The Crypto Council for Innovation's Consolidated Response to the European Banking Authority's 3rd Consultation Package on Prudential and Related Aspects of MiCAR[1]

The Crypto Council for Innovation (CCI) welcomes the opportunity to submit comments on the EBA's third consultation package under the Markets in Crypto-assets Regulation (MiCAR). Our comments – summarised below and detailed in subsequent pages – cover the draft technical standards/guidelines on *stablecoin* reporting[2], liquidity[3], reserve assets,[4] and own funds and stress testing.[5]

- **Stablecoin reporting** – we support several aspects of the EBA's proposals on stablecoin reporting, but have made the following recommendations:

    - Transactions should be tagged with pseudonymous unique identifiers for payers/payees and not with personally identifiable information (PIIs) as this poses serious privacy and security concerns, including creating a honey pot of information which bad actors may seek to exploit.
    - The scope of reporting should be narrowed to only transactions where both the payer and payee are in the Eurozone rather than covering all transactions with an EU payer and/or EU payee.
    - The threshold for triggering mandatory quarterly reporting should be based on the value of issued tokens exceeding the EUR100k for significant time (e.g., 25%) during the reporting period rather than when the maximum value exceeds a threshold for solely one day, as the EBA has proposed.
    - Detailed geographical reporting of transactions should only be required for significant ARTs and EMTs should be for the purposes of determining supervisory college composition.
    - Issuers should not be required to report transactions involving non-custodial wallets unless this can be justified through cost benefit analysis, including not undermining the value of the non-custodial technology for users, taking fully account of security and privacy concerns, and assessing the resulting data to be of sufficient quality given that the EBA acknowledges such data is a rough approximation and unreliable due to challenges in defining all transactions with certainty.

[1] This document contains the consolidated response to 8 public consultation papers published by the EBA. Responses to each consultation will be submitted separately to the EBA.

[2] Consultations on draft RTS on the use of ARTs and EMTs denominated in a non-EU currency as a means of exchange and draft ITS on the use of ARTs and EMTs denominated in a non-EU currency

[3] Consultations on draft RTS to: (i) specify the minimum contents of the liquidity management policy and procedures and (ii) draft guidelines on liquidity stress testing.

[4] Consultations on draft RTS to: (i) specify the highly liquid financial instruments with minimal market risk, credit risk and concentration risk and (ii) further specify the liquidity requirements of the reserve of assets.

[5] Consultations on: (i) RTS on procedure and timeframe to adjust its own funds requirements for issuers of significant asset-referenced tokens or e-money tokens under MiCAR and (ii) the adjustment of own funds requirements and design of stress testing programmes for issuers under MiCAR.

- **Liquidity requirements** – we broadly support many aspects of the EBA's approach to defining liquidity management policies and stress testing but have made the following recommendations:

    - The application of the proportionality principle – reflecting the complexity, risk profile, scope of operation of issuers – should be reconfirmed more vigorously throughout for all provisions of the guidelines and RTS.
    - The liquidity risk mitigation tools for addressing liquidity shortfalls in emergency situations should be clarified to also include in specie redemption of holders.

- **Reserve Assets** – we support the EBA's overall approach for reserve assets but have made the following recommendations:

    - The deposit counterparty limits should be removed as they will heighten the undesirable consequences highlighted by the EBA, including operational and economic challenges when sourcing banking partners and adverse selection based on factors other than creditworthiness and liquidity soundness.
    - The EBA should consider mechanisms through which its calibration of the relevant percentages of reserve assets that need to mature within the following 1 and 5 working days can be adjusted in a timely manner to take account of the growth and maturity of the crypto market and bank activities.
    - The EBA should review the restrictions it has proposed to narrow the eligibility of highly liquid financial instruments from those listed in the delegated regulation on the liquidity coverage requirement (LCR), to ensure they achieve the overall intended policy outcomes.

- **Own funds and stress testing** – we broadly support the sequencing proposed by the EBA for the adjustment of own funds by sART/sEMT issuers, but have made the following recommendations:

    - A consultation period of 10 working days should be introduced after an NCA provides a draft plan to an issuer, to enable the issuer to make representations to the NCA to alter the proposed timeframe for the issuer to change its own funds.
    - NCAs should be required to have regard to the potential impact on token holders when setting the timeframe for the adjustment of a sART issuers' own funds. Where a rapid adjustment will cause detriment, the NCA should be permitted to provide up to 6 months for the sART issuer to adjust its own funds.
    - Issuers should not be subject to pre-determined mandatory restrictions during the implementation of the additional own funds requirements as it is challenging to foresee with accuracy the range of market circumstances during which an issuer may need to adjust its own funds.
    - The criteria for an NCA to determine if an issuer has a high degree of risk should draw a distinction between factors which increase the risk of an issuer in its own right and those factors which increase the risks arising from the use of an ART on an external system such as for payment which may be entirely outside of the issuer's control.

Stablecoin Reporting

The EBA has published the following two consultations on stablecoin reporting:

- Draft Implementing Technical Standards on the reporting of asset-referenced tokens under Article 22(7), MiCAR and on e-money tokens denominated in a currency that is not an official currency of a Member State pursuant to Article 58(3), MiCAR; and

- 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), 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), MiCAR.

The EBA has also published draft reporting templates and instructions for CASPs, draft reporting templates and instructions for ART issuers and a data point model with validation rules.

DRAFT ITS ON THE FORMS, FORMATS AND TEMPLATES OF STABLECOIN REPORTING

Background

MiCAR aims to address the risks posed by the widespread use of stablecoins to financial stability; the smooth operation of payment systems; monetary policy transmission; or monetary sovereignty.[6]

MiCAR[7] requires ART issuers (for issuance value of > EUR100mn or otherwise if required by the NCA) to report the following data to NCAs on a quarterly basis:

- The number of holders;
- The value of the asset-referenced token issued and the size of the reserve of assets;
- The average number and average aggregate value of transactions per day during the relevant quarter;
- an estimate of the average number and average aggregate value of transactions per day during the relevant quarter that are associated with uses [of the ART] as a means of exchange within a single currency area.

CASPs that provide services related to ARTs are required to provide the issuers of ARTs with the information necessary to meet the ART issuer's quarterly reporting obligations (as above).[8]

The EBA is mandated to develop draft implementing technical standards (ITS) establishing the standard forms, formats and templates for the purposes of reporting by the issuers and CASPs.[9] Furthermore, the EBA is mandated to develop draft RTS specifying the methodology to estimate the number and value of transactions

[6] Recital 5, MiCAR
[7] Article 22(1), MiCAR
[8] Article 22(3), MiCAR
[9] Article 22(7), MiCAR

associated to uses of asset-referenced tokens as a means of exchange and of e-money tokens denominated in a currency that is not an official currency of a Member State (see below).

The final ITS and RTS will apply to both ARTs and EMTs denominated in a non-EU currency. The EBA will also develop a data point model (i.e., a data dictionary),[10] XBRL taxonomy and validation rules based on the final draft ITS.

Summary of the EBA's proposed approach and consultation Q&A

The EBA is proposing to require the collection and reporting of a significant volume of granular information by CASPs and ART issuers, as set out below.

- **Reporting of ART holders** – the EBA is proposing to require reporting by holder type (retail vs non-retail and legal vs natural person), wallet type (custodial vs non-custodial), location (i.e., country based on a firm's registered office address or habitual residence of an individual holder) and tag holders by a unique identifier (LEI code, tax/national insurance number, name etc.).

