p.4 “Given the novelty of asset-referenced tokens and their issuers, the fact no universal risks assessment framework exists and the rapid developments in this sector, these RTS have been developed with a certain degree of flexibility for competent authorities ...” and

p.12, para 34 “Given the novelty of issuers of asset-referenced tokens and the tokens themselves, no universal assessment framework exists. This makes it difficult for competent authorities to evaluate the risks of an issuer of asset-referenced tokens, its therefore crucial that competent authorities have the flexibility to increase the own funds requirements of issuers of asset-referenced tokens, if they observe a higher degree of risk. The higher degree of risk criteria specified in Article 3 of these RTS should guide competent authorities in their decision and ensure a harmonised approach across competent authorities in the EU.”

We therefore urge the EBA to remove any specific language in the proposed Guidelines addressing governance arrangements for **ARTs** classified as significant. Instead supervisory expectations and demands should reflect, and respond to, the actual findings from competent authorities' case-by-case evaluation and risk assessment. The criteria for the classification as significant may well be relevant for that assessment, however, not the set thresholds.

We also encourage the EBA to add general guidance on how to assist issuers in their transition to compliance with the increased prudential requirements, not least with regard to the any required upgrading of their governance arrangements. Supervisory assistance will be needed in particular regarding an issue highlighted in the EBA's Consultation Paper on "Draft Regulatory Technical Standards to further specify the liquidity requirements of the reserve of assets under Article 36(4) of Regulation (EU) 2023/1114". In para 22 and 23 the EBA sets out:

"22. Point (d) of Article 36(4), together with Article 58(1) and (2), of MiCAR establishes that the amount of deposits with credit institutions cannot be lower than 30% of the amount referenced in each official currency, in the case of issuers of ARTs that are not significant or e-money institutions issuing EMTs that are not significant if required by the relevant competent authority. This percentage is 60% for the cases of issuers of ARTs or EMTs that are significant.

23. The EBA considers that an amount of bank deposits in the reserve of assets higher than those percentages of the amount of assets referenced in tokens might trigger concerns from the perspective of the liquidity of the reserve assets overall and their exposure to credit risk. The EBA considers that it is key to keep a relevant amount of the reserve of assets as susceptible to be liquidated in the market and not just with specific counterparties. Furthermore, the interconnectedness between the banking system and crypto-asset sector should be well controlled to avoid reciprocal contagion effects in case of distress of one of them. Therefore, the EBA considers that the minimum amount of bank deposits in the reserve assets should not be set at a higher default level than those percentages of the amount referenced in each official currency."

We agree with the EBA's analysis that this jump from 30 to 60% minimum deposits to be held with credit institutions as triggered by the classification of an **ART** as significant effectively results in an increase of liquidity risks, credit risks, as well as interconnectedness hence, in combination in an increase in financial stability risks. For issuers it will be challenging to address these heightened risk resulting from the increased prudential requirements associated with the MiCAR significance concept. In their transition towards compliance with these increased prudential requirements issuers will need supervisory handholding to understand competent authorities' expectations including as they relate to governance arrangements during and after completion of the transition.

The issue is even further compounded where national competent authorities exercise the national discretion MiCAR provides and choose to apply some or all of the increased prudential requirements for significant **ARTs** to non-significant **ART**.

It is a complicated matter for both significant and, where applicable, non-significant **ARTs**. To ensure EU-wide consistent supervisory practices the **Guidelines** should address the issue and provide guidance for national competent authorities regarding issuers' governance arrangements as they relate to and underpin the management of liquidity and credit risks, of risks associated with the issuers' interconnectedness with the financial system and, as a consequence, of the resulting heightened financial stability risks. Clear and timely supervisory communication is essential to address the challenges related to a regulatory framework that, though meant to reduce risks, effectively increases them.

Question 2: Is the subject matter, scope, and definitions section appropriate and sufficiently clear?

We agree that as stipulated under para 6 the scope of application of the proposed **Guidelines** is and, indeed, should be limited to issuers of **ARTs**. However, we urge the EBA to include explicit language delineating the scope of application also negatively, that is to clearly state in the section on scope that the proposed **Guidelines** do not apply to issuers of EMTs.

