



**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 Regulatory Technical Standards to specify the highly liquid financial instruments in the reserve of assets Article 38(5) of Regulation (EU) 2023/1114**

We welcome the opportunity to provide input on the EBA's Consultation Paper on Draft Regulatory Technical Standards to specify the minimum contents of the liquidity management policy and procedures.

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,

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 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 the wealth of insight that industry efforts to comply with all aspects of this new rulebook will generate and direct, and from 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 issuers' exposure to liquidity risks and their management, we urge the EBA to work together with the European Commission towards a consolidation of the different level 2 instruments. It would be most helpful to merge the different instruments now proposed into a consistent compendium covering all regulatory technical standards pertaining to liquidity risks and their management 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 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 Consultation Paper on Regulatory Technical Standards to specify the highly liquid financial instruments in the reserve of assets Article 38(5) of Regulation (EU) 2023/1114 ("MiCAR", "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**

The MiCAR regulatory approach to issuers of EMTs, both significant and non-significant, does call for more general comments regarding the basic regulatory principles of “same risks, same rules” and “technology neutrality”. According to these principles, EMTs should be subject to the same rules as traditional e-money as long as the associated risks are the same. In the absence of MiCAR, EMTs are subject to EMD2, as they meet the definition of electronic money in Article 2 (2) EMD2, and the same EMD2 prudential requirements would apply regardless as to whether or not the EMT were meeting the MiCAR significance criteria. Accordingly, Article 48 (2) MiCAR stipulates that EMTs “*shall be deemed to be electronic money*” and, as matter of principle, EMD2 does apply to non-significant EMTs. The difference between traditional e-money and EMTs is purely a difference in the underlying technology.

We are, of course, well aware that the EU-legislator, with the MiCAR level I text that has been adopted, deviated from these principles. Under MiCAR, much more stringent requirements apply to significant EMTs. Moreover, national competent authorities are afforded discretion to apply these more stringent requirements also to non-significant EMTs.

We appreciate that the EBA is bound by the level I text but would still urge, for its work on MiCAR level 2 instruments, to take into account as much as possible these two basics and unanimously agreed principles of “same risks, same rules” and “technology neutrality”. At a minimum, whenever relevant, the EBA should set out the reasons why the principles have not been adhered to. Full transparency is crucial in order to enable the industry to provide substantial input and participate in the consultation process with constructive comments informing a risk-based regulatory framework and risk-based and proportionate regulatory standards.

That said, we acknowledge the possibility that differences in technology can be the source of differences in risks and risk profiles. However, the brief discussion of “*Liquidity risks related to the DLT infrastructure*” in paragraph 19 of the CP does not set out in any way why the EBA believes these risks to be higher than the liquidity risks to which traditional e-money is exposed. There is no comparison of the respective liquidity risks, and the two sentences in this paragraph are far from offering a comprehensive and balanced analysis of the potential effects on the liquidity risk profile of EMTs of their operation in a DLT-based infrastructure.

Regarding the comparison to traditional e-money products, the EBA analysis should acknowledge that, as EMTs and as many other financial services, these products are technology-dependent and exposed to a wide range of technology-related operational risks including cyber-incidents. As for EMTs such incidents can undermine the full backing of issued e-money by safeguarded funds and, as other potential operational disruptions, can cause users’ loss of confidence triggering large-scale redemption requests. An analysis of cyber-events and other operational loss data or loss events and their respective relevance or not for EMTs as opposed to traditional e-money products is needed to justify the proposed significantly higher requirements regarding liquidity risks for EMTs.

Regarding a more balanced analysis of liquidity risks EMTs are exposed to the EBA analysis should take into account and discuss the potential advantages from their operation in a DLT-based infrastructure. Due to this infrastructure EMTs are benefiting from a potentially large ecosystem with

significant network effects that allow EMT holders to address requests for exchange against funds - effectively redemption - not only to the issuer but also across the entire underlying ecosystem and all participating CASPs. In addition, the CASPs, since integrated into the ecosystem, may well provide better transparency and better access to information for EMT holders. CASPs will have a strong incentive for ongoing monitoring of EMT issuers and may well be acting as an additional line of defence by exercising in their own interest control over the soundness, risk profile and risk management of the issuers of EMTs they are offering. These unique aspects of operation in a DLT-based infrastructure and ecosystem are absent from traditional e-money products operating in strictly centralised infrastructures run by the issuer.

**Question 1. Do respondents have any comment on the list of eligible highly liquid financial instruments provided under point (c) of Article 1(I) of these draft RTS?**

See comments above.

**Question 2. Do respondents have any comment on the general and operational requirements to be met by highly liquid financial instruments provided under points (a) and (b) of Article 1(I) of these draft RTS? Please explain if some criteria is expected to be challenging to be met in practice.**

No.

**Question 3. Do respondents find the treatment for hedging derivatives under Article 2 clear to be applied?**

No.

**Question 4. Do respondents think that the draft RTS create any impediment for issuers to ensure a good control of the correlation between the highly liquid financial instruments and the assets referenced? This is particularly relevant for the case of tokens referenced to assets other than official currencies.**

No.