- **Reporting of the value of ARTs in issuance** – the EBA is proposing to require reporting of the value of tokens that have been issued as of a reference date, along with the minimum, maximum and average value over the preceding quarter (using a MMF Regulation based valuation methodology[11]). Furthermore, the EBA is proposing that if the maximum value of tokens issued exceeds EUR100k on one or more days during the preceding quarter this will trigger enhanced mandatory quarterly reporting to the relevant NCA.[12]

- **Reporting of reserve assets** – the EBA is proposing to require reporting of the value of reserve assets on a similar basis to the reporting of the value of issued ARTs i.e., the value of reserve assets as of a reference date, along with the minimum, maximum and average value over the preceding quarter.

- **Reporting of ART transactions** – the EBA is proposing to require reporting of on-chain and off-chain transactions in ARTs from one holder to another[13] - broken down by the geographical location of the sender and receiver of the transaction – and the reporting of ART transactions within the single currency area where the ART is used as a means of exchange. Furthermore, the EBA is proposing to require best efforts reporting of transactions involving non-custodial wallets and other types of distributed ledger addresses where there is no CASP involved.

- **Reporting of transactions by CASPs** – the EBA is proposing to require CASPs to provide issuers transaction information for in-scope ARTs, including the hash, distributed ledger address, account number and country of the originator and/or beneficiary,[14] the value and date of the transaction, and

[10] https://www.eba.europa.eu/risk-and-data-analysis/reporting-frameworks/dpm-data-dictionary
[11] Article 36(11) and (12), and Article 39(2)(c), MiCAR
[12] Article 22(2)
[13] In accordance with the definition in Article 22(1), MiCAR and further specified in Recital 60, MiCAR
[14] Per Article 14(1) and (2) of the TFR

whether the ART is used as a means of exchange. Furthermore, the EBA is proposing that CASPs should report the public distributed ledger addresses used for making transfers on behalf of their clients.

- **Data quality and reconciliation by ART issuers of CASP reported data** – the EBA is proposing that CASPs should leverage their existing controls and procedures under AMLD to report information to ART issuers. In turn, ART issuers should have the systems and procedures to reconcile the data they receive from CASP reported data and verify its quality. The EBA is proposing that a common format is established between CASPs to facilitate smooth reconciliation of data shared by CASPs.

The EBA proposes that quarterly reporting to NCAs by ART issuers[15] should be on reporting reference dates of 31 March, 30 June, 30 September, and 31 December, with remittance dates of 10 calendar days after the reference date for CASPs and 30 calendar days for issuers (subject to adjustment for public holidays and weekends.)

Question 1: Do you agree with the proposal included in the ITS on how issuers and CASPs should report on holders in Article 22(1)(a) of MiCAR? If not, please provide your reasoning and suggest an alternative approach.

We support the reporting of unique identifier information for each holder by the CASP to the issuer to facilitate accurate reporting and avoid the double counting of holders and transactions. However, this unique identifier should be pseudonymous. Requiring CASPs to provide issuers with the personally identifiable information (PII) of their customers such as the originators address, personal document number, date and place of birth serves no net benefit over a unique pseudonymous identifier and would create a honey pot of information which bad actors may seek to exploit.

While CASPs and issuers may adopt measures to secure PII data, the nature of blockchain technology can result in holdings in cryptocurrency wallets being broadcast in aggregate on the blockchain.[16] Where information such as PII that is not directly available on blockchains is collected and retained, this may pose serious privacy and security concerns. This is particularly the case where such information would link a person's PII with their blockchain addresses, which, if accessed without authorisation, could reveal their entire blockchain transaction history.[17] Privacy is a central tenet to a well-functioning internet[18] and imperative to support user confidence of blockchain technology and to spur ongoing innovation.[19]

We respectfully request that the EBA only require the reporting of pseudonymous unique identifier information by CASPs to issuers and not PII.

[15] Article 22(1), MiCAR
[16] *See* p6-7 of CCI's letter on Proposal of Special Measure Regarding Convertible Virtual Currency Mixing for a discussion of the risks consumers face which can partially be mitigated through the use of mixers.
[17] https://cryptoforinnovation.org/wp-content/uploads/2022/08/CCI-Treasury-RFC-Response.pdf
[18] *See* II.B, https://api.a16zcrypto.com/wp-content/uploads/2023/05/a16z-TC-Van-Loon-Amicus-Briefing.pdf
[19] See II, https://a16zcryptofrz.wpenginepowered.com/wp-content/uploads/2024/01/a16z-CVC-Mixing-Comment-filed.pdf

Question 2: Do you agree with the template S 02.00 - VALUE OF THE TOKEN ISSUED AND THE SIZE OF THE RESERVE OF ASSETS on how issuers should report the different values of the token issued in Article 22(1)(b) of MiCAR, and in particular do you agree with how the maximum value that would trigger the reporting obligation is defined? If not, please provide your reasoning and suggest an alternative approach.

We respectfully disagree that if the maximum value of tokens that have been issued over a preceding quarter exceeds EUR 100,000 on a single day then this should trigger enhanced mandatory quarterly reporting to the relevant NCA. While we acknowledge the policy objective to provide NCAs with timely data to oversee the use of stablecoins, including in determining whether a stablecoin is to be classified as significant, the additional burden resulting from requiring such reporting is not commensurate with the alleged benefit to the NCA in such 'edge' cases, particularly the lack of regard for the value of the token at the start and end of the reporting period.

We request that the EBA adopts an approach which takes greater account of the fluctuation in the value of the issued tokens over the course of the reporting period. For instance, only triggering mandatory reporting obligations if the token has exceeded the EUR 100,000 threshold for at least 25% of the reporting period and is either at or within 10% of the threshold at the end of the reporting period.

Question 4: Do you agree with templates S 04.01 - TRANSACTIONS PER DAY - AVERAGE, S 04.02 - TRANSACTIONS PER DAY - AVERAGE_EU and S 05.00 - TRANSACTIONS PER DAY THAT ARE ASSOCIATED TO ITS USES AS A MEANS OF EXCHANGE WITHIN A SINGLE CURRENCY AREA - AVERAGE on how issuers should report transactions under Article 22(1)(c) and (d) of MiCAR? In particular, do you agree to include a separate template (S 04.03 - TRANSACTIONS AND TRANSFERS PER DAY BETWEEN NON-CUSTODIAL WALLETS - AVERAGE) requesting information on transactions and transfers made between non-custodial wallets or other types of distributed ledger addresses where there is no CASP involved? If not, please provide your reasoning and suggest an alternative approach.

We respectfully disagree with the EBA's interpretation that the scope of the reporting obligation covering transactions 'within a single currency area' includes Eurozone and non-Eurozone transactions and covers transactions where only one of the payer or payee is located within the Eurozone. We request that the EBA limits the reporting obligation to only those transactions where both the payer and payee are located within the Eurozone as we believe this to be the intention of the co-legislators in the primary legislation (see also our answer to Question 4 in response to the consultation on the *draft RTS on the methodology for estimating quarterly non-EU stablecoin transactions*).

