Electronic Money Association
68 Square Marie-Louise
Brussels 1000
Belgium
Telephone: +32 2 320 3156
www.e-ma.org

By online submission

08 February 2024

Dear Sir/Madam

Re: EMA response to EBA Consultation Paper on 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 crypto-assets

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 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 finalised standards and guidelines 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.

Regarding specifically the regulatory technical standards addressing different aspects of own funds requirements and the adjustment to higher mandatory and discretionary requirements, we urge the EBA to work together with the European Commission towards a consolidation of the proposed level 2 instruments. It would be most helpful to merge over time the different instruments now proposed into a consistent compendium covering in a fully consistent fashion the regulatory technical standards pertaining to own funds requirements under MiCAR. Such a comprehensive and consistent compendium of technical standards would facilitate implementation and compliance by both competent authorities and issuers. Eventually that compendium may well include all RTS related to MiCAR prudential requirements, including requirements related to liquidity risks and their management, as they apply to issuers of ARTs and EMTs, significant and non-significant.

That said, we welcome the opportunity to comment on this specific Consultation Paper on Draft Regulatory Technical Standards specifying 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 (“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.

General comments

Before turning to the specific questions in the CP we would want to make the following more general comments related specifically to the first part of the draft RTS on "*the procedure and timeframe for an issuer … to adjust to higher own funds requirements*" (Article 35 (6) (a)) and "*the criteria for requiring a higher amount of own funds*" (Article 35 (6) (b))

Focus of the draft RTS on increase of own funds not covered by EBA's mandate

The CP and the draft RTS seem to assume that the power conferred on competent authorities by Article 35 (3) "*… to require an issuer … to hold an amount of own funds which is up to 20 % higher than the amount resulting from the application of Article paragraph 1, first subparagraph, point (b)*" implies a power to request an issuer to increase its own funds, and that the increase of own funds is the only available option for an issuer to adjust to the additional discretionary own funds requirement. Accordingly, Article 1 (2) of the draft RTS requires as part of the mandatory content of the competent authority's draft determination (as referred to in Article 35 (3)) that the draft shall set out

- "*the amount by which the own funds must be increased …*" (Article 1 (2) (a)), and
- "*the timeline within which the relevant issuer shall increase its own funds …*" (Article 1 (2) (a)).

Also, in the remainder of this part of the draft RTS, reference is made throughout to the increase of the issuer's own funds that competent authorities shall request. It does not address any other possible options for adjusting to additional discretionary own funds requirements.

In our view this exclusive focus on the increase of an issuer's own funds falls short of what the EBA according to the mandate in Article 35 (6) is tasked to develop. Article 35 (6) (a) does not refer in any way to a requirement or a supervisory request for an issuer to increase its own funds. The mandate requires the EBA "*to develop draft regulatory technical standards further specifying … the procedure and timeframe for an issuer …* ***to adjust to higher own funds requirements*** *as set out in paragraph 3*". Nothing in Article 35 (6) (a) suggests that such adjustments have to be in the form of an increase of the issuer's own funds.

According to Article 35 an issuer must ensure that it meets the applicable mandatory (Article 35 (1)) and additional discretionary (Article 35 (3)) own funds requirements. It doesn't specify how to adjust to changing own funds requirements in order to ensure compliance at all times. Whether the setting of additional discretionary own funds requires any adjustments by the issuer depends upon the specific circumstances. A comfortably capitalized issuer may very well be able to meet the additional own funds requirements without having to engage in any adjustments, let alone an increase in own funds. In such cases there is no reason - and no room - for the competent authority to set in its draft determination of the higher own funds requirements an amount by which and a timeline within which the issuer should increase its own funds.

If adjustments are necessary, they can take different forms. Swift remedial action by the issuer to reduce risks would be, even from a supervisory perspective, the preferred option. Reducing risks is the ultimate objective, and increased own funds only strengthen the issuer's capacity to absorb losses resulting from materialised risks. They do not reduce these risks.

Such remedial action could take different forms. An issuer could

- reduce its business activities to bring down its mandatory own funds requirements and, thus, free up own funds to meet the additional discretionary own funds requirements,

and/or

- reduce the identified risks that the additional discretionary own funds requirements are meant to cover (e.g. depending upon the specific reason for the additional own funds requirements by adopting and implementing a more risk-averse investment policy (Article 35 (3) (d)) or by taking swift action to remedy its risk management processes and internal control mechanisms the competent authority may have found deficient (Article 35 (3) (a))),

possibly combined with

- a partial increase of its own funds, commensurate with the risks that the issuer, in line with its risk appetite, is willing to take and cover by own funds.

