

Response to EBA's 2nd Consultation Package on governance and white papers under MiCA

22 January 2024

Introductory comments

The [Crypto Council for Innovation](#) (CCI) - the premier global alliance advancing crypto innovation - welcomes the opportunity to provide input into a set of consultations¹ put out for comment by the European Banking Authority (EBA) in the context of the EU's MiCA legislation and open for comment until January 22, 2024.

CCI and our [members](#) believe in:

- Inclusive regulation;
- Leading with a global worldview;
- Developing actionable and evidence-based insights
- Working in trusted partnership with government and business stakeholders.
- Unlocking the promise of web3.

We appreciate EBA's willingness to have a constructive dialogue with industry through this consultation process. We are also grateful to EBA for taking the time to meet with a delegation of our Europe working group in October 2023 - this response builds on our input given during and after that meeting. We also welcome EBA organizing a virtual hearing on these draft RTS/guidelines, in which CCI intends to participate.

General comments

CCI welcomes EBA's constructive and comprehensive approach to the consultation paper (CP). We believe it is important that EBA remains open to modify and further adapt its draft proposals based on expert input it receives from industry representatives and other specialists in the field in response to this CP.

We have chosen to respond selectively to this CP where we believe we can add value. As such, our response primarily focuses on general comments rather than specific responses to the questions posed. We believe our individual members, as well as other ecosystem operators, are better placed to answer more business-centric, technical questions, however, we have provided short responses to a couple of the questions posed.

¹ [Draft RTS on governance arrangements \(remuneration policy\)](#); [Draft Guidelines on internal governance arrangements \(issuers of asset-referenced tokens\)](#); [Draft Regulatory Technical Standards on the approval process for white papers for ARTs issued by credit institutions](#); [Joint \(with ESMA\) Guidelines on suitability assessments of the management body and holders of qualifying holdings](#).

Finally, we fully support the EU's MiCA legislative framework insofar as it provides helpful clarity on the operating environment and legislative/regulatory framework applicable to stablecoin issuers and CASPs. However, we would underscore the fundamental importance of the 'level 2' work currently being undertaken by the European Supervisory Authorities (ESAs). If these technical standards are appropriately crafted, they can provide important additional clarity and certainty to current and future market operators active in the EU. This will help drive investment and innovation in the EU, something we believe was the intention of the co-legislators in developing the MiCA framework in the first place (alongside putting in place important financial stability and consumer protection provisions). Conversely, if the draft regulatory technical standards are overly prescriptive or do not take into account the specificities of the ecosystem, they will have a chilling effect on innovation and competition, which would hamper the overarching ambition of the MiCA regime.

High-level overview

This section of our response provides some high-level, discursive views of the draft proposal, broken down by respective CP.

Governance arrangements on the remuneration policy

Broadly speaking, we naturally support EBA's intention to create remuneration policies which promote the sound and effective risk management of issuers and do not create incentives to reduce risk standards.

Whilst we understand the desire to ensure cross sectoral consistency, and recognise the scope of these RTS being narrowed exclusively to significant ARTs/EMTs, we nevertheless feel further proportionality could be introduced in order to better reflect a risk-based approach. If this is not done, the provisions risk acting as a disincentive to growth of the ART/EMT market in the EU.

We do not agree that the RTS should set a framework similar to the remuneration framework for investment firms, where we believe the risk transformation model of highly sophisticated, complex products, offered by globally systemic financial institutions, is significantly higher than is the case for cryptocurrencies and digital asset products.

We believe that the requirements need to be further tailored to the business model of issuers of significant tokens, as defined by this RTS, that are not considered financial instruments and that achieving the same regulatory objectives should be possible by taking a more risk-based approach and not applying the same rules to small, non-systemic actors in a nascent market as are applied to traders in globally systemic banks.

Internal governance arrangements

We support the basic premise of these guidelines: that sound internal governance arrangements are fundamental if issuers of asset reference tokens (ARTs) are to operate well as part of the financial system. We can also subscribe to the assertion that it is the responsibility of the management body to ensure sound

governance arrangements, including a sound risk strategy, risk culture and risk management framework.

We welcome the mainstreaming of the concept of proportionality, e.g. specifying that whilst all issuers of ARTs should have a permanent and effective compliance function, not all issuers are required to have a risk management and an internal audit function and that issuers of ARTs should also employ resources proportionate to the scale of their activities.

