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By email to fintech@eba.europa.eu

10 June 2024

Dear Sir/Madam

Re: EMA response to EBA Consultation Paper on Draft Guidelines on redemption plans under Articles 47 and 55 of Regulation (EU) 2023/1114

We welcome the opportunity to provide input on the EBA's Consultation Paper 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 has been and still is facing the enormous challenge of producing a complex, comprehensive and highly technical body of MiCAR level 2 regulatory standards and related GL within a tight timeframe. We are grateful for the staggered consultation process, which is now coming to an end, 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 standards and GL that are 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 Guidelines on redemption plans under Articles 47 and 55 of Regulation (EU) 2023/1114 ("MiCAR"; "CP", "Guidelines" and "GL") and would be grateful if the following comments were considered. We stand ready to engage in a dialogue with the EBA and national competent authorities well beyond the close of this consultation.

Question 1. Do you consider that the scope of the GL on redemption plans is sufficiently clear and takes into account the differences regarding the obligation to hold a reserve of assets set out in Regulation (EU) 2023/1114 applicable to the different types of ART or EMT issuers?

We generally agree with the proposed scope of the GL and the suggested differentiation between those issuers that are subject to the obligation to hold a reserve of assets and those that are not. We note, however, that this distinction contributes even further to the enormous and highly disproportionate cliff-edge effect triggered for issuers by the classification of the ARTs or EMTs they issue as significant (or the discretionary application national competent authorities of the related MiCAR requirements to issuers of non-significant ARTs and EMTs). Details of this multi-faceted cliff-edge effect have been set out in our responses to previous MiCAR-related EBA consultations as for instance in EMA responses of 8 February on the "Consultation on Draft Regulatory Technical Standards to specify the procedure and timeframe to adjust its own funds requirements for issuers

of significant asset-referenced tokens or of e-money tokens subject to the requirements set out in Article 45(5) of Regulation (EU) 2023/1114 on markets in crypto-assets" and on the "Consultation Paper on Draft RTS to further specify the liquidity requirements of the reserve of assets under Article 36(4) of Regulation (EU) 2023/1114". Since originating from the MiCAR level 1 text this cliff-edge effect cannot be removed or compensated by the proposed GL or by any level 2 instruments. However, the GL should take into account and respond to the specific implications regarding ARTs and EMTs issued by credit institutions that are not facing any cliff edge effect, that are not subject to MiCAR-specific capital or reserve requirements, but still in a position to issue ARTs and EMTs, which, as stipulated in Articles 19 (4) (e), 51 (4) (b), and 81 (9) (e), are not covered by deposit guarantee schemes under Directive 2014/49/EU. To avoid distortions of competition and a tangibly lower level of protection of holders of ARTs or EMTs issued by credit institutions the GL should specify requirements ensuring equivalent protection of holders compensating for the lack of deposit protection. Redemption plans of credit institutions should set out how holders of ARTs and EMTs are protected by specific and documented allocation of highly liquid, low risk assets to cover any outstanding tokens as well as committed funds covering the costs related to the execution of the redemption plan. To this end, the GL should clearly set out which provisions of the current draft GL apply to the redemption plans of credit institutions and specify additional specific requirements applicable to ensure an equivalent protection of holders compensating for the absence of deposit protection and of a reserve of assets.

Question 2. Do you consider that the GL on redemption plans are sufficiently clear and comprehensive and that they cover all aspects of the mandate?

The GL do provide clarity on a broad range of issues related to the required redemption plans and their execution. However, further clarification would be welcome on the following issues:

Application of MiCAR reserve requirements during the execution of the redemption plan

We urge the EBA to set out clearly under which circumstances, to which extent and for which liquidation strategies - as they respond to specific stress redemption scenarios - MiCAR reserve requirements would still have to be complied with. For instance, if triggered by the withdrawal of the issuer's authorisation we would assume that the issuer were not bound anymore by MiCAR reserve requirements. In the absence of the otherwise applicable limitations the issuer could pursue a liquidation strategy strictly aimed at maximising the return with a view to achieve the ultimate objective of full and timely redemption of holders and minimal economic harm, if at all. In contrast, if triggered for some other reason, the question arises whether the liquidation would have to be pursued in full compliance with the MiCAR reserve requirements? The consequences could be far-reaching. Compliance with limits related to credit, concentration and liquidity risks would represent problematic constraints potentially slowing down the process, generating additional costs, exposing to additional risks and forcing investment in lower-yielding assets possibly at the expense of full redemption to token holders. In particular, the shift of investments from high quality assets to bank deposits would increase the exposure to credit risk associated with the deposit-taking bank whilst also generating a lower return. The liquidation strategy best suited to ensure full and timely