From the perspective of both effectiveness and proportionality of the supervisory intervention remedial action reducing risks should always have precedence over an increase of own funds, which, as set out before, only strengthens the issuer's capacity to absorb losses without mitigating the risks causing these losses.

The range of options for issuers to adjust to additional discretionary own funds requirements shows that the draft RTS' exclusive focus on competent authorities' request to increase an issuer's own funds cannot be right. It is far too narrow to properly respond to the EBA's mandate. As they stand the proposed RTS stipulate standards for the exercise of a supervisory power, i.e. the power to request an increase of an issuer's own funds, which in potentially many cases competent authorities will not have. The most obvious case is a comfortably capitalized issuer with enough own funds to meet the additional discretionary own funds requirements.

Criteria for requiring a higher amount of own funds - Supervisory process regarding the determination of additional discretionary own funds requirements and issuers' adjustment to the increased requirements

Broadening the RTS to reflect the full range of possible options for issuers to adjust to additional discretionary own funds requirements should give rise to building out the RTS to a framework ensuring EU-wide consistent supervisory practices and processes for competent authority's case-by-case evaluation and risk assessment of issuers aimed at identifying higher risks. That framework should address more specifically those criteria in Article 35 (3) which relate to aspects of an issuer's business and business operations allowing for remedial action to reduce associated risks. The RTS should assist competent authorities regarding

- The case-by-case evaluation and risk assessment for the identification of higher risks;
- The determination of additional discretionary own funds requirements commensurate with the identified risks,

- The request of remedial action by the issuer to mitigate these risks, and
- The proper timeframe and sequencing of these measures in order for the additional discretionary own funds requirements to work as a strong incentive for timely remedial action by the issuer to restore compliance and/or mitigate the identified risks.

We therefore urge the EBA to rework the draft RTS and build them out to a framework that assists EU-wide consistent practices in shaping effective and proportionate supervisory interventions where the competent authority's case-by-case evaluation and risk assessment identifies higher risks. That framework should address more specifically those criteria in Article 35 (3) that relate to aspects of an issuer's business and business operations allowing for remedial action to reduce associated risks. The RTS should assist competent authorities' considerations and decision-making regarding:

- Additional discretionary own funds requirements commensurate with identified risks,
- The request of remedial action by the issuer to mitigate these risks,
- The proper timeframe and sequencing of these measures in order for the additional discretionary own funds requirements to work as a strong incentive for timely remedial action by the issuer to restore compliance and/or mitigate the identified risks.

To that end we urge the EBA to expand upon recital 5 of the draft RTS, which states that an "*… issuer should always discuss and agree with the competent authority a set of measures to restore compliance. Such measures should be to the discretion of the competent authority with due regard to the assessment performed for determining the higher own funds requirements. In assessing the appropriateness of the measures, the competent authority should also consider whether they would mitigate the higher degree of risk observed in the near future.*"

We note in this regard that the CP itself highlights in para 18 that what is being proposed "*is similar to a Pillar 2 requirement under the banking regulation*". This pillar 2 capital add-on presupposes and is informed in banking regulation by the so-called "*Supervisory Review and Evaluation Process*" ("SREP"). We encourage the EBA to set out in the RTS the broad lines of the supervisory process competent authorities should follow to assess risks and respond to identified higher risks. The RTS would, thus, help ensure the development of EU-wide harmonised supervisory practices for both the risk assessment and the supervisory intervention when higher risks are identified. To that end and as mandated in Article 35 (6) (b), the EBA should specify further the criteria in Article 35 (3) such as to assist effective and proportionate supervisory intervention aimed at reducing identified risk in the first place by requesting issuers to take remedial, risk mitigating action. As highlighted before and much in line with the statement in recital 5, for supervisory intervention to be proportionate, supervisory measures ensuring swift and effective risk mitigation would always have to take precedence over the request to increase own funds (see also the following comments on recital 3).

Additional discretionary own funds requirements only for risks that are not yet covered and only as and when issuers' remedial action to reduce the identified risks has failed

We fully concur with the statement in recital 3 of the proposed RTS that:

"*Generally, increases in own funds requirements should only be requested when there is a higher degree of risk, which is not already covered, and the measures of the relevant issuer are insufficiently effective to reduce the risks*."

There are two key aspects to this statement that we urge the EBA to elaborate further in the RTS.

