

**Provisional request to the European Banking Authority (EBA) for technical advice on delegated acts under a Regulation on markets in crypto-assets concerning certain criteria for classification of asset-referenced tokens and e-money tokens as significant and the fees that are to be charged by EBA to issuers of significant asset-referenced tokens and e-money tokens**

With this provisional request the Commission seeks EBA's technical advice on certain delegated acts to be adopted under the future Regulation on markets in crypto-assets ("MiCA" or "Regulation"). These delegated acts should be adopted in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU).

The request is provisional since MiCA has not yet entered into force. Yet the provisional agreement was reached by the Council and the European Parliament on 30 June 2022, which was endorsed by COREPER and the ECON Committee on 5 October and 10 October, respectively. Currently, MiCA is subject to legal revision prior to its formal adoption by the European Parliament and the Council and publication in the EU Official Journal planned for Spring 2023<sup>1</sup>.

The Commission reserves its right to revise or supplement this mandate. The technical advice received on the basis of this mandate should not prejudice the Commission's final decision.

The mandate follows MiCA (**Article 39(6) and Article 119(3) read in conjunction with Article 121**), the Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union<sup>2</sup> (the "290 Communication"), the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making<sup>3</sup> and the Framework Agreement on Relations between the European Parliament and the European Commission<sup>4</sup> (the "Framework Agreement").

According to **Article 39(6) of MiCA**, the Commission must adopt delegated acts in accordance with Article 121 to further specify certain criteria for classification of asset-referenced tokens (ARTs) and e-money tokens (EMTs) as significant by EBA as well as on the content and format of the information to be provided by the competent authorities to the EBA and central banks

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<sup>1</sup> The provisional request refers to the provisions of the final compromise text as endorsed by the EU legislature in October 2022, available at: <https://data.consilium.europa.eu/doc/document/ST-12933-2022-INIT/en/pdf>.

<sup>2</sup> COM/2022/230 final.

<sup>3</sup> OJ L 123, 12.5.2016, p. 1–14.

<sup>4</sup> OJ L 304, 20.11.2010, p. 47–62.

on the classification criteria and the procedure and timelines for the EBA's decision on classification of asset-referenced tokens as significant.

According to **Article 119(3) of MiCA** the Commission must adopt a delegated act in accordance with Article 121 by 12 months after the entry into force of MiCA to specify further the type of fees that EBA is empowered to impose on the issuers of significant ARTs and EMTs in accordance with MiCA, the matters for which fees are due, the amount of the fees, the manner in which they are to be paid and the methodology to calculate the maximum amount per entity that can be charged by the EBA.

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The European Parliament and the Council shall be duly informed about this provisional request.

In accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, the Commission will continue, as appropriate, to consult experts appointed by the Member States in the preparation of possible delegated acts in the financial services area.

In accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with experts appointed by the Member States within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

The Commission is empowered to adopt delegated acts pursuant to **Article 39(6) and Article 119(3) read in conjunction with Article 121** of MiCA. As soon as the Commission adopts the delegated acts, it will notify them simultaneously to the European Parliament and the Council.

## 1. Context

### *1.1. Scope*

On 24 September 2020, the Commission published its proposal for a Regulation, as part of the Digital Finance Package. On 30 June 2022 the Council and the European Parliament reached a political agreement on a compromise text, which was formally endorsed by the two institutions, respectively, on 5 October 2022 and 10 October 2022. Publication in the Official Journal is expected in Spring 2023. The text will enter into force on the twentieth day following its publication.

MiCA aims to promote sustainable and safe innovation in crypto-assets and underlying distributed ledger technology while addressing the risks that this new class of assets pose to investors, market integrity and financial stability. It regulates issuers of currently unregulated crypto-assets and providers of services in relation to such crypto-assets. MiCA provides for the provisions to classify crypto-assets that stabilise their value by referencing another asset/basket of assets or a single official currency (ARTs or EMTs, respectively) as significant. EBA classifies ARTs or EMTs as significant based on criteria defined in the Regulation. Once ARTs or EMTs are classified as significance, EBA will in most cases directly supervise the issuers of such significant tokens.

This provisional request for a call for advice concerns possible delegated acts:

- under **Article 39(6)** on certain criteria for classification of ARTs and EMTs as significant by EBA as well as on the content and format of the information to be provided by the competent authorities to the EBA and central banks on the classification criteria, and the procedure and timelines for the EBA's decision on classification of ARTs as significant.
- under **Article 119(3)** to be adopted by the Commission within 12 months after the entry into force of MiCA to specify further the type of fees that EBA is empowered to impose on the issuers of significant ARTs and EMTs in accordance with MiCA, the matters for which fees are due, the amount of the fees, the manner in which they are to be paid and the methodology to calculate the maximum amount per entity that can be charged by the EBA.

