Electronic Money Association
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By online submission

08 February 2024

Dear Sir/Madam

Re: EMA response to EBA's Consultation Paper on Draft Regulatory Technical Standards on the methodology to estimate the number and value of transactions associated to uses of asset-referenced tokens as a means of exchange under Article 22(6) of Regulation (EU) No 2023/1114 (MiCAR) and of e-money tokens denominated in a currency that is not an official currency of a Member State pursuant to Article 58(3) of that Regulation

We welcome the opportunity to provide input on the EBA's Consultation Paper on Draft Regulatory Technical Standards referred to above.

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 faithfully,

Dr Thaer Sabri
Chief Executive Officer
Electronic Money Association

EMA responses

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.

We note that according to Article 140 the European Commission will have to present by 30 June 2025 a report to the European Parliament and the Council on the application of MiCAR accompanied as appropriate by a legislative proposal. EBA and ESMA will be consulted, and we urge the EBA to engage in a dialogue with the industry to help identify and shape necessary amendments as early as possible.

That said, we welcome the opportunity to comment on this specific Consultation Paper on Draft Regulatory Technical Standards on the methodology to estimate the number and value of transactions associated to uses of asset-referenced tokens as a means of exchange under Article 22(6) of Regulation (EU) No 2023/1114 (MiCAR) and of e-money tokens denominated in a currency that is not an official currency of a Member State pursuant to Article 58(3) of that Regulation ("CP" and "RTS"). We would be grateful if our following comments were considered for the finalisation of the RTS and stand ready for engaging in an ongoing dialogue with the EBA and national competent authorities which we believe is warranted well beyond the close of this consultation.

Key issues

Before turning to the specific questions put forward in the CP we would like to highlight upfront two key issues we believe to be particularly important:

- We welcome the clarification in the draft RTS that transactions between non-custodial wallets or between other types of distributed ledger addresses where no EU CASP is involved in the transaction are not to be covered in the reporting under Article 22. Not least for practical reasons, the focus of the reporting must be on transactions involving issuers and/or CASPs, thus ensuring a sufficiently accurate capture of the transactions in scope of Article 22. However, according to the clear wording in Article 22 (1) (d), (5) and (6) (and in Article 23 (1) and (5) and recital 61) the transactions targeted are exclusively transactions "*within a single currency area*".

We urge the EBA to rework the draft RTS and drop the extension of the reporting obligation to transactions **across currency areas**. There are **no legal grounds** for the proposed extension, and even less so, for a similarly extended application of the restrictions in Article 23 (1).

There is also no rationale to support an interpretation of Article 22, let alone Article 23, against the explicit and unequivocal wording of the level 1 text. Nothing in MiCAR suggests that the reference to transactions "within a single currency" is due to an editorial oversight of the EU legislator. The only instance where the MiCAR text deviates from this wording is in recital 110 addressing specifically the European Commission's power to adopt this specific draft RTS. There the reference reads "… in each single currency area …" (our mark-up). Thus, recital 110 offers even further and specific evidence that the EU-legislator's intention was indeed to limit the reporting obligation to transactions "within (each) single currency area".

Moreover, an interpretation against the **explicit** wording of Article 22 on reporting would necessarily also have to apply for the restrictions imposed by Article 23. This would have direct implications for any related, potentially severe supervisory measures (including e.g. the withdrawal of an issuer's authorisation under Article 24 (1) (d) in case of infringements of the tighter restrictions applying if Article 23 were interpreted against its wording). For the introduction of such significantly more demanding requirements well beyond the reporting obligation under Article 22, it is imperative to fully comply with the EU legislative process and adoption of an amended MiCAR level 1 wording by the EU-legislator.

- We also urge the EBA to introduce mechanisms that would allow issuers to exclude any artificial inflation of the transaction data by other market participants (e.g. competitors). Manipulation can easily be achieved simply by malicious actors sending a given ART or EMT back and forth through a CASP. A mechanism needs to be put in place ensuring that CASPs identify and report such transactions.