First, competent authorities, when performing the required case-by-case evaluation and broad assessment of risks across all relevant criteria, will have to ascertain whether and to which extent the identified risks are effectively already covered by the mandatory own funds requirements according to Article 35 (1). Own funds requirements according to Article 35 (1) obviously include the 50% increase in cases where the percentage in Article 35 (1) (b) is set at 3% instead of 2% of the average amount of the reserve assets (as triggered by the classification of an ART or EMT as significant or pursuant to a competent authority's discretionary application of the higher percentage to a non-significant ART or EMT).

Accordingly, risks identified in the course of a competent authority's case-by-case evaluation associated with some aspect of an issuer's business activities, their size or some aspect of its risk profile that have been taken into account under Article 43 (1) (a) to (e) for the classification of the issued ART or EMT as significant must be assumed to being covered already by the mandatory 50% increase of own funds requirements under Article 35 (1) (b). These risks cannot give rise to additional discretionary own funds requirements imposed under Article 35 (3). In this regard the size-related criteria specified in Article 35 (3) (e) to (g) are particularly relevant given the overlap with the size-related criteria specified in Article 43 (1) (a) to (c) for the classification of an ART or EMT as significant. It would amount to double-counting if these same aspects gave rise to both the classification of the ART or EMT as significant and hence application of the 50% increase in mandatory own funds requirements under Article 35 (1) (b) AND additional discretionary own funds requirements under Article 35 (3).

In principle the same would have to apply with regard to a 50% increase of own funds requirements under Article 35 (1) (b) where it is being applied to non-significant ARTs or EMTs. For obvious reasons any risks giving rise to a competent authority's discretionary application of the 50% increase of own funds requirements under Article 35 (1) (b) cannot be taken into account for any additional discretionary own funds requirements under Article 35 (3).

The issue is further compounded where the classification of an ART or EMT as significant is triggered for instance by an issuer's gatekeeper function (Article 43 (1) (d)) or by the fact that it issues at least one additional ART or EMT or provides at least one crypto-asset service (Article 43 (1) (g)) in combination with some other qualitative or quantitative criterion the issuer meets. Both these criteria are digital, Yes/No triggers of significance that do not provide any measure of the associated risks.

For instance, an issuer issuing a relatively small EMT, which on a stand-alone basis meets only two of the other significance criteria in Article 43 (1), will turn significant as soon as it engages in the issuance of another EMT. This classification as significant will not change if later on that issuer adds to its business portfolio a series of other ARTs and EMTs and the provision of a range of crypto-asset services for its own crypto-assets and/or crypto-assets issued by other market participants. Whilst the classification as significant does not change, the issuer's risk profile and the systemic risks it poses may well change dramatically. A proper case-by-case evaluation and risk assessment will surely identify the difference in risk profile and may well conclude that the 50% increase of own funds requirements under Article 35 (1) (b) understates the actual risks in the latter case whilst it overstates the actual risks in the former case. Where it overstates the actual risks a potentially significant part of the own funds the issuer has to hold to meet the 50% increase is effectively not bound by any identified risks. A proportionate and risk-sensitive approach to the setting of additional discretionary own funds requirements must take into account such "free" own funds available to cover some other identified risks (related e.g. to the issuer's risk management processes (Article 35 (3) (a)) or its investment policy (Article 35 (3) (d)). Since these higher risks are effectively already covered by the issuer's "free" own funds they must not give rise to the request of additional own funds under Article 35 (3) on top of the mandatory 50% increase of own funds requirements under Article 35 (1) (b).

We believe the issues discussed here are most relevant for the evaluation and risk assessment by competent authorities and any additional own funds requirements that assessment informs. As recital 3 explicitly states, "*given the novelty of issuers of asset-referenced tokens and the tokens themselves, no universal assessment framework exists*", which "*makes it difficult for competent authorities to evaluate the risks of an issuer of asset-referenced tokens*". We accept that the related significant uncertainties require some degree of flexibility afforded to competent authorities. However, at the same time the framework for their risk assessments, key principles to observe and how and when an identified higher degree of risk can give rise to increased own funds requirements must be clarified as much as possible.

We, therefore, urge the EBA to address these issues in more detail in the RTS in order to ensure the emergence of EU-wide consistent and proportionate supervisory practices from the outset.

