ABBL’s Response to the Consultation on Draft Regulatory Technical Standards on information for application for authorisation to offer to the public and to seek admission to trading of asset-referenced tokens and Draft Implementing Technical Standards on standard forms, templates and procedures for the information to be included in the application, under Article 18(6) and (7) of Regulation (EU) 2023/1114

### Date: 12 October 2023

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| **Questions** |
| **Q1: Do you consider that letter (a) of Article 3(2) captures in a clear and realistic manner all necessary requirements of the offer to the public or admission to trading of the asset-referenced tokens, including the mechanism for the issuance, redemption and distribution of the asset-referenced tokens?** |
| Partially  In general, the requirements in letter (a) of article 3(2) of the draft RTS are sufficient to capture all necessary requirements for the offer to the public or admission to trading of ART (incl. the issuance, redemption and distribution of ART).  However, we have the following comments:   * **Article 3(2)(a)(i)**: in our perspective, the following wording of the Delegated Regulation seems incorrect: “*main features of* *the asset-referenced token for which the authorisation is sought*”. The authorisation is sought, not for the ARTs themselves, but more specifically for the offering of ARTs to the public and their admission to trading ([Art. 16-1 MiCA](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114#d1e2951-40-1)). Therefore, we suggest the following wording for this Article: “*main features of the asset-referenced token for which the authorisation* ***to offer to the public and for admission to trading*** *is sought, including all of the following*” (in this regard, see [MiCA’s Annex II, Part C, §12 and Part D, §5](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114#d1e32-188-1)). * **Article 3(2)(a)(i)(2)**: Drawing up a crypto-asset white paper is an obligation that equally applies to those exempted from an authorisation – including to issuers who address offers of ARTs solely to qualified investors **and** where ARTs can only be held by such qualified investors ([Art. 16-2(b), last para., MiCA](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114#d1e2951-40-1)). We believe this Article 16-2 provides a double cumulative condition for an issuer to be exempted from an authorisation: (1) the offer of ARTs may only be addressed to qualified investors, **and** (2) only qualified investors can hold these ARTs. **Therefore**, offers of ARTs addressed to retail investors, and offers addressed to qualified investors that can subsequently be held by retail investors, may require an authorisation. In our opinion, article 3(2)(i)(2) Delegated Regulation should also request information regarding the public to which is addressed the offer of ARTs and who may hold these ARTs. * **Article 3(2)(a)(i)(7):** we are unsure how someone may provide information on all bridges regarding the DLT where it intends to issue an ART, especially DLTs that it does not control (since MiCA does not seem to prevent an issuance of ARTs in a decentralised DLT). We are even less sure how someone may provide information on all the “bridges between different DLTs”. We consider that the issuer of ARTs may at best provide (1) information on bridges regarding the specific DLT where it intends to issue an ART, (2) as made available in the whitepaper/documentation of that DLT project, (3) at the time of its application for an offer of ARTs. |
| **Q2: Do you consider that the information requirements about the internal control framework are sufficiently clear and exhaustive?** |
| Partially  We are of the view that the requirements in article 6 of the Draft RTS Authorisation are sufficiently clear and exhaustive regarding the information to be provided on the internal control framework of the applicant issuer.  We noticed that the Delegated Regulation does not require any description on the DLT used for the issuance/offer of ARTs: public, private, permissioned, permissionless, etc. Since the Delegated Regulation requires from the issuer a detailed description of the transparency mechanisms “*in case the proprietary distributed ledger technology is permissioned*” ([Art. 6-4(e) Delegated Regulation](https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Consultations/2023/Consultation%20paper%20on%20draft%20Technical%20Standards%20on%20information%20for%20authorisation/1057529/MiCAR%20CP%20RTS-ITS%20information%20for%20authorisation.pdf)), we would suggest to generalise this request to all DLTs and not only to proprietary DLTs.  We also noticed that the Delegated Regulation uses at times the terms “*distributed ledger technology*” and, other times, its acronym (DLT), without any apparent logic. We consider that the usage of these terms should be harmonised in the Delegated Regulation. |
| **Q3: Do you consider that Article 6(4) captures in a clear and correct manner all necessary information about the functioning of proprietary DLT or other similar technology where ARTs are issued, transferred and stored and that is operated by the issuer or a third party operator acting on the issuer’s behalf?** |