Question 1: Do you agree with the EBA's proposals on how issuers should estimate the number and value of transactions associated to uses of an ART or of an EMT denominated in a non-EU currency "as a means of exchange", as reflected in Article 3 of the draft RTS? If not, please provide your reasoning and the underlying evidence, and suggest an alternative approach for estimating the number and value of these transactions.

We generally agree with the EBA's approach but would welcome further clarification regarding the following issues:

- Transactions related to capital markets trading and settlement via ARTs and EMTs are in our view "associated with investment functions and services" and should therefore also be excluded (see recital 61). Explicit confirmation of the exclusion by the EBA would be of assistance.
- Regarding the deduction of transactions associated with the exchange of an ART for funds or other crypto-assets with the issuer or with a CASP further guidance will be needed as to what transactions are to be regarded as associated with the exchange of funds or crypto-assets and

how in practice issuers and CASPs are expected to distinguish between simple transactions and payments for goods and services that their customers trigger. A consistent approach across issuers and CASPs is key to ensure consistent and accurate reporting to competent authorities.

- We would welcome clarification by the EBA regarding challenges during the initial phase of reporting when MiCAR already applies to issuers but not yet to all CASPs due to the delayed application of Title 5 of MiCAR (end of 2024) or the transitional period of up to 18 months for CASPs are already registered or authorised under national regimes.

Question 2: Please describe any observed or foreseen use cases where transactions involving two legs of crypto-assets, that are different from an ART, are settled in the ART, as referred to in recital 61 of MiCAR.

We are not aware of any such use cases.

Question 3: Do you agree with the EBA's proposals regarding the geographical scope of the transactions covered by Article 22(1), point (d) of MiCAR, as reflected in Article 3(5) of the draft RTS? If not, please provide your reasoning and the underlying evidence.

See our comments above. We reiterate our serious concerns regarding RTS based upon an interpretation of the level 1 MiCAR text against the clear and explicit wording in Article 22 and across the entire regulation.

Question 4: Do you agree with the EBA's proposals on how issuers should assign the transactions in scope of Article 22(1)(d) of MiCAR to a single currency area, as reflected in Article 4 of the draft RTS? If not, please provide your reasoning and the underlying evidence.

See our comments above.

Question 5: Do you agree with the EBA's proposals on how issuers should calculate the value of transactions referred in Article 22(1), point (d) of MiCAR, as reflected in Article 5 of the draft RTS? If not, please provide your reasoning and the underlying evidence.

We agree with the proposed reporting reference dates, but urge the EBA to require reporting of the transactions referred to in Article 22(1)(d) exclusively in EUR. It is the EUR that Article 23(1) references for the corresponding volume restrictions. Reporting in other official currencies would further increase the already significant operational burden CASPs and issuer are facing and may well be a source of inconsistencies due to diverging foreign exchange rates being applied.

Question 6: In your view, does the transactional data to be reported by CASPs to the issuer, as described in paragraph 43 above, cover the data needed to allow the issuer to reconcile the information received from the CASP of the payer and the CASP of the

payee before reporting the information in Article 22(1), point (d) to the competent authority? If not, please provide your reasoning with details and examples of which data should be added or removed.

The data reported by CASPs to the issuer will be key for the issuer in order to comply with Article 22(1)(d) and Article 23(1) of MiCA.