Second, we also fully concur with the other key principle emphasised in recital 3 that competent authorities must request increases in own funds requirements only if "*the measures of the relevant issuer are insufficiently effective to reduce the risks*". This key principle is obviously well aligned to the statement in recital 5 we have quoted and commented on before. Both recital 3 and 5 confirm the need to outline and further specify in the main body of the RTS the supervisory process, which, alike the SREP in banking regulation, is required to inform the identification of high risks and shape the subsequent supervisory intervention leading to the determination of additional discretionary own funds requirements and their effective application only if "*the measures of the relevant issuer are insufficiently effective to reduce the risks*".

Not least with a view to the significant uncertainties surrounding the risk assessment as highlighted by the EBA in recital 3 (see comments and quote above) it is particularly important to clarify the proper process and sequencing of supervisory interventions. Starting off with the risk assessment including the assessment whether identified risks are already covered by own funds requirements, competent authorities should then specify and communicate the measures to be taken by the issuer to mitigate the higher risks and restore compliance. For these measures competent authorities should set a realistic timeframe and, as the case may be, determine the amount of commensurate additional own funds to be hold by the issuer if it fails to mitigate the identified risks within the set timeframe. Finally, competent authorities should specify the timeframe for meeting the increased own funds requirements if the identified risks have not been (fully) mitigated. Where only a partial risk mitigation has been achieved competent authorities should review and adjust the amount of requested additional own funds commensurate with the remaining risks and, if appropriate, also adjust the timeframe for meeting the additional own funds requirement.

It is our view that full compliance with the principle of proportionality requires following the sequencing of supervisory interventions and a supervisory process along the line of the SREP as applied in banking regulation. The sequencing as set above has the additional advantage of providing some more discretionary flexibility regarding the risk assessment and the quantification of the amount of additional own funds commensurate with the identified risks. Since the additional own funds requirements are conditional and set, at least initially, primarily as a strong incentive for swift remedial action, thus, allowing the issuer to avert their effective application, the underlying risk assessment and the quantification of the amount of additional own funds commensurate with the identified risks requires less rigour. It also allows to focus on the primary objective of mitigating the identified risks. We reiterate, Risk mitigation as the ultimate objective must take precedence over increased own funds. Own funds mitigate risks only by strengthening the issuer's capacity to absorb losses resulting from materialised risks. Mitigating the risks before they materialise is the much better outcome, which, not least with regard to the principle of proportionality, must be the primary objective.

Finally, we note that the language in recital 3 explicitly (we quote again: "*given the novelty of issuers of asset-referenced tokens and the tokens themselves, no universal assessment framework exists*", which "*makes it difficult for competent authorities to evaluate the risks of an issuer of asset-referenced tokens*") sets the bar for the supervisory risk assessment and the quantification of commensurate additional own funds rather high. It also highlights the non-negligible legal risks regulators are running and should be mitigating by observing high standards in terms of both methodology and process of their case-by-case evaluation and risk assessment. Elaborating on the key aspects and steps of this process including the proper sequencing in the RTS would also help contain these risks.

Specific comments

Question 1: Is the procedure clear and the timelines for the issuer to provide views on the assessment and submit the plan reasonable?

The ***procedure is clear but deficient***. It effectively requires competent authorities to immediately combine the setting of additional discretionary own funds requirement with a request and binding timeline to increase own funds. As set out before, proportionate supervisory intervention must focus on mitigating the risks by specifying and communicating <u>remedial measures</u> to be taken by the issuer within a set timeframe.

The ***timelines*** for an issuer to provide views on the competent authority's assessment and submit the plan is tight, and, depending upon the quality of the competent authority's draft of the determination referred to in Article 35 (3), will be unreasonable in many cases. Recital 3 of the draft RTS emphasises that "*given the novelty of issuers of asset-referenced tokens and the tokens themselves, no universal assessment framework exists*", which "*makes it difficult for competent authorities to evaluate the risks of an issuer of asset-referenced tokens*". Regarding this difficult risk assessment, the requirement in Article 1 (2) (b) to provide with the draft determination just "*relevant reasoning as to the higher degree of risk*" is entirely insufficient to ensure due process. In order for the issuer to be able to assess, and respond to, the competent authority's draft, the draft must set out at least:

- The risk assessment methodology and process,
- The findings from the underlying fact-finding exercise covering:
  - The full range of assessed risks,
  - The assessed risk management, mitigation and internal control processes of the issuer,
  - Any other relevant considerations including in particular where related to systemic and financial stability risks,
- The remedial action to be taken by the issuer to mitigate the identified risks and the timeline for that action, and
- If the competent authority does not want to allow for remedial action by the issuer to avert the additional discretionary own funds requirements becoming effective, the reasons why it has come to the conclusion that the identified risks cannot be mitigated in a timely fashion.