We believe such a statement is needed given the reference in Article 35 (3) (a) to Article 34 (1), (8) and (10). Since according to Article 58 (1) (b), Article 35 (3) also applies for the discretionary additional own-funds regulators may require issuers of significant EMTs to hold, regulators may well be inclined to apply the **Guidelines** also for the assessment whether additional own funds should be required and, if so, for the computation of the amount of additional own funds. We also note in this regard that according to Article 58 (2) national competent authorities could require even issuers of non-significant EMTs to hold such additional own funds. As it stands, the MiCAR level 1 text opens a Pandora box of options for national competent authorities to apply to non-significant EMTs and their issuers prudential requirements that go well beyond the EMD2 requirements, which according to the underlying MiCAR principle should apply indifferently to all non-significant EMTs. Related guidance is needed all the more since the related national discretion not only undermines EU-wide consistent application and implementation in supervisory practices of a regulation it also runs counter to the principle of technology neutrality since if provided based upon the technology of traditional e-money these much more demanding requirements would obviously not apply. Addressing the issue in the **Guidelines** could help ensure at least some degree of EU-wide consistency and technology neutrality.

Given the significant differences in business model and risk profile between issuers of **ARTs**, as targeted by the proposed **Guidelines**, and issuers of significant and non-significant EMTs, we firmly believe that a straight-forward line-by-line application of these **Guidelines** to issuers of EMTs is neither sensible nor in any way justified. All the more since in line with the mandate in Article 34 (13) the proposed **Guidelines** cover aspects of the governance requirements under Article 34, which Article 35 (3) (a) does not refer to and which, therefore, could not give rise to discretionary additional own funds that issuers of EMTs could be required to hold (namely

Article 34 (9) and (12) regarding business continuity planning and audits respectively).

Similar considerations as those specified in the proposed **Guidelines** may well apply also with regard to the governance arrangements of issuers of significant and non-significant EMTs. However, in the absence of a “universal risks assessment framework”, careful consideration must be given to any read-across of governance standards and related supervisory expectations and demands on issuers of significant and non-significant EMTs. Any such read-across must be informed by a proper case-by-case assessment of each individual issuer, the issued product and the related risks it may pose for consumers, other counterparties, markets and financial stability.

Question 3: Is the Title on proportionality appropriate and sufficiently clear?

In general, we believe the Title on proportionality to be appropriate and sufficiently clear. There are, however, two important aspects we urge the EBA to address:

First, as highlighted repeatedly in the **CP**, the **Guidelines** including the proportionality principle need to be applied consistently not only to all issuers of ARTs but also across financial sectors. Here as well the “same risks, same rules” principle must be adhered to. Accordingly, if an issuer of **ARTs** across key criteria listed in para 15 of the proposed **Guidelines** is comparable to some other regulated provider of financial services, the applicable standards for governance arrangements and any related case-specific supervisory expectations and demands must be fully aligned in order to ensure consistent application of the proportionality principle within and across financial sectors. More demanding standards must apply only if required by the issuer’s specific business model, its business activities, its product and its overall risk profile. We therefore urge the EBA to specifically emphasise the importance of “cross sectoral consistency within the financial sector” (see e.g. p. 6, para 1 and p. 43, para 155) also in this Title on proportionality.

Second, the classification as significant referred to in para 15 (e) as a separate criterion should be removed from the list of criteria to be taken into account for the proper application of the proportionality principle. All the criteria that according to Article 43 (1) have to be taken into account for the classification of an **ART** as significant are comprehensively reflected across a large number of other criteria listed in para 15. Including the classification as significant as an additional criterion effectively amounts to double-counting. Moreover, the classification as significant is based upon a number of binding quantitative thresholds and indicators that do not provide much leeway for the supervisory assessment. Accordingly, it is not informed by the difficult and comprehensive discretionary assessment required for the proper application of the proportionality principle. This short-cutting of a fully proportionate, case-specific assessment may be viewed as acceptable by the EU-legislators for the MiCAR level 1 significance concept. However, it is not for compliance with the proportionality principle in case-by-case firm-specific supervisory decision-making.

Finally, we urge the EBA to provide additional guidance on how to address, as part of a proper application of the proportionality principle, the fact that, as set out before, the classification of an **ART** as significant and the resulting application of the associated much increased prudential

requirements results in a potentially significant increase of credit, liquidity, interconnectedness and, hence, financial stability risks. National competent authorities and issuers need assistance on how to respond to these surely unintended consequences of the MiCAR significance concept, which provides clear evidence of the misguided risk assessment underlying the MiCAR level 1 text. We call upon the EBA to help clarify how to navigate through the hopefully limited time period until the flawed MiCAR level 1 text has been corrected.

Members of the EMA, as of January 2024

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