We do not believe it is proportionate to require issuers to report transactions broken down by the holder's country to NCAs. We respectfully request that the EBA removes the proposed requirement for issuers to categorise transactions into those made within a country, received to a country, and sent from a country. Instead, and in line with the approach in Article 22(1)(c), MiCAR, issuers should be required to only report the average number and average aggregate value of transactions per day during the relevant quarter without the holder's country breakdown. This information will support NCAs when monitoring the concentration and related volumes of the transactions, including meeting the obligation for monitoring the significance of the activities of the issuer of the asset-referenced token on an international scale, such as the use of the

asset-referenced token for payments and remittances.[20] In the event that an ART or EMT is deemed significant, at that stage information can be requested from the issuer so that NCAs can determine whether they qualify to be a member of the supervisory college for the sART or sEMT.[21]

We request that the EBA does not proceed with its proposal to require issuers to report transactions and transfers between non-custodial wallets or between other types of distributed ledger addresses where there is no CASP involved. As the EBA acknowledges, issuers may have limited available information and would not necessarily know whether the transfer is made between addresses of different persons or between addresses of the same person. The issuer may therefore not be able to determine if a transfer qualifies as a transaction. The EBA has acknowledged that reporting of transactions and transfers between non-custodial wallets or between other types of distributed ledger addresses where there is no CASP involved will only be based on proxies and on a best efforts basis. Given that this reporting may be based on approximations and has a high degree of inherent unreliability/lack of comparability, we do not consider the additional burden resulting from requiring such reporting that would be imposed on an issuer to be commensurate with the benefit to NCAs. Mandating this without the necessary data risks undermining trust and confidence. It also makes comparability for NCAs and investors alike impossible given potential divergent interpretations.

Question 5: Do you agree with template S 07.01 - INFORMATION ON TRANSACTIONS how CASPs should report transactions of Article 22(1)(c) and (d) of MiCAR to the issuers? Do you agree with template S 07.02 - DISTRIBUTED LEDGER ADDRESSES FOR MAKING TRANSFERS ON BEHALF OF CLIENTS to be reported by the CASPs to the issuers? If not, please provide your reasoning and suggest an alternative approach.

The reporting by CASPs of the public distributed ledger addresses used for making transfers on behalf of their clients, will support issuer's efforts in data reconciliation and data quality verification, but will not allow issuers to definitively identify whether an on-chain transaction involves a non-custodial wallet and therefore to comprehensively reconcile reported data. This is because a wallet address may belong to a CASP that is not within the scope of MiCAR or the TFR e.g., a non-EU CASP.

We do not agree with the EBA's proposal that issuers should be required to report information on the number of transfers between non-custodial wallets or between other types of distributed ledger addresses where there is no CASP involved. Furthermore, issuers should also not be required to report on a best efforts basis the number and value of such transactions.

We believe the EBA's proposals risk seriously undermining the value of non-custodial wallets for users. Non-custodial wallets are software tools that enable users to interact with blockchain networks by allowing them to sign and send cryptographic messages. Non-custodial wallets are used as a convenient way to interact with blockchain networks, just as web users tend to use web browsers to access the Internet. With a non-custodial wallet, users are able to hold their private keys and digital assets, as well as send and receive

[20] Article 43(1)(e), MiCAR
[21] Article 119(2)(l), MiCAR

digital assets in a peer-to-peer manner. Neither the provider of the non-custodial wallet software, nor the non-custodial wallet itself "effectuate" transactions on a user's behalf.[22]

If the EBA continues to favour non-custodial transaction reporting requirements, it should only pursue such a policy if this can be justified through cost benefit analysis. This includes not undermining the value of the non-custodial technology for users, taking full account of security and privacy concerns, and assessing the resulting data to be of sufficient quality given that the EBA acknowledges such data is a rough approximation and unreliable due to challenges in defining all transactions with certainty.

Question 6: Do you agree that issuers should define and agree on one common harmonised format and file extension, that they request the CASPs to use for submitting the reports for them? If yes, please provide your suggestions for this common format and file extension

We support the development of a common harmonised format and extension of the files that CASPs send to issuers to facilitate a smooth reconciliation of the data. We do not have specific suggestions for the precise format or extension that is used.

Question 7: Do you have any other comments on the ITS, the templates or instructions?

CCI appreciates that this proposal does not extend to algorithmic stablecoins. However, we nonetheless would like to take this opportunity to underscore just how different such stablecoins are, and highlight that the application of such reserve asset requirements would effectively ban algorithmic stablecoins — the best of which operate through over-collateralization by exogenous collateral — and signal hostility toward web3 applications that rely on algorithms to develop products and services.

CCI is aware that the EBA views crypto asset-backed stablecoins as distinct from algorithmic stablecoins (in accordance with MiCAR), but for the purpose of future regulatory consideration we include the following information about the benefits and risks of what are broadly considered algorithmic stablecoins. Algorithmic stablecoins have a number of highly beneficial characteristics. For example, because algorithmic stablecoins rely on assets that exist natively on a blockchain, they are generally free from off-chain counterparty risks that can arise from custodying assets with third parties, like banks. Without third parties, algorithmic stablecoins can achieve true decentralisation and provide users with alternative payment instruments. It is important to note that many of these benefits derive from the extent to which algorithmic stablecoins are decentralised in practice. To determine how decentralised an algorithmic stablecoin is, CCI would encourage regulators to evaluate whether it meets certain decentralisation thresholds such as that collateralization ratios cannot be changed in the absence of a decentralised governance process.

Any risks that may be posed in algorithmic stablecoins are distinct from those of other types of stablecoins and we hope that, in future rulemaking, stakeholders will calibrate rules accordingly. For example, the primary risk of algorithmic stablecoins is when such protocols do not have sufficient collateral to cover all outstanding stablecoins. However, over-collateralized stablecoins also exist and alleviate these issues. By ensuring that the

[22] See p7, https://api.a16zcrypto.com/wp-content/uploads/2023/11/A16z-Comment-Response-%E2%80%94-IRS-Proposed-Digital-Asset-Broker-Reporting-Requirements.pdf

protocol (i) always retains collateral in excess of outstanding stablecoins and (i) that such collateral is exogenous, over-collateralized algorithmic stablecoins actually achieve a degree of safety commensurate with fiat-backed products.

Exogenous collateral consists of collateral external to the issuing system whose value is not dependent on the success or failure of the stablecoin protocol. As we have seen in real-world cases, over-collateralized stablecoins backed by exogenous assets have demonstrated a high-degree of resilience to market shocks, and have exhibited relatively low risk. Algorithmic stablecoins that require overcollateralization using high quality collateral like bitcoin and ether remained stable and functioned uninterrupted throughout the recent downturn. Examples include DAI,[23] RAI,[24] and LUSD.[25] While CCI recognizes that algorithmic stablecoins are not under consideration for this proposal, we appreciate this opportunity to provide a summary of just how different this category of stablecoins is, and why it will ultimately require unique treatment. We would encourage the EBA (and the European co-legislators) to consider studying these differences in stablecoin design in determining how each should be treated and welcome further opportunities to provide input.

In sum, while we wholeheartedly support regulation that prevents stablecoin issuers from taking on unreasonable amounts of risk, we believe that policymakers can protect users without such restrictive requirements. And they can do this by enacting narrowly tailored collateralization requirements that allow for the development of safe software code but prevent overly risky projects.

DRAFT RTS ON THE METHODOLOGY TO ESTIMATE THE NUMBER AND VALUE OF TRANSACTIONS FOR NON-EU STABLECOINS AS A MEANS OF EXCHANGE

Background

ART issuers must report on a quarterly basis to NCAs "an estimate of the average number and average aggregate value of transactions per day during the relevant quarter that are associated to uses [of the ART] as a means of exchange within a single currency area".[26] The EBA is mandated, in cooperation with the ECB to develop draft regulatory technical standards specifying the methodology for this reporting[27] which will apply to both ARTs and e-money tokens (EMTs) denominated in a non-EU currency.