| Partially  We are of the view that the requirements in article 6 (4) of the draft RTS are sufficient to capture in a clear and correct manner all necessary information about the functioning of proprietary DLT or other similar technology where ART are issued, transferred and stored and that is operated by the issuer or a third party operator acting on the issuer’s behalf.  However, concerning the Article 6(4), to limit the risk of confusion and diverging interpretations by competent authorities, it would be useful to clarify in article 6 (4) of the draft RTS or at least in a recital of the draft RTS that these requirements do not apply when the ART are issued, stored and transferred using a public blockchain (whether it is permissioned or permissionless). |
| **Q4**: **Do you consider that the information requirements about the policies and procedures on the composition and management of the reserve of assets, as well as on the custody and investment of the reserve of assets are sufficiently clear and comprehensive?** |
| We are of the view that the requirements in article 7 of the draft RTS are sufficiently clear and comprehensive regarding the information to be provided about the policies and procedures on the composition and management of the reserve of assets, as well as on the custody and investment of the reserve of assets. |
| **Q5. Do you agree with the general content and level of detail of the information to be contained in the application?** |
| As a matter of principle, we agree with the general content and level of detail of the information to be contained in the application as further detailed in articles 2 to 9 of the draft RTS. However, based on our experience with authorisation processes for other types of financial institutions, certain of the requirements set out in the draft RTS, while being relatively detailed, could still give rise to divergent interpretations by competent authorities and it would therefore be worth clarifying such requirements to limit the risk of forum shopping, either in the draft RTS or in the draft ITS. In particular, the following elements of the draft RTS would require clarifications:   * article 8 (1) (e): requesting criminal records of proposed members of the management body in respect of the nationality(ies) and places of residence of the last ten years may prove relatively cumbersome (especially where the relevant person has to request a criminal record in a country in which it is no longer residing as this is not always possible). Also, it would be worth clarifying that (i) n case of residence in a federal State a criminal record should only be obtained in the State in which the person is residing and not in all States constituting that federal State and (ii) criminal records, when available, do not have to be supplemented by other types of background checks (such as FBI checks). Finally in order to ensure consistency with the requirements in other pieces of financial legislation, the reference period should be the last five years instead of the last ten years * article 8 (1) (f)(v): the concept of “positions of international, national or local political influence” should be clarified, for instance by cross-referring to the concept of politically exposed persons in the AML Directive * article 8 (1) (g)(v): the types of responsibilities that should be described should be clarified. Shall this cover only responsibilities involving management tasks ? * article 8 (5): the concept of minimum requisite experience should be clarified |
| **Q6: Do you consider that Annex II to the ITS is sufficiently clear in the identification of the information requested for each field and sub-field?** |
| As a matter of principle, we are of the view that Annex II to the ITS is sufficiently clear in the identification of the information requested for each field and sub-field. However, we refer to our answer to question 5 regarding certain elements to be clarified.  Furthermore, we note that pursuant to article 1 and article 2 of the draft ITS, competent authorities may request that information be submitted in paper form and that if they do so the application shall not be considered as complete until the receipt of the information in paper form. In addition, in case of missing information, the competent authority may notify the applicant in paper format. The fact that the assessment process may differ depending on the discretion of competent authorities as to the possibility to request information in paper form (and without clear harmonised list of the information that can be requested in such format) creates a risk of forum shopping and could therefore affect the level-playing field within the EU. Therefore, either this possibility should be deleted or the circumstances in which competent authorities may exercise this right should be harmonised. If these provisions are maintained as such, it should at a minimum be specified that competent authorities may request information to be provided in original in paper form only where available (for instance, criminal records may be available only in electronic format in certain jurisdictions). |

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