Approval process for white papers for ARTs issued by credit institutions

We generally understand and support EBA's intention of outlining provisions for ART issuance by credit institutions given they are not required to obtain additional permissions under MiCA.

Whilst we support the general concept of assuming positive assessment of a complete application, we are concerned that some NCAs will not be in a position to meet the tight deadlines outlined in article 3. This risks the potential de facto approval of white papers issued by credit institutions without the NCAs having had sufficient time to assess them.

We fully support the flexibility the draft guidelines afford to NCAs regarding the assessment process and believe this could be further enhanced by extending the time periods outlined in articles 3, 4 and 7. This flexibility could be offset by enabling crypto-asset white paper to be published prior to approval by the competent authority of the home Member State as long as it is clearly indicated that approval is pending.

Suitability assessments of i) members of the management body of issuers of ARTs and CASPs and ii) shareholders and members, whether direct or indirect, with qualifying holdings in issuers of ARTs and CASPs.

We support, through these draft guidelines, EBA/ESMA's aim to achieve a policy outcome where the governance arrangements of ARTs and CASPs match their individual risk profile and business model through proportionality.

We agree that the size of the issuer or CASP, along with the nature, scale, and complexity of the assets issued and the services provided should be taken into account.

Furthermore, we acknowledge that issuers of significant ARTs should have more sophisticated suitability policies and assessment processes as compared to issuers of non-significant ARTs and CASPs should be assessed based on their size and the class of crypto asset services

Detailed responses to individual CP questions

In this section of our response we provide some more granular, detailed responses to select individual questions from the CP.

Governance arrangements on the remuneration policy

Question 4: Are the criteria of identification of staff appropriate and sufficiently clear?

We believe the criteria of identification of staff to be overly detailed/prescriptive relative to the size of players likely to be in scope for these RTS. This article is an example of where EBA has, in our view, too rigidly applied existing remuneration rules for credit institutions and investment firms without taking into account the specificities of digital asset companies' business models (with the latter employing many fewer employees than the former). Such an exhaustive list of criteria for identified staff, particularly in para 2 e, would have the impact of applying these rules to practically all staff, something which we deem as disproportionate in relation to the risk-based approach.

Question 5: Are the provisions within Article 5 appropriate and sufficiently clear?

We believe the provisions on variable remuneration in article 5 once again reflects an overly simplistic, inappropriate copy/paste from existing remuneration provisions applicable to credit institutions and investment firms without taking into account the specific nature, scope and size of native digital asset firms likely to form the bulk of in-scope entities.

For example, many crypto-native firms do not have traditional structures which would enable variable remuneration to be paid in shares, share-linked instruments or equivalent ownership interests.

We also believe that the percentages outlined in para 1 i) and k) are significantly prohibitive when seen in relation to the size of the market and nature of the risk, neither of which are comparable to credit institutions or investment firm activities.

Finally, we encourage EBA to reflect on the potential negative competitive impact of such restrictive measures for significant ARTs/EMTs in the EU. Digital assets and stablecoin markets are global in nature and given such prohibitive regimes do not exist in several other major jurisdictions which are developing crypto legislation (UK, USA, Hong Kong, Singapore) there's a risk that the attractiveness of the MiCA passport will be largely or entirely negated by overly conservative remuneration provisions.

Internal governance arrangements

Question 3: Is the Title on proportionality appropriate and sufficiently clear?

We welcome the focus on proportionality and the comprehensive criteria outlined in para 15 of the draft RTS.

We believe the RTS could be further enhanced from a proportionality perspective if there was the inclusion of some form of de minimis threshold for small issuers of ARTs. This would have the effect of encouraging/incentivising innovation and growth of ART issuance in the EU - something we believe was a primary objective of the EU legislators in developing the MiCA regime - without increasing risks or reducing consumer protection or financial stability.

Whilst we recognise paragraph 16 seeks to outline requirements on ARTs managed by a single natural person, we believe a slightly broader de minimis threshold, including perhaps a combination of quantitative and qualitative criteria merits consideration.

Question 7 Are the provisions in Title V – Internal control framework and mechanisms appropriate and sufficiently clear?

We agree that the provisions are sufficiently clear however we also feel that they might be considered as overly prescriptive, particularly in the case of smaller ARTs issuers.