The additional information required under Article 1 (2) (a) and (c) to (e) should be provided as part of, and properly build into, such a much broader draft document.

Question 2. Are the timeframes for issuers to adjust to higher own funds requirements feasible?

In line with the language in Article 35 (6) (a), Question 2 asks about timeframes for issuers "*to adjust to higher own funds requirements*". However, the timeframes set in Article 2 relate to the increase of own funds. As set out before, we believe the exclusive focus of the RTS on the increase of own funds as the only way to adjust to additional discretionary funds to be misconceived. We urge the EBA to review Article 2 and develop standards specifying key criteria for competent authorities to consider for the setting of proportionate timeframes.

We acknowledge that considerations regarding the materiality of the impact are relevant. However, as for risk assessments in general, the probability of the risk materialising would also have to be taken into account. Timeframes set by competent authorities should reflect the probability of the risk materialising <u>but also</u> if it can be swiftly mitigated by appropriate remedial action by the issuer.

We agree that competent authorities should take into account whether or not the identified risks result from deficiencies in an issuer's governance or business model. However, where that is the case, the primary focus of competent authorities' supervisory intervention should be on swift remedial action to be taken by the issuer. We reiterate in this regard the statement in recital 5 that an "… *issuer should always discuss and agree with the competent authority a set of measures to restore compliance. Such measures should be to the discretion of the competent authority with due regard to the assessment performed for determining the higher own funds requirements. In assessing the appropriateness of the measures, the competent authority should also consider whether they would mitigate the higher degree of risk observed in the near future."* Competent authorities should combine supervisory measures based upon a timeframe and a sequencing best suited to ensure the swift mitigation of identified risk.

Question 3. During the period when own funds need to be increased by the issuer, should there be more restrictions on the issuer to ensure timely implementation of the additional own funds requirements, for example banning the issuance of further tokens?

We repeatedly referred to recital 5, which provides the response to this question. We reiterate that measures to reduce the identified risk must always take precedence. Though, as recital 5 highlights an "… *issuer should always discuss and agree with the competent authority a set of measures to restore compliance*". Two-way communication and agreement between the issuer and the competent authority on the most effective way to reduce risk is preferable to imposing business restrictions, which is of course an alternative method of adjusting to additional discretionary own funds requirements.

Question 4. Do you agree with the criteria to identify if an issuer has a higher degree of risk?

Here again it is unclear how the proposed Article 3 responds to the EBA's mandate in Article 35 (6) (b) to "*specify further … the criteria for requiring a higher amount of own funds as set out in paragraph 3*". Article 3 adds additional criteria without providing much detail as how to apply the criteria in Article 35 (3). It doesn't specifically address these criteria. Also, regarding Article 3 (1), it refers to a likely breach of the requirements in Article 34 despite the fact that Article 34 does not apply to issuers of EMTs and the reference in Article 35 (3) (a) is limited to Article 34 (1), (8) and (10). Insufficient compliance with other provisions in Article 34 cannot give rise to additional discretionary own funds requirements under Article 35 (3) for issuers of ARTs nor for issuers of EMTs.

The other additional criteria Article 3 specifies may be relevant for competent authorities' considerations regarding additional discretionary own funds requirements under Article 35 (3). However, they provide only very limited assistance in terms of further specifying how competent authorities should perform the required case-by-case evaluation and risk assessment with regard to the criteria referred to in Article 35 (3) (a) and (d) to (g) and how that evaluation should be translated into additional discretionary own funds requirements.

We urge the EBA to further elaborate on Article 3. The RTS should set a framework for consistent competent authorities' decision-making not least with regard to the proper combination and sequencing of supervisory measures, which should aim primarily at effective and timely mitigation of identified risks <u>before</u> additional discretionary own funds requirements become effective. As it stands Article 3 does not provide any additional substance regarding the required supervisory process and dialogue set out in recital 5. We reiterate that according to recital 5 an "*issuer should always discuss and agree with the competent authority a set of measures to restore compliance. Such measures should be to the discretion of the competent authority with due regard to the assessment performed for determining the higher own funds requirements. In assessing the appropriateness of the measures, the competent authority should also consider whether they would mitigate the higher degree of risk observed in the near future.*"

Question 5. Do you agree with the procedure to assess whether an issuer has a higher degree of risk?