## ***1.2. Principles that the EBA should take into account***

On the working approach, the EBA is invited to take into account the following principles:

- The principle of proportionality: the technical advice should not go beyond what is necessary to achieve the objective of the Regulation. It should be simple and avoid excessive financial, administrative or procedural burdens for issuers of ARTs and EMTs, national competent authorities (NCAs) and central banks.
- The rule-of-law principle, which requires appropriate rights of defence for persons that are subject to EBA's supervision.
- While preparing its advice, the EBA should seek coherence within the regulatory framework of the Union.
- In accordance with the EBA Regulation<sup>5</sup>, the EBA should not feel confined in their reflections to elements that they consider should be addressed by the delegated acts but, if appropriate, they may indicate guidelines and recommendations that they believe should accompany the delegated acts to better ensure their effectiveness.
- The EBA will determine their own working methods depending on the content of the provisions being dealt with. Nevertheless, horizontal questions should be dealt with in such a way as to ensure coherence between different standards of work being carried out by the various expert groups.
- In their approach, the EBA should ensure cross-sectoral consistency, and where relevant, cooperate with the ESMA and central banks.
- The EBA is invited to justify its advice by providing an analysis of all the options considered and proposed. The EBA should provide the Commission with a description of the problem, the objectives of the technical advice, possible options for consideration and a comparison of the main arguments for and against the considered options. The analysis should justify EBA's choices vis-à-vis the main considered options.
- The EBA's technical advice should not take the form of a legal text. However, the EBA should provide the Commission with a clear and structured ("articulated") text, accompanied by sufficient and detailed explanations. Furthermore, the technical advice

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<sup>5</sup> Regulation (EU) No 1093/2010.

should be presented in an easily understandable language respecting current terminology in the Union.

- The EBA should provide comprehensive technical analysis on the subject matters described in section 3 below, where these are covered by the delegated powers included in:
  - the relevant provision of the Regulation;
  - the corresponding recitals; or
  - the relevant Commission's request included in this provisional request.
- The EBA should address to the Commission any question to clarify the text of the Regulation that the EBA consider of relevance to the preparation of its technical advice.

## **2. Procedure**

The Commission is requesting EBA's technical advice in view of the preparation of certain delegated acts to be adopted pursuant to MiCA and in particular regarding the questions referred to in section 3 of this provisional request.

The provisional request takes into account the Regulation (Article 39(6) and Article 119(3) in conjunction with Article 121), the EBA Regulation, the 290 Communication, the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making and the Framework Agreement.

The Commission reserves the right to revise or supplement this mandate. The technical advice received on the basis of this mandate will not prejudice the Commission's final decision.

In accordance with established practice, the Commission may continue to consult experts appointed by the Member States in the preparation of delegated acts relating to the Regulation.

The Commission must duly inform the European Parliament and the Council about this provisional request. As soon as the Commission adopts the delegated acts, it will notify them simultaneously to the European Parliament and the Council.

### **3. The EBA is invited to provide technical advice on the following matters**

#### ***a) Delegated acts on criteria and procedures for classification of ARTs and EMTs as significant***

In order to address increased risk from significant ARTs or EMTs, the issuers of those tokens must comply with additional obligations and their supervision shifts to the EBA. While issuers of significant ARTs are solely supervised by EBA, only those issuers of significant EMTs that are e-money institutions and with respect to compliance with certain provisions are supervised by EBA (dual supervision by EBA and NCAs).

EBA classifies ARTs and EMTs as significant in accordance with the procedures set out in Articles 39 and 50, respectively. Article 39(1) provides that EBA classifies ARTs as significant where they meet at least three criteria listed in that Article and those same criteria are met in the first biannual report by the competent authority following the authorisation of the issuer of the ARTs or in at least two consecutive reports. When several issuers issue the same ART, the criteria shall be assessed after aggregating the data from all issuers. Article 50 on classification of EMTs as significant cross-refers to the criteria set out in Article 39(1). At the same time, the Regulation allows an issuer to request, normally at the time of application for authorisation, a voluntary classification of ARTs and EMTs as significant in accordance with the procedures set out in Articles 40 and 51, respectively. In this case, EBA classifies ARTs or EMTs as significant if based on the issuer's programme of operations at least three of the criteria in Article 39(1) are met or are likely to be met.