ART issuers are required to stop issuing an ART where the estimated quarterly average number and average aggregate value of transactions per day associated to its uses as a means of exchange within a single currency area is higher than 1 million transactions and EUR 200 000 000 and submit a plan for maintaining transaction volumes at below that cap.[28]

Summary of the EBA's proposed approach and consultation Q&A

[23] See MakerDAO, https://makerdao.com/en/.
[24] See Reflexer, https://reflexer.finance/.
[25] See Liquidity, https://www.liquity.org/.
[26] Article 22(1)(d), MiCAR
[27] Article 22(6), MiCAR
[28] Article 23(1), MiCAR

In the draft RTS, the EBA has proposed a methodology to be applied by issuers for reporting the transactions referred to in Article 22(1), point (d) of MiCAR, including how issuers should estimate the number and value of transactions associated to uses of ARTs and of EMTs denominated in a non-EU currency "as a means of exchange", and the criteria for reporting these transactions per single currency area. The EBA also clarifies that it is the ART issuer's responsibility to ensure that information reported to the relevant NCA is correct and complete, by having in place systems and procedures for the reconciliation of data received from CASPs.

The EBA recalls that while MiCAR does not comprehensively define which transactions with an ART or with an EMT denominated in a non-EU currency are considered to be "associated to uses [of that token] as a means of exchange", it provides some 'indications as regards transactions that are included in this category, and those that are excluded'. The EBA notes that transactions associated with the use of an ART as a means of exchange include transactions "associated to payments of debts including in the context of transactions with merchants".[29] However, "transactions that are associated with the exchange for funds or other crypto-assets with the issuer or with a crypto-asset service provider shall not be considered associated to uses of the asset-referenced token as a means of exchange, unless there is evidence that the asset-referenced token is used for the settlement of transactions in other crypto-assets".[30] Furthermore, "where a transaction involving two legs of crypto-assets, which are different from the asset-referenced tokens, is settled in the asset-referenced tokens" this should be deemed as used for the settlement of transactions.[31]

In defining transactions associated to uses of an ART or of an EMT denominated in a non-EU currency "as a means of exchange", the EBA is proposing the following:

- To include transactions where such tokens are used to pay for goods or services, irrespective of whether the payment is made to a merchant or any other payee (legal or natural person).
- To exclude the exchange of an ART or of an EMT denominated in a non-EU currency for funds or other crypto-assets with the issuer or with a crypto-asset service provider unless the respective ART or the EMT is used for the settlement of transactions in other crypto-assets.

The EBA acknowledges that in some cases a CASP may not be able to determine with accuracy transactions associated with an ART or EMT denominated in a non-EU currency as a means of exchange. The EBA therefore proposes that issuers should deducting from the total number and value of transactions with an ART, during the relevant quarter, the transactions associated with the exchange of the ART for funds or other crypto-assets with the issuer or with a CASP to get an estimate the number and value of transactions associated to uses of an ART as a means of exchange. The EBA notes however that transactions associated to uses of an ART as a means of exchange shall include the exchange of an ART for funds or other crypto-assets with the issuer or with a CASP, where the ART is used for the settlement of transactions in other crypto-assets. This would include, where a transaction involving two legs of crypto-assets, which are different from the ARTs, is settled in ARTs.

[29] Recital 61, MiCAR
[30] Article 22(1), MiCAR
[31] Recital 61, MiCAR

The EBA proposes that the reporting of transactions associated with an ART or EMT denominated in a non-EU currency as a means of exchange only covers transactions where at least the payer or the payee is located in the EU and excludes transactions where both the payer and the payee are located outside the EU.

The EBA is interpreting the concept of 'a single currency area' to cover one or several countries that have the same official currency. The EBA suggests that a "single currency area" may include, for example, the euro-area Member States (that shall collectively be a "single currency area") or a non-euro area Member State. Furthermore, the EBA considers that transactions where the payer and payee are located in the same or different single currency areas within the EU to be in scope. The EBA asserts that this is consistent with the policy intention of MiCAR to ensure a "comprehensive monitoring over the whole ecosystem of asset-referenced tokens issuers" and "capture all transactions that are conducted with any given asset-referenced token".[32]

The EBA is proposing that the calculation of the average number and average aggregate value of reported transactions are as at 31 March, 30 June, 30 September and 31 December reference dates and reporting is based on the official currency of the home Member State of the issuer.

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 agree with the EBA's proposed approach for issuers to estimate the number and value of transactions of an ART as a means of exchange, by deducting from the total number and value of transactions, those associated with the exchange of the ART for funds or other crypto-assets with the issuer or a CASP.

As the EBA acknowledges, specific technical features of the underlying distributed ledger infrastructure used for transfers of ARTs or EMTs may prevent the issuer or a CASP from determining with accuracy which transactions are associated to uses of an ART or of an EMT denominated in a non-EU currency "as a means of exchange". As such the estimates reported by issuers and CASPs should be understood to be on a best efforts basis.

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 have set out one example use case below.

- The counterparties to a transaction involving two crypto assets (e.g., BTC and ETH) may agree to settle the transaction using an ART (e.g., a stablecoin pegged to USD or EUR) to mitigate volatility or for the simplicity of settlement.

[32] Recital 60, MiCAR

The extent to which such a use case represents means of exchange will need to be considered on a case-by-case basis.

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.

We support the EBA's proposal to exclude from the geographical scope of non-EU stablecoin reporting those transactions where both the payer and payee are located outside the EU, but respectfully request that the EBA expand this exclusion so that the reporting obligation only applies to those transactions where both the payer and payee are located within the Eurozone (see also our answer to Question 4).

Article 22(d), MiCAR requires the quarterly reporting of various estimated metrics covering transactions 'within a single currency area'. We respectfully disagree with the EBA's interpretation that a 'single currency area' as referenced in MiCAR includes a non-Euro Member State. We request that the EBA revises the scope of its transaction proposals to cover only transactions within the Eurozone.

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.

We respectfully disagree with the EBA's interpretation that the scope of the reporting obligation includes transactions where only one of the payer or payee is located within the Eurozone (i.e., the single currency area in the EU). The reporting obligation in Article 22(1)(d) applies to transactions within a single currency area. This implies that both parties to the transaction (i.e., the payer and the payee) are located in the single currency area, otherwise the transaction would not be 'within' the area but partly outside. We consider the reporting requirements in Article 22(1)(a)-(c) to be consistent with the stated policy intention of ensuring "comprehensive monitoring over the whole ecosystem of asset-referenced tokens issuers" and "capture (ing) all transactions that are conducted with any given asset-referenced token" in Recital 60, MiCAR.

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 do not have any comments on the EBA's proposed approach to calculating the various transaction metrics. As set out in our other responses, we respectfully request that the EBA limit the scope of reported transactions to only those where both the payer and payee are located within the Eurozone.

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.

We disagree with the EBA's proposal to require issuers to report transactions and transfers concerning non-custodial wallets and therefore, on the basis that we are proposing the removal of that requirement, we do not consider it necessary that CASPs should report to the issuer the public distributed ledger addresses they use for making transfers on behalf of their clients (see our response to question 9).

The reporting by CASPs of: (i) transactional information; and (ii) the public distributed ledger addresses used for making transfers on behalf of their clients, will not allow issuers to definitively identify whether an on-chain transaction involves a non-custodial wallet and therefore to comprehensively reconcile reported data. This is because a wallet address may belong to a CASP that is not within the scope of MiCAR or the TFR e.g., a non-EU CASP.