No, for the reasons set out above. The process as set out in recital 5 should be further developed and substantiated in the main body of the RTS.

Question 6. Do you consider the criteria and their evaluation benchmarks sufficiently clear?

No, for the reasons set out above. As it stands Article 3 primarily adds new criteria in part (i.e. regarding the reference to Article 34) running against the explicit language in Article 35 (3) (a). There is very little providing further specification regarding the application of the criteria listed in Article 35 (3).

Moreover, Article 3 does not provide much needed clarification as to how to avoid the potential double-counting related to criteria in Article 35 (3), which coincides with criteria referred to in Article 43 (1) for the classification of an ART or EMT as significant. We set out this issue in our general comments above. The principle stands that additional discretionary own funds requirements must not be imposed for identified risks that are <u>already covered</u> by own funds requirements. Any aspect of an issuer's business and/or the ARTs or EMTs it issues that already gave rise to its classification as significant and hence the application of the 50% increase of its mandatory own funds requirements must not give rise to <u>additional</u> discretionary own funds requirements.

Question 7. Do you agree with the need for a solvency and liquidity stress-test and the requirements of the stress-test?

We do not contest the need for a solvency and liquidity stress-test. However, stress-testing requirements should be formulated and applied in a strictly proportionate manner and consistently across the EU and within and across financial sectors. Accordingly, all aspects of the required stress-testing practices should respond to and be commensurate with the competent authorities' case-by-case evaluation and risk assessment.

Question 8. Do you agree with the frequency and time horizon of the solvency and liquidity stress-test? Should there be more differentiation between significant and not-significant issuers? Should the stress testing be more frequent for issuers of asset-referenced tokens referenced to official currencies?

As highlighted above, stress testing requirements including frequency and time horizon should formulated and applied in a strictly proportionate manner and consistently across the EU and within and across financial sectors. Supervisory practices, expectations and demands must respond to and be commensurate with the competent authorities' case-by-case evaluation and risk assessment. Regarding further differentiation between significant and non-significant issuers we reiterate our severe doubts 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, whether classified as significant or not, any stress-testing requirements should be applied based upon the competent authorities' case-by-case evaluation and risk assessment

We have to acknowledge, however, that as 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" the classification as significant triggers the application of prudential requirements resulting in an increase of issuers' credit and liquidity risks with, as a consequence, increased interconnectedness and, hence, increased financial stability risk. In para 22 and 23 of that consultation paper the EBA states:

> *"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 have no suggestions on how to reflect the additional risks resulting from the misconceived MiCAR significance concept, but would expect the unintended and most harmful impact for issuers not to filter through to further increased requirements also regarding their stress testing practices. Issuers must not be punished any further by increased prudential requirements increasing liquidity and solvency risks, which clearly runs counter to the very objective of MiCAR. The EBA should help find a solution that minimises the negative impact of these MiCAR level 1 provisions, which we expect to be corrected as a matter of urgency.

Question 9. Should a reverse stress testing requirements/methodology be introduced? Please provide your reasoning.

We continue to view reverse stress testing as a useful instrument. However, setting up and running reverse stress testing processes is a challenging and resource-intensive tasks. We would not regard this as an integral element of "*the minimum requirements for the design of stress testing programmes*" that the EBA is tasked according to Article 35 (6) (c) to further specify.

Question 10. Do you have any other comments in relation to the stress-testing part in these RTS?

No. We reiterate our earlier comments that in order to be proportionate, stress testing requirements must be informed by, and strictly respond to, competent authorities' case-by-case evaluation and issuer-specific risk assessment, which the EBA has highlighted is difficult. In particular competent authorities should resist relying upon the classification as significant under Article 43 (1) as an indicator for a step change in an issuer's risk profile thus warranting more demanding supervisory expectations regarding its stress testing programmes and practices. Whilst some (not all) of the criteria for that classification are relevant for a proper issuer and product-specific risk assessment, the set thresholds are far too low. Regarding the increase of liquidity and solvency risks resulting from the increased prudential requirements triggered by the classification as significant, we refer to our related comments above. This increase in risks originating from the flawed MiCAR significance concept must not give rise to more demanding stress-testing requirements let alone additional discretionary own funds requirements under Article 35 (5).

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
- TrueLayer Limited
- Uber BV
- VallettaPay
- Vitesse PSP Ltd
- Viva Payments SA
- Weavr Limited
- WEX Europe UK Limited
- Wise
- WorldFirst
- Worldpay
- Yapily Ltd