redemption at minimal cost and subject to minimal risk would be to keep investments as long as possible in highly liquid, low risk assets and sell these assets only as the redemption and pay-out to token holders progresses. Flexibility should also be provided with regard to the termination of costly banking partnerships during the final phase of the execution of the redemption plan when concentration risks die out and strict compliance with the related limits is not warranted any longer. The related costs are disproportionate to the residual concentration risk and may well run counter the token holders' interest in full redemption of their claims.

Given the important issues set out above the GL should provide more clarity regarding when and to which extent the MiCAR reserve requirements apply during the execution of the redemption plan and the key phase of liquidating the issuer's reserve of assets, in particular. To the extent MiCAR reserve requirements apply during the liquidation the GL should allow issuers sufficient leeway for developing and implementing liquidation strategies best suited to ensure full redemption to holders and the avoidance of any economic harm. Conditions for a temporary waiver of MiCAR reserve requirements, where applicable, should be specified. To optimise the redemption outcome and minimise risks, the GL should allow keeping as little investment as possible in higher risk/lower return bank deposits.

Limitation of redemption to submitted and positively assessed redemption claims

We welcome that the GL explicitly limit the redemption as processed in the course of the execution of a redemption plan to the properly submitted and positively assessed redemption claims. It is vital for a successful and timely execution of the redemption plan that all claims participating in the redemption must have undergone the specified process of communication from the issuer, filing of the claim including related information by token holders to the issuer and subsequent positive assessment of the filed claim by the issuer. However, the GL should also address the approach to, and the fate of, tokens where the holder has failed to submit a redemption claim (within the set timeline), or where the claim has not been positively assessed (e.g. because of ML/TF considerations). The GL should specify that issuers in their communication to holders (including related information provided in the white paper) should state clearly that in the cases above the permanent right of redemption according to Article 39 (1) first sentence MiCAR expires. Issuers should also address these cases explicitly in the policies and procedures they are required, according to Article 39 (1) second sentence MiCAR, to develop and maintain.

ML/TF checks by issuers that are not obliged entities

We acknowledge that ML/TF related risks must be managed and contained also by issuers that are not obliged entities. In contrast, we cannot see how an obligation to employ an intermediary that is an obliged entity to perform ML/TF checks during the execution of a redemption plan could be imposed by GL for issuers that are not obliged entities and that would not have to comply with such an obligation in the normal course of their business. GL are aimed at providing guidance to competent authorities for the application and, as the case may be, enforcement of obligations originating from binding level 1 EU legislation. GL under MiCAR do not represent a suitable regulatory instrument for introducing ML/TF related (or any other) obligations not already set by the MiCAR level 1 text.

Issuers that are not obliged entities should be free to set out in their redemption plan suitable ML/TF checks without resorting to employing an intermediary that is an obliged entity. Freedom of choice is all the more important since outsourcing these ML/TF checks to an intermediary that is an obliged entity will come at a relatively high cost potentially at the expense of token holders not being redeemed in full.

Overcollateralization

The proposed GL seem to suggest that funds set aside to cover the cost of redemption would have to be hold as additional "overcollateralization", that is as part of the reserve of assets. We urge the EBA to explicitly acknowledge that this is not the case. The specific requirements for the reserve of assets respond to its purpose of ensuring full coverage at all times of issued tokens and corresponding redemption claims. To that end the reserve of assets and the broad range of related investment and other limitations aim at containing the de-pegging risk. In contrast, the purpose of assets or funds set aside to cover the costs of executing a redemption plan is fundamentally different and completely unrelated to any de-pegging risk. Therefore, issuers should be free to arrange for committed funding of these costs as they deem fit including investment in assets that would not qualify as reserve assets and without any of the limitations applicable to the reserve of assets.