**Question 5. Do respondents have any concern about the feasibility for issuers to have the minimum amount of reserve of assets considering the list of eligible highly liquid financial instruments, the one-to-one currency matching requirement in Regulation (EU) 2023/1114 and the concentration limits under Article 3 of these draft RTS? This is particularly relevant for tokens referenced to official currencies.**

From the perspective of MiCAR's ultimate objective to contain risks, including liquidity risks and eventually financial stability risks, we have serious concerns regarding the EBA's general approach to its mandate and, more specifically, the major adverse consequences of the proposed RTS in the case of non-EUR denominated EMTs.

To illustrate the problem: Under the proposed draft RTS a USD-referencing EMT could only invest up to 35% of its reserve in US government bonds (or assets backed by such bonds). If non-significant, 30% of reserve assets of that EMT would have to be deposited with a credit institution. The remaining 35% of reserve assets could be either invested into covered bonds or deposited with credit institutions. This is an unusual position, as investing into covered bonds or bank deposits instead of government bonds (the latter representing level 1 assets according to Article 10 of Delegated Regulation (EU) 2015/61 since the safest and most liquid assets available in the financial system) exposes the EMT to significantly higher risks with, in the case of US government bonds, limited additional exposure to concentration risks, if at all. (N.B. in the case of a significant EMT the applicable percentages would depend upon whether or not the 60% de minimis threshold for bank deposits were retained).

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As it stands the draft RTS runs counter to the ultimate objective of MiCAR, and does not live up to its mandate. Article 38 (5) clearly stipulates that the EBA "shall take into account" the regulations referenced in the remainder of that provision. Article 38 (5) does not require a I to I read across. If that had been the intention of the EU-legislator, it would have referenced these regulations directly. Instead, the EU-legislator delegated supplementing regulation to the European Commission, drawing on the expertise of the EBA to develop RTS adjusting the referenced regulations as needed to deliver on MiCAR's ultimate objective.

That objective is clearly expressed in provisions that **must** guide the EBA in delivering on its mandate. Article 36 (1) second sentence stipulates:

*"... The reserve of assets shall be composed and managed in such a way that:*

- (a) the risks associated to the assets referenced by the asset-referenced tokens are covered; and*
- (b) the liquidity risks associated to the permanent rights of redemption of the holders are addressed."*

In the above example of a US-denominated EMT, and with a view to the full range of risks referred to in Article 36 (1) (a) and (b), investment of the reserve of assets in US government bonds is clearly superior to investment in covered bonds or bank deposits.

In addition, well in line with the principle in Article 36 (1), Article 36 (6) second sentence requires: *"... issuers shall ensure that the issuance and redemption of asset-referenced tokens is always matched by a corresponding increase or decrease in the reserve of assets."* For issuance and redemption of US-

denominated EMTs the required match is obviously best achieved by a corresponding increase and decrease of US government bonds in the reserve of assets.

Even closer to the EBA mandate in Article 38 (5), Article 38 (1) stipulates that "*issuers ... shall only invest those assets in highly liquid financial instruments with minimal market risk, credit risk and concentration risk. The investments shall be capable of being liquidated rapidly with minimal adverse price effect.*" Also with regard to this principle and the full range of risks it refers to, investments in US government bonds are clearly superior to investments in covered bonds. For the EBA's draft RTS this principle must take precedence. Concerns regarding concentration risks, if there are any in relation to US government bonds, cannot justify a sub-optimal coverage of all other risks by forcing issuers to invest in covered bonds or bank deposits.

We urge the EBA to live up to its mandate and, based upon its expertise, provide in the proposed RTS the leeway needed to allow for investments of the reserve of assets best suited to deliver MiCAR's objective as expressed in the corresponding principle specified in Article 36 (1) and 38 (1). As the EBA has done for other aspects of the regulations referenced in Article 38 (5) it should disapply limitations that force issuers to invest in covered bonds or bank deposits, which in all relevant respects increase risks that MiCAR is intended to contain.

**Question 6. Do respondents have any concern about the operational feasibility of the look through approach envisaged in paragraph 3 of Article 3 of these draft RTS? If yes, please elaborate your answer and specify the reasons for the concerns.**

See comments in our response to question 5.

**Question 7. Do respondents have any comment with regards to the unwind mechanism proposed under Article 4 of these draft RTS and the related examples provided?**

We would welcome clarification of the term "working days". Does the term mean working day as in the primary market of the underlying currency, as in Target2, or is it any calendar day?

**Question 8. Do respondents have any general comment about the interaction of these draft RTS with the business model and the continuity of the business of these activities?**

See comments in our response to question 5. If retained the proposed limitations will obviously have a significant impact upon the investment of the reserve of assets, the underlying investment strategy and policy and, as a consequence, on issuers' business model, especially for issuers of non-EUR denominated EMTs.

**Question 9. Do respondents find any provision in these draft RTS confusing or difficult to understand?**

Article 4 (c) of the draft RTS (Unwind mechanism) refers to the application of concentration limits by deposit counterparty established in Article 5 of the RTS to further specify the liquidity requirements of

the reserve of assets under Article 36(4) MiCAR. However, Article 4 also highlights that e-money institutions issuing EMTs shall apply the approach only “where applicable”. We would welcome clarification as to how the limitations specified in Article 5 of the referenced RTS applies to significant vs. non-significant issuers, who are subject to the more stringent requirements applicable to significant issuers if national competent authorities exercise the related discretion afforded by MiCAR.

**Question 10. Do respondents have any comment on the impact assessment provided?**

No.

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