



Brussels, 22.2.2024
C(2024) 898 final

COMMISSION DELEGATED REGULATION (EU) .../...

of 22.2.2024

supplementing Regulation (EU) 2023/1114 of the European Parliament and of the Council by specifying the procedural rules for the exercise of the power to impose fines or periodic penalty payments by the European Banking Authority on issuers of significant asset-referenced tokens and issuers of significant e-money tokens

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Regulation (EU) 2023/1114 of 31 May 2023 on markets in crypto-assets and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 (MiCA) was published in the Official Journal of the European Union on 9 June 2023 and entered into force on 29 June 2023. MiCA will start applying on 30 June 2024 as regards Titles III and IV on issuers of asset-referenced tokens (ARTs) and e-money tokens (EMTs), respectively, and will fully apply as of 30 December 2024.

MiCA regulates issuers of crypto-assets that are not already covered by other financial services acts as well as providers of services in relation to such crypto-assets (crypto-asset service providers). Its objective is to promote safe and sustainable innovation while addressing the risks to consumers, market integrity, financial stability as well as the risks to monetary policy transmission and monetary sovereignty arising from this new class of assets.

Pursuant to Article 117(1) of MiCA, where an ART has been classified as significant in accordance with Articles 43 and 44 of MiCA, the issuer of such an ART is to carry out its activities under the supervision of the European Banking Authority (EBA). Similarly, under Article 117(4), where an EMT issued by an electronic money institution has been classified as significant in accordance with Article 56 or 57, EBA is to supervise the compliance of the issuer of such significant EMT with Articles 55 and 58 of that Regulation.

The procedural rules for taking supervisory measures and imposing fines are laid down in Article 134 of MiCA. Article 134(10) empowers the Commission to adopt delegated acts to further specify the rules of procedures for the exercise of the power to impose fines or periodic penalty payments, including provisions on the rights of the defence, temporal provisions, the collection of fines or periodic penalty payments and the limitation periods for the imposition and enforcement of fines and periodic penalty payments.

This delegated act is to be adopted in accordance with Article 134(10) of MiCA and Article 290 of the Treaty on the Functioning of the European Union.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

On 29 September 2023, the Commission consulted the Expert Group on Banking, Payment and Insurance (EGBPI) on the provisional content of this delegated act. The EGBPI comprises representatives of Member States. In accordance with the Better Regulation Guidelines, the draft delegated act was published on the Have Your Say Portal for a four-week public feedback period running from 8 November to 6 December 2023. 6 responses were received relating to this delegated act. The responses are available on the Commission's website. EBA also provided further technical feedback.

Stakeholder views

As a result of the abovementioned consultations as well as ad hoc contributions, the Commission received a wide range of views on the content of the draft delegated act. The views of stakeholders mainly expressed the need for a clear and flexible procedure that also allows for the handling of urgent cases. One respondent (an NGO) commented that the 4-week period to take several actions may not be sufficient when the nature of actions or tasks, as well as accompanying circumstances, demand longer periods. Another respondent (a university) called for incorporating a condition of proportionality.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Articles 1 and 2 specify rules of procedure in infringement proceedings before the investigation officer and EBA, such as the content of the file to be transmitted by the investigation officer to EBA, and the right of the persons subject to investigation to be heard by the investigation officer and EBA before the imposition of fines and supervisory measures.

Article 3 specifies the rules of procedure in infringement proceedings before EBA with regard to periodic penalty payments.

Articles 4 specifies the rules of procedure for interim decisions