Moreover, if, as the GL seem to suggest, funds committed to cover the redemption costs were part of the reserve of assets the increased reserve would attract an additional capital charge. However, here again, the risks related to the remote possibility of a need to fund the execution of a redemption plan are fundamentally different from the risks these capital requirements are meant to cover.

Question 3: Do you consider that the redemption process as described herein provides adequate operational guidance to token holders about the actions and steps relating to the redemption claim?

See our comment regarding question 2 above.

Question 4: Do you consider that the information to be contained in the draft public notice is adequate and covers the necessary information to be conveyed to the token holders and for a sound redemption process?

See our comment regarding question 2 above.

Question 5.1: Do you consider that the aspects to be assessed by the competent authority for purposes of assessing whether the issuer is unable or likely to be unable to fulfil its obligations under Regulation (EU) 2023/1114 envisaged in the Guidelines appropriately complement those set out in Article 47(1) of Regulation (EU) 2023/1114?

Yes. However, we would welcome further emphasis on the "second order" nature of these additional aspects. According to Article 47 (1) MiCAR the execution of an issuer's redemption plan can only be triggered if the competent authority comes to the conclusion that the issuer is unable or likely to be unable to fulfil its obligations. Since requesting the execution of the redemption plan effectively amounts to termination of the issuer's business followed most likely by the withdrawal of its authorisation, the bar for coming to this conclusion must be set particularly high not least since it exposes the competent authority to potentially significant legal risks should its assessment turn out to be misjudged. We would still assume cases of issuers not being able anymore to fulfil their obligations are relatively straightforward. Triggering the execution of a redemption plan in the case of an issuer that is still able to fulfil its obligation but, based upon the competent authority's assessment, only likely not be able to do so, is much more challenging involving for the authority a much higher exposure to legal and eventually financial risks if it were to compensate for damage resulting from an unlawful request to execute the redemption plan. Accordingly, we urge the EBA to complement the GL by additional guidance regarding how imminent the issuers non-compliance with obligations would have to be and the kind of (strong) evidence the competent authority would have to provide. The EBA may also wish to consider process-related guidance e.g. in terms of early involvement of a competent authority's internal legal services or external legal advice, the proper documentation of its decision-making process and how to properly respond and build into the process ways of responding to the issuers right to be heard. These aspects are crucial for ensuring competent authorities' lawful request to launch the execution of a redemption plan.

Question 5.2 ***Do you agree that in case of credit institutions and the other entities subject to Directive 2014/59/EU or of central counterparties subject to Regulation (EU) 2021/23, the competent authority should not trigger the redemption plan without prior consultation and coordination with the relevant prudential or resolution competent authorities under that Directive or Regulation, in case of commencement of crisis prevention measures or crisis management measures under such sectoral acts?***

Yes. For additional guidance regarding redemption plans by credit institutions see our comments on question 1.

Members of the EMA, as of June 2024

Airbnb Inc
Airwallex (UK) Limited
Allegro Group
Amazon
Ambr
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
Coinbase
Contis
Crypto.com
Currenxie Technologies Limited
Decta Limited
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
Flywire
Gemini
Globepay Limited
GoCardless Ltd
Google Payment Ltd
IDT Financial Services Limited
iFAST Global Bank Limited
Imagor SA
Ixaris Systems Ltd
J. P. Morgan Mobility Payments Solutions S. A.
Lightspark Group, Inc.
Modulr Finance B.V.
MONAVATE
MONETLEY LTD
Moneyhub Financial Technology Ltd
Moorwand Ltd
MuchBetter
myPOS Payments Ltd
Navro Group Limited
Nuvei Financial Services Ltd
OFX
OKG Payment Services Ltd
OKTO
One Money Mail Ltd
OpenPayd
Own.Solutions
Park Card Services Limited
Payhawk Financial Services Limited
Paymentsense Limited
Paynt
Payoneer Europe Limited
PayPal
Paysafe Group
Paysend EU DAC
Plaid
PPRO Financial Ltd
PPS
Push Labs Limited
Ramp Swaps Ltd
Remitly
Revolut
Ripple
Securiclick Limited
Segpay
Soldo Financial Services Ireland DAC
Square
Stripe
SumUp Limited
Syspay Ltd
Transact Payments Limited
TransferGo Ltd
TransferMate Global Payments
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