Regarding the proper identification of holders necessary to avoid double-counting related to information provided by different CASPs, the EBA's draft ITS on the reporting of ARTs and EMTs denominated in a non-EU currency clarifies that "*CASPs should include unique identifier information for each holder, so issuers can reconcile the lists shared by different CASPs. These unique identifiers should be LEI code, official tax registration number, national identification number, name(s), depending on the type of the holder (legal entity or natural person).*"

Moreover, we urge the EBA to include a reporting requirement on the absolute overall amount of ARTs and EMTs held by CASPs and their customers. This information is crucial for accurately determining the value of the issued ART or EMT and the corresponding size of the reserve of assets referred to in Article 22(1)(b). It plays a key role not least for issuers of global ARTs and EMTs since the amount of tokens in circulation in the EU, including tokens issued outside the EU is needed for the significance assessment and for compliance with recital 54 of MiCAR stipulating that: "*Issuers of asset-referenced tokens that are marketed both in the Union and in third countries should ensure that their reserve of assets is available to cover the issuers' liability towards Union holders. The requirement to hold the reserve of assets with firms subject to Union law should therefore apply in proportion to the share of asset-referenced tokens that is expected to be marketed in the Union.*"

We refer in this regard to the European Commission has recently clarified in its draft delegated Regulation specifying certain criteria for classifying ARTs and EMTs as significant that the "*market capitalisation on an international scale of a token should be understood to include the same token issued outside the Union in order to distinguish that capitalisation from the market capitalisation referred to in Article 43(1), point (b), of Regulation (EU) 2023/1114.*" Accordingly, the market capitalisation in the EU and hence the amount of ARTs and EMTs held at EU CASPs informs the assessment of the quantitative market capitalization indicator in Article 43(1), point (b).

Question 7: Do you agree that, based on the transactional data to be reported by CASPs to the issuer as described in paragraph 43 above, issuers will be able to reconcile the data received from the CASP of the payer and the CASP of the payee on a transactional basis and in automated manner? If not, what obstacles do you see and how could these be overcome?

The reconciliation will be possible, though, depending upon the files used, not necessarily in an automated fashion. Where automation is not possible the workload related to the reconciliation including the cleaning, preparation and reporting of this data will be substantial. Costs will have to be borne eventually by customers. We acknowledge that this reconciliation is important for accurate and consistent reporting but urge the EBA to remove at least the requirement to provide best-effort estimates for transactions between non-custodial wallets. Producing these estimates is a resource-intensive exercise, which however will not result in market-wide accurate and consistent reporting.

Question 8: In your view, how can an issuer estimate, in the case of transactions between noncustodial wallets, or between other type of distributed ledger addresses where there is no CASP involved: (i) whether the transfer is made between addresses of different persons, or between addresses of the same person, and (ii) the location of the payer and of the payee? Please describe the analytics tools and methodology that could be used for determining such aspects, and indicate what would be, in your view, the costs associated to using such tools and the degree of accuracy of the estimates referred to above?

We fully concur with the EBA's understanding that the information on the distributed ledger does not include any information on the location of the payer or the payer, nor on the facts whether a transfer is made between addresses of different persons. Therefore, transactions between noncustodial wallets, or between other type of distributed ledger addresses will have to be disregarded for the reporting under Article 22 and the restrictions pursuant to Article 23.

Question 9: Do you consider the EBA's proposals set out in recital 2 of the draft RTS and further explained in paragraphs 48-55 above as regards the reporting of transactions between noncustodial wallets and between other type of distributed ledger addresses where there is no CASP involved to be achieving an appropriate balance between the competing demands of ensuring a high degree of data quality and imposing a proportionate reporting burden? If not, please provide your reasoning and the underlying evidence.

We welcome and are grateful for the EBA's pragmatic approach as set out in recital 2 of the draft RTS. It strikes the right balance between ensuring a high degree of data quality and imposing a proportionate reporting burden.

Members of the EMA, as of February 2024

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
Currenxie
eBay Sarl
ECOMMPAY Limited
Em@ney Plc
emerchantpay Group Ltd
EPG Financial Services Limited
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.
Lightspark
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
Soldo Financial Services Ireland DAC
Square
Stripe
SumUp Limited
Swile Payment
Syspay Ltd
Transact Payments Limited
TransferGo Ltd
TransferMate Global Payments
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