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 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?

We support the reporting of unique identifier information for each holder by the CASP to the issuer for the purpose of avoiding the double counting of transactions reported by the CASP of the payer and the CASP of the payee. However, this unique identifier should be pseudonymous. Requiring CASPs to provide issuers with the personally identifiable information (PII) of their customers such as the originators address, personal document number, date and place of birth serves no net benefit over a unique pseudonymous identifier and would create a honey pot of information which bad actors may seek to exploit.

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?

Issuers may seek to use the data available on the distributed ledger coupled with distributed ledger analytics tools to estimate transactions.

Question 9: Do you consider the EBA's proposals set out in recital 3 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 agree with the EBA that issuers should not be required to report transactions between non-custodial wallets or between other types of distributed ledger addresses where there is no CASP involved. However, we do not agree with the EBA's proposal that issuers should be required to report information on the number of transfers between non-custodial wallets or between other types of distributed ledger addresses where there is

no CASP involved. Furthermore, issuers should also not be required to report on a best efforts basis the number and value of such transactions.

We believe the EBA's proposals risk seriously undermining the value of non-custodial wallets for users. These wallets are software tools that enable users to interact with blockchain networks by allowing them to sign and send cryptographic messages to blockchains. Non-custodial wallets are used as a convenient way to interact with blockchain networks, just as web users tend to use web browsers to access the Internet. With a self-hosted wallet, users are able to hold their private keys and digital assets, as well as send and receive digital assets in a peer-to-peer manner. Neither the provider of the self-hosted wallet software, nor the self-hosted wallet itself "effectuate" transactions on a user's behalf.[33]

If the EBA continues to favour non-custodial transaction reporting requirements, it should only pursue such a policy if this can be justified through cost benefit analysis. This includes not undermining the value of the non-custodial technology for users, taking full account of security and privacy concerns, and assessing the resulting data to be of sufficient quality given that the EBA acknowledges such data is a rough approximation and unreliable given the challenges in defining all transactions with certainty.

Liquidity Requirements

The EBA has published the following two consultations on liquidity provisions in MiCAR:

- Draft Regulatory Technical Standards to specify the minimum contents of the liquidity management policy and procedures under Article 45(7)(b), MiCAR

- Draft Guidelines establishing the common reference parameters of the stress test scenarios for the liquidity stress tests referred in Article 45(4) Regulation (EU) 2023/1114

The draft RTS and guidance, once finalised, will apply to issuers of sARTs and issuers of sEMTs and can be extended to issuers of non-significant ARTs and issuers of non-significant EMT at the discretion of an NCA where this is necessary to address certain identified risks.

Draft Regulatory Technical Standards to specify the minimum contents of the liquidity management policy and procedures under Article 45(7)(b), MiCAR

Background

MiCAR requires issuers of sARTs to establish, maintain and implement a liquidity management policy and procedures[34] to assess and monitor their liquidity needs to meet redemptions requested by holders of the ART. The EBA recalls that the ultimate target of the liquidity management policy and procedures is to ensure reserve assets have a resilient liquidity profile that enables issuers of sARTs to continue operating normally, including under scenarios of liquidity stress. Liquidity management policy and procedures apply to sEMT

[33] See p7, https://api.a16zcrypto.com/wp-content/uploads/2023/11/A16z-Comment-Response-%E2%80%94-IRS-Proposed-Digital-Asset-Broker-Reporting-Requirements.pdf

[34] Article 45(3), MiCAR

issuers and can be extended to issuers of non-significant ARTs and issuers of non-significant EMT at the discretion of an NCA where this is necessary to address certain identified risks.

MiCAR requires the reserve of assets for sARTs to consist of at least 60% of deposits referenced in each official currency. The EBA has been mandated[35] to develop draft RTS to specify the minimum content of the liquidity management policy and procedures and related liquidity requirements, including specifying the minimum amount of deposits in each official referenced currency.

Summary of the EBA's proposed approach and consultation Q&A

The EBA has developed the draft RTS based on the relevant Basel Standards[36] and considering the Capital Requirements Directive (CRD)[37] and EBA guidelines on ILAAPs.[38]

Question 1. Do respondents have any concerns of Article 1 for the identification, measurement and monitoring of liquidity risk of issuers? Do respondents think that the main aspects in the processes for issuers of tokens to properly manage liquidity risk are captured?

We are supportive of the EBA's proposal to apply the procedural requirements for identifying, measuring and managing liquidity risk based on a proportionate basis considering the complexity, risk profile and scope of operation of ART and EMT issuers.

Question 2. Do respondents have any comment on the minimum content of the liquidity contingency policy proposed in Article 2? In particular, do respondents have any concern on the inclusion of the required indicator to measure deviations between the market value of the token and the market value of the assets referenced as an early warning signal to be calibrated by the issuer?

We are supportive of the EBA's overall approach to defining the content of the liquidity contingency policy. We would welcome additional clarity from the EBA that the development of the policy and related documentation by issuers is subject to the same proportionality principle as for Article 1 of the draft RTS – reflecting the complexity, risk profile, scope of operation of issuers.

The EBA has recalled that holders of ARTs and EMTs have a permanent right of redemption – meaning that the issuer has the obligation to redeem the tokens at any time and upon request by holders. However, the EBA has also recalled that issuers can fulfil this redemption request through payment in funds or in specie. We request that the EBA therefore clarifies that liquidity risk mitigation tools which could be included in strategies for addressing liquidity shortfalls in emergency situations could include the in specie redemption of holders (Article 2(4)(b)).

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[35] Article 45(7)(b), MiCAR

[36] Basel Committee on Banking Supervision: Prudential Treatment of Cryptoasset exposures, https://www.bis.org/bcbs/publ/d545.pdf

[37] Article 86, CRD(https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0036)

[38] https://www.eba.europa.eu/sites/default/files/documents/10180/1645611/6fa080b6-059d-4b41-95c7-9c5edb8cba81/Final%20report%20on%20Guidelines%20on%20ICAAP%20ILAAP%20(EBA-GL-2016-10).pdf?retry=1

Question 3. Do respondents find any challenge in the application of the segregation of the liquidity management policy as envisaged in Article 3?

We do not have any comments on challenges in the application of segregation of liquidity management policies and procedures. We note that the guidelines require the development of policies that detail the different assets referenced and their correlation with the relevant segregated reserve of assets (Article 3(1)). The EBA notes in the consultation the liquidity management policy and procedures of the issuer need to be separate for each ART, consistent with the required legal and operational segregation of their corresponding reserve of assets. We would recommend that the EBA clarifies that this provision does not limit issuers use of custodians on a fair, reasonable and non-discriminatory basis as required in MiCAR.[39]

Question 4. Do respondents have any comment regarding the minimum content envisaged in Article 4 of these RTS about the liquidity stress testing under Article 45(4) of MiCAR to be included in the liquidity management policy?

We do not have specific proposals on the minimum content of liquidity stress testing in the liquidity management policy, process and procedures. We would recall that issuers are likely to place significant reliance on intermediaries such as CASPs – including the data that will be required to be reported to them under MiCAR – for historical and current data analysis such as the profile of ART and EMT holders.

Question 6. Do respondents have any comment on the impact assessment provided?

We do not have any specific comments on the impact assessment. We are supportive of the EBA decision to adopt its 'option 1' approach which appears to cover the basis risk test from a qualitative point of view without additional requirements beyond those already applied to issuers in MiCAR.