Article 39(1) lists quantitative and qualitative criteria for classification of ARTs and EMTs as significant. The quantitative criteria are the following:

- (a) the number of holders of the asset-referenced tokens is larger than 10 million;
- (b) the value of the ARTs issued, where applicable, their market capitalisation or the size of the reserve of assets of the issuer of the asset-referenced token, is higher than EUR 5 billion;
- (c) the number and value of transactions in those asset-referenced tokens, is higher than 2 500 000 transactions and EUR 500 million respectively, per day;

The qualitative criteria are the following:

- (da) the issuer of the asset-referenced tokens is a provider of core platforms services designated as gatekeeper in accordance with Regulation (EU) .../... (Digital Markets Act).
- (e) the significance of the activities of the issuer of the asset-referenced tokens on an international scale, including the use of the asset-referenced tokens for payments and remittances.
- (f) the interconnectedness with the financial system.
- (g) the fact that the same legal person or other undertaking issues at least one additional asset-referenced token or e-money token, and provides at least one crypto-asset service.

According to Article 39(6) the Commission shall adopt delegated acts to further specify the criteria referred to in points (e) to (g) above by determining:

- the circumstances under which the activities of the issuer of asset-referenced tokens are considered to be significant on an international scale outside the EU;
- the circumstances under which asset-referenced tokens and their issuers shall be considered as interconnected with the financial system;
- the circumstances under which the issuance of other asset-referenced tokens, e-money tokens or provision of crypto-asset services should be considered for the purposes of identification of an asset-referenced token as significant.

In addition, those delegated acts must also further specify:

- the content and format of information provided by competent authorities to the EBA under paragraph 2 of Article 39;
- the procedure and timeframe for the decisions taken by the EBA under paragraphs 3 to 5 of Article 39.

EBA is invited to provide technical advice to assist the Commission in drafting the delegated acts as set out in Article 39(6). Thereby EBA is invited to specify the most relevant indicators of a qualitative and, where possible, quantitative nature in relation to the relevant criteria:

- a) As regards the criterion of significance of the issuer's activities on international scale outside the EU, the EBA is invited to explore other indicators than the criteria referred to in Article 39(1), points (a) to (c) that would indicate significance of activities of issuers of ARTs and EMTs on an international scale outside the EU.
- b) As regards the criterion of interconnectedness of ARTs/EMTs and their issuers with the financial system, EBA is invited when defining the indicators to consider, among other things:
- the exposure of financial institutions to the ARTs or EMTs;
  - concentration of financial institutions' holdings of the ARTs or EMTs.

***b) Delegated act on supervisory fees***

According to Article 119(1) of MiCA, the EBA must charge fees to the issuers of significant ARTs and EMTs in accordance with this Regulation and the delegated acts adopted pursuant to paragraph 3 of that Article. Those fees cover the EBA's expenditure relating to the supervision of issuers of significant ARTs and EMTs in accordance with Article 98, as well as the reimbursement of costs that the competent authorities may incur carrying out work pursuant to this Regulation, in particular as a result of any delegation of tasks in accordance with Article 120.

Article 119(2) of MiCA provides that the amount of the fee charged to an individual issuer of significant ARTs or EMTs must be proportionate to the size of the reserve assets of the ART or to the size of the EMT and must cover all costs incurred by the EBA for the performance of its supervisory tasks in accordance with this Regulation.

Article 119(3) of MiCA requires the Commission to adopt a delegated act by 12 months after entry into force to specify further the type of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid and the methodology to calculate the maximum amount per entity under paragraph 2 that can be charged by the EBA.

The EBA is invited to provide technical advice to assist the Commission in drafting the delegated act set out in Article 119(3).



#### **4. Indicative timeline**

This provisional request takes into consideration that the EBA requires sufficient time to prepare its technical advice and that the Commission needs to adopt the delegated acts according to Article 290 of the TFEU. The powers of the Commission to adopt the delegated acts are subject to Article 39(6) and Article 119(3) in conjunction with Article 121 of the Regulation, which allow the European Parliament and the Council to object to a delegated act within a period of three months, extendible by three further months. The delegated act will only enter into force if neither the European Parliament nor the Council has objected on expiry of that period or if both institutions have informed the Commission of their intention not to raise objections.

The Regulation requires the Commission to adopt the delegated act under Article 119(3) within twelve months from its entry into force. In order for the Regulation to be fully operational and for the EBA to be able to perform their new tasks with regard to the direct supervision of issuers of significant ARTs and EMTs, it is of the outmost importance to start working on this issue as soon as possible.

The deadline set to the EBA to deliver the technical advice is 30 September 2023.