Draft Guidelines establishing the common reference parameters of the stress test scenarios for the liquidity stress tests referred in Article 45(4) Regulation (EU) 2023/1114

Background

MiCAR requires sART issuers[40] and sEMT issuers[41] to conduct liquidity stress testing on a regular basis. Stress testing requirements can be extended to issuers of non-significant ARTs[42] and issuers of non-significant EMTs[43] at the discretion of NCAs where this is necessary to address certain identified risks. NCAs may, based on the outcome of liquidity stress testing, decide to strengthen the liquidity requirements related to the management of the reserve of assets and to the minimum content of the liquidity management policy and procedures.[44]

[39] Article 45(2), MiCAR
[40] Article 45(4), MiCAR
[41] Article 58(1)(a), MiCAR
[42] Article 35(4), MiCAR
[43] Article 58(2), MiCAR
[44] Article 45(4), MiCAR

The EBA has been mandated[45] to develop guidelines, in cooperation with ESMA and the ECB, to establish common reference parameters of the stress test scenarios to be included in the liquidity stress testing.

Summary of the EBA's proposed approach and consultation Q&A

The EBA has proposed guidelines covering the following areas:

- Risks to be assessed by issuers of ARTs and EMTs – the EBA proposes that risks related to redemption, deposits with credit institutions, de-pegging and market volatility should be considered in stress testing.

- Stress testing methodology – the EBA has proposed an approach for liquidity stress testing and for the identification of common referenced parameters for stress test scenarios.

The EBA has opted for an approach to liquidity stress testing based on the pre-specified risks that it has identified rather than providing the issuer with scope to determine the risks that should be covered. In contrast, the EBA has provided greater discretion for issuers to determine the calibration of the stress factors/weights for stress tests.

Question 1. Do respondents have any comment with respect to the proposed non-restrictive list of parameters of the stress test scenarios that need to be considered for the calibration of the stress factors?

We do not have specific proposals on the addition or removal of parameters from the non-exhaustive list that the EBA has proposed in the draft guidelines. We recommend that the EBA clarifies that the determination of the stress factors by ART/EMT issuers of reserve assets (paragraph 29 of the draft guidelines) should take account of the non-exhaustive list of parameters only where relevant (i.e., acknowledging that some asset classes may not currently be a component of an ART/EMT issuer's reserve assets at the time of the stress test).

We recommend that the EBA introduces proportionality into the guidelines, for instance into the complexity of the stress testing methodology, to take account of the potential application of the guidelines to issuers of non-significant ARTs/EMTs. The proportionate application of the guidelines to issuers of non-significant ARTs/EMTs will better reflect the inherently lower risk that such issuers are deemed to represent by virtue of the non-significant classification of the tokens they issue.

Question 2. Do respondents have any comment about the risks identified that need to be covered by the parameters of the stress test scenarios? Do respondents think that any other risk should be included?

We do not have any specific proposals on the addition or removal of the risks which the EBA has proposed should be covered in the parameters of stress test scenarios. The EBA has acknowledged that a disadvantage of its proposed approach to determining risk factors is the possibility that the specific risk profile of the issuer is not fully reflected in liquidity stress testing due to the guidelines mandating the risks that need to be covered. We recommend that the EBA provides the ability for issuers to propose to NCA possible alternative approaches to liquidity stress testing if such approaches would better reflect an issuer's specific risk profile.

[45] Article 45(8), MiCAR

Reserve Assets

The EBA has published the following two consultations on reserve asset requirements in MiCAR:

- Draft Regulatory Technical Standards to further specify the liquidity requirements of the reserve of assets under Article 36(4), MiCAR

- Draft Regulatory Technical Standards to specify the highly liquid financial instruments with minimal market risk, credit risk and concentration risk under Article 38(5), MiCAR

The RTS, once finalised, will apply to issuers of sARTs and issuers of sEMTs and can be extended to issuers of non-significant ARTs and issuers of non-significant EMT at the discretion of an NCA where this is necessary to address certain identified risks.

Draft Regulatory Technical Standards to further specify the liquidity requirements of the reserve of assets under Article 36(4), MiCAR

Background

MiCAR requires ART issuers and sEMT issuers to maintain a reserve of assets to ensure timely payment to the holders, upon redemption request of the tokens at any time, in funds by market value of the assets referenced or via their physical delivery.[46] Reserve asset requirements can be extended to issuers of non-significant EMTs at an NCA's discretion, subject to conditions.[47]

The EBA has been mandated[48] to develop draft RTS specifying a percentage of the reserve of assets with a maturity of no longer than 1 working day, an additional percentage of the reserve of assets with a maturity of no longer than 5 working days and any additional percentage of the reserve of assets with any maximum maturity that can be found relevant. Furthermore, the RTS shall establish overall techniques for liquidity management to further specify the liquidity requirements of the reserve of assets. Moreover, the RTS shall also establish the specific minimum value of deposits in each official currency referenced, which cannot be lower than 30% of the amount referenced in each official currency for non-significant ARTs or 60% for sARTs.

Summary of the EBA's proposed approach and consultation Q&A

The EBA is proposing to require reserve assets for tokens referencing official currencies to hold:

- a minimum of 20% of reserve assets which have a residual maturity of no longer than one working day; and
- a minimum of 40% of reserve assets which have a residual maturity of no longer than five working days.

[46] Article 36(1), MiCAR
[47] Article 58(2), MiCAR
[48] Article 36(4), MICAR

The EBA is proposing to require reserve assets for tokens not referencing official currencies to hold:

- a minimum of 20% of reserve assets in reverse repo or cash which can be terminated/withdrawn with one working day's notice.
- a minimum of 30% of reserve assets in reverse repo or cash which can be terminated/withdrawn with five working day's notice.

For significant tokens, the percentages in the bullet points above are doubled.

The EBA is also proposing to require issuers of ARTs and EMTs referencing official currencies to hold reserve assets as deposits with credit institutions in each official currency referenced by the tokens equal to at least 30% of the amount referenced in each official currency. For significant tokens, the prior percentages are doubled. Furthermore, the EBA is proposing a deposit counterparty limit of 10% per credit institution (and 5% if not a large credit institution) – half that under the well-established UCITS framework.

Question 1. Do respondents have any comment about the calibration of the percentages of reserve assets with specific maximum maturities as suggested in Article 1 and Article 2 of the draft RTS?

We note that the EBA has proposed its calibration of the relevant percentages of reserve assets that need to mature within the following 1 and 5 working days on the recent evidence of deposit run-offs in banks related to crypto related activities and the comparable Money Market Funds Regulation. We respectfully assert that 'baking in' this calibration creates a risk to market dynamics, including that the growth and maturity of crypto market and bank activities may warrant a revision of this calibration in the future. Such a revision cannot always be promptly or easily made through RTS and therefore the EBA should consider mechanisms through which this calibration can be adjusted in the future more easily. For instance, this could include the issuance of an opinion or other supervisory convergence measure by the EBA.

Question 2. Do respondents consider that the requirements in Article 1 and Article 2 related to the 1 and 5 working days maximum maturity could create excessive pressure in the repo market, taking into account the minimum required amount of deposits in credit institutions in the case of tokens referenced to official currencies?

We do not have a definitive view on whether excessive pressure will be created in the current repo market. We are concerned, however, that the inflexible nature of the calibration of the 1-5 working maximum maturity floor in the reserve asset calculation could create such pressure in the market in stress scenarios in the future. We would encourage the EBA to consider in advance how it might amend the calibration or take other measures into account were such an event to occur. As noted in our response to question 1, revisions to calibrations cannot always be promptly or easily made through RTS or through the bounds of the supervisory discretion afforded to NCAs in MiCAR.

Question 3. Do respondents have any comment on the proposed approach in Article 3 of the draft RTS to not increase the minimum amount of deposits from 30% (or 60% if the token is significant) of the asset referenced in each official currency?

We agree with the EBA's proposal not to increase the proposed floor for reserve assets held as deposits with credit institutions. As set out in our other comments, we recommend that the EBA increases the proposed deposit counterparty limits (see our answer to Q5 and Q6).

Question 4. Do respondents have any comment with the definition of the requirement of a minimum liquidity soundness and creditworthiness in the deposits with credit institutions as proposed in Article 4 of the draft RTS?

We do not have any comments on the proposed definition for the purposes of including deposits in the reserve assets but note that issuers may have reason to expect non-performance by credit institutions in the event of such an institution getting into financial difficulty.

Question 5. Do respondents have any comment about the definition of the requirement of a maximum concentration limit of deposits with credit institutions by counterparty in Article 5 of these draft RTS? And about the definition of the general limit considering, in addition to deposit with a bank, also the covered bonds issued by and unmargined OTC derivatives with the same bank counterparty?

We respectfully disagree with the EBA's proposal to set the concentration limit by deposit counterparty to half that of the UCITS framework on the basis of 'the risks inherent in crypto activities.' The EBA's impact assessment does not appear to justify setting a significantly lower limit than is in the well tested UCITS framework which has existed for several decades.

Question 6. Do respondents have any concern about compliance with these concentration limits in Article 5, considering in particular paragraph 14 of the cost/benefit analysis in relation to the potential operational burden and risk of a wrong direction diversification, linked to the minimum required liquidity soundness and creditworthiness of deposits with banks, and taking into account the minimum amount required of deposits with credit institutions by MiCAR for tokens referenced to official currencies?

We do not support the EBA's proposals for a 10% limit per credit institution (and 5% if not a large credit institution). The proposed concentration limits will heighten the undesirable consequences highlighted by the EBA, including operational and economic challenges when sourcing banking partners and increase the risk of adverse selection based on factors other than creditworthiness and liquidity soundness.

Draft Regulatory Technical Standards to specify the highly liquid financial instruments with minimal market risk, credit risk and concentration risk under Article 38(5), MiCAR

Background

MiCAR requires that issuers of all ARTs and of sEMTs that decide to invest the proceeds they receive from the issuance of the tokens and form part of the reserve of assets, shall do it in financial instruments that are highly liquid and with minimal market risk, credit risk and concentration risk.[49]

[49] Article 38(1), MiCAR

The EBA has been mandated to specify the financial instruments that can be considered highly liquid and bearing minimal market risk, credit risk and concentration risk.[50] In developing the draft RTS, the EBA is required to take into account the various types of assets that can be referenced by an asset-referenced token and the correlation between the asset referenced by the asset-referenced token and the highly liquid financial instruments that the issuer might invest in, in order to mitigate different market value volatilities between them to ensure that the amount of the reserve of assets can meet at all times the market value of the asset referenced for any redemption request that can arise.

Summary of the EBA's proposed approach and consultation Q&A

The EBA has taken into account liquidity related risks of issuers of ARTs and EMTs, including risks related to reserve assets, redemption of tokens, financial stability, DLT infrastructure and custody. The EBA has generally taken a stricter approach to defining highly liquid financial instruments than that in the delegated regulation on the liquidity coverage requirement.[51]

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

We respectfully request the EBA to review the restrictions it has proposed to narrow the eligibility of highly liquid financial instruments from those listed in the delegated regulation on the liquidity coverage requirement (LCR), to ensure they achieve the overall intended policy outcomes. While the EBA has used this as the basis for the definition of the eligible highly liquid financial instruments in the issuer's reserve assets, the additional restrictions, and specificities it has applied[52] do not appear to be commensurate with the overall policy outcomes. Furthermore, these may unintentionally force issuers to invest reserve assets in riskier assets. For instance, the EBA has sought to reduce the scope of highly liquid financial instruments to consider the expected higher volatility of the assets referenced by the tokens, when they are not referenced to official currencies. This would appear to suggest that all such assets will behave in a similar manner and does not consider situations where greater correlation of assets referenced by the token reduces expected volatility and therefore reduces the potential mismatch in market and credit risk between the assets referenced and the reserve of assets.

Own Funds and Stress Testing

The EBA has published the following two consultations on own funds and stress testing requirements in MiCAR:

- 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), MiCAR

[50] Article 38(5), MiCAR
[51] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0061
[52] For instance, a 35% issuer limit on level 1 exposures.

- Draft Regulatory Technical Standards to specify the minimum contents of the liquidity management policy and procedures under Article 45(7)(b), MiCAR

MiCAR requires issuers of sARTs[53] and of sEMTs[54] to invest the proceeds they receive from the issuance of tokens only in financial instruments that are highly liquid and with minimal market risk, credit risk and concentration risk ('reserve asset requirements'). NCAs have the discretion to reserve asset requirements on issuers of non-significant EMTs, where they deem this necessary to address risks such as liquidity risk or operational risk.[55]

The EBA, in cooperation with ESMA and the ECB, has been mandated to develop regulatory technical standards (RTS) specifying the financial instruments that can be considered highly liquid and bearing minimal market risk, credit risk and concentration risk.[56]

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), MiCAR

Background

Issuers of asset-referenced tokens (ARTs) issuers must have own funds at least equal to the higher of:[57]

(i) EUR350k;
(ii) 2% of average reserve assets.[58] or
(iii) a quarter of their preceding year's fixed overheads.

Issuers of significant ARTs (sARTs) are required to have a minimum level of own funds equal to the higher of points (i) and (ii) above or 3% of average reserve assets.[59] Issuers of significant e-money tokens (sEMTs) are also subject to aspects of the own fund requirements and the obligation to hold at least 3% of average reserve assets.[60] These requirements can be applied to issuers of EMTs by NCAs if these are necessary to address certain risks.[61]

The EBA has been mandated, in cooperation with ESMA to develop draft RTS specifying the procedure and timeframe for the issuer of an ART to adjust the amount of its own funds when an ART it issues or has issued is

[53] Article 38(1), MiCAR
[54] Article 58(1), MiCAR
[55] Article 58(2), MiCAR
[56] Article 38(5), MiCAR
[57] Article 35(1), MiCAR
[58] Calculated in accordance with Article 36, MiCAR with the average being the average amount of reserve assets at the end of each calendar day, calculated over the preceding six months.
[59] Article 45(5), MiCAR
[60] Article 58(1), MiCAR subjects sEMT issuers to the provisions in Article 35(2), (3) and (5), MiCAR concerning own funds and Article 45(5), MiCAR requiring 3% of the average amount of reserve assets to be held.
[61] Article 58(2), MiCAR

voluntarily[62] or otherwise[63] classified as a sART. The EBA considers the draft RTS that it is developing to be relevant and applicable to issuers of EMTs and sEMTs.

Summary of the EBA's proposed approach and consultation Q&A

The EBA is proposing that within 25 working days of the classification of an ART as a sART, the relevant NCA will set a timeframe for the sART's issuer to adjust its own funds. The sART's issuer will then have 20 working days to provide a plan, with time-bound steps, for the own funds adjustment. The NCA will monitor the execution of the plan, including requesting additional information and agreeing an alternative plan if necessary.

The EBA is proposing that NCAs shall not grant more than 3 months from the date of notification for an sART's issuer to adjust its own funds, having regard to the potential impact on the relevant issuer, its specificities, and risks to the financial stability of the wider financial system.

Question 1. Is the procedure clear and the timelines for the issuer to submit the plan reasonable?

We recommend the following two changes to the EBA's proposals for the procedure and timelines for the notification from the NCA to the sART's issuer, and for the sART's issuer to adjust its own funds:

- The period for an sART's issuer to provide a plan for the adjustment of its own funds should be extended from the 20 working days proposed in the consultation paper to 25 working days, to mirror the time that is given for an NCA to provide notification of the timeframe for the issuer to adjust its own funds; and
- A consultation period of 10 working days should be introduced – from when the notification is provided by the NCA to the sART's issuer and before the period the sART issuer is required to prepare a plan for the adjustment of its own funds – during which the sART's issuer should be permitted to request that the NCA adjusts the timeframe for the issuer to adjust its own funds.

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

We recommend the following two changes to the EBA's proposals for the timeframe in which sART issuers are required to adjust their own funds:

- NCAs should be required to have regard to the potential impact on token holders when setting the timeframe for the adjustment of an sART issuers' own funds. Where an sART issuer can show that an adjustment to its own funds within a 3-month period may have a material impact on token holders, the NCA should be permitted to provide up to 6 months for the sART issuer to adjust its own funds.
- The period for an sART issuer to adjust its own funds should commence from when the plan is provided by the sART issuer to the NCA and not from when the NCA notifies the sART issuer of the timeframe for it to adjust its own funds.

[62] Article 44, MiCAR
[63] Article 43, MiCAR

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?

The sART issuer should not be subject to mandatory restrictions during the implementation of the additional own funds requirements. It is challenging to foresee with accuracy the range of market circumstances during which an sART issuer may need to adjust its own funds requirements. Prescribing restrictions ahead of time may hinder timely implementation of additional own funds requirements. For instance, banning the issuance of further tokens may impair token holder confidence, result in price volatility with unintended consequences or have other market effects on the token or other tokens in issuance. The EBA should provide for the possibility that sART issuers may determine measures that will support the implementation of additional own funds requirements and make representations on such measures to the relevant NCA.

DRAFT RTS 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, MICAR

Background

MiCAR imposes own funds requirements on issuers of ARTs consisting of three different aspects of capital – initial capital, a going concern capital based on the size of the business (reserve assets) and a minimum requirement based on fixed overhead costs.[64] Issuers of ARTs are required to have robust governance arrangements[65] and take measures to reduce the risks to which they are exposed.

NCAs have the discretion to mandate an increased own funds requirement for the issuer of an ART in the following two instances, subject to conditions:

- Where the NCA assesses the issuer of an ART to represent a higher degree of risk – based on seven criteria – it may require an up to a 20% increase in own funds;[66]
- Where the NCA, considering severe but plausible financial stress scenarios and parameters and based on the outcome of the stress testing conducted by the issuer of the ART and considering the overall risk outlook, may require an increase of between 20% and 40% in own funds.[67]

The EBA has been mandated, in cooperation with ESMA with the ECB to develop draft RTS specifying: (a) the procedure and timeframe for an ART issuer with higher degree of risk to adjust to higher own funds requirements and: (b) the criteria used during the assessment of a higher degree of risk that leads to require a higher amount of own funds.

Summary of the EBA's proposed approach and consultation Q&A

[64] Article 35(1), MiCAR
[65] Article 34(1), MiCAR
[66] Article 35(3), MiCAR
[67] Article 35(5), MiCAR

The EBA is proposing that an NCA which decides to impose a higher own funds requirement on an ART issuer should decide whether the increase should be completed within 3 months – when the higher degree of risk indicates that this can have a material impact on the financial situation of the ART issuer or on the financial stability of the wider financial system or is associated with the ART issuer's governance or business model or whether it should grant the Art issuer a longer period. In any case, the EBA is proposing that NCAs should not grant more than 1 year to an ART issuer to implement the measures needed to increase the level of their own funds.

NCA's should consider the ART issuer's financial situation when determining the timeframe to implement changes to own funds and in principle should complete the increase within a short time frame and in any case within a year.

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

The EBA has clearly set out the sequencing of the procedure for: (i) an NCA to provide an ART/EMT issuer with a draft plan for increasing the issuer's own funds; (ii) the issuer to make representations on that plan; and (iii) the plan to be finalised. We respectfully request that the EBA includes an additional component of the plan in Article 1(2) of the draft RTS which would consider 'whether the timeline within which the relevant issuer shall increase its own funds will have a detrimental impact on ART/EMT holders'. We consider that the draft RTS reflect well the implications for financial stability of the issuer and the wider financial system, but do not adequately take account of the implications for ART/EMT holders.

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

We broadly support the timeframes that have been proposed by the EBA. We would request that the EBA includes within the considerations for an NCA extending the timeframe for the adjustment of own funds to up to one year, the potential implications for ART/EMT holders (Article 2(2), draft RTS). Where an issuer can show that an adjustment to own funds within a shorter period may have a material impact on token holders, the NCA should have the discretion to extend the timeframe to up to one year.

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?

The issuer should not be subject to mandatory restrictions during the implementation of the additional own funds requirements. It is challenging to foresee with accuracy the range of market circumstances during which an issuer may need to adjust its own funds requirements. Prescribing restrictions ahead of time may hinder timely implementation of additional own funds requirements. For instance, banning the issuance of further tokens may impair token holder confidence, result in price volatility with unintended consequences or have other market effects on the token or other tokens in issuance. The EBA should provide for the possibility that issuers may determine measures that will support the implementation of additional own funds requirements and make representations on such measures to the relevant NCA.

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

We note that the criteria for determining if an issuer has a high degree of risk includes increased risk arising from external systems such as the underlying distributed ledger and from external parties such as trading platforms and CASPs. While such systems and platforms may increase risks to certain policy objectives, it is important to draw a distinction between factors which increase the risk of an issuer in its own right (ie within the issuer's direct control) and those factors that increase the risks arising from the use of an ART on an external system such as for payment which may be entirely outside of the issuer's control.

We respectfully request that the EBA clarifies that when assessing the criteria to determine whether the 'issuer has a higher degree of risk' the source of the risk is appropriately considered by the NCA and reflected in remedial actions pursued by the NCA i.e., whether the risk has arisen because of an action or otherwise that the issuer has taken, or whether the risk has arisen from an externality or external party.

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

We respectfully request that issuers have a defined right to provide input and make representations during the NCA's assessment of whether the issuer has a higher degree of risk. This is consistent with the representations that the EBA has proposed for issuers when NCAs are developing a draft plan for the increase of own funds.

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

We believe it would be helpful to provide greater clarity and evaluation benchmarks for the determination of whether an increased risk arises from the systems and external parties in Article 3(c) of the proposed RTS.

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

We broadly support the EBA's proposed stress-testing requirements, including the application of proportionality considering the issuer's nature, scale and size, redemption rights and the complexity, concentration and composition of reserve assets.

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?

We request that the EBA clarifies its proposal that issuers of sARTs and sEMTs will be required to undertake quarterly solvency stress tests, whereas non-significant ART/EMT issuers will only need to undertake semi-annual stress tests.

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

We do not believe it is necessary to introduce a reverse stress testing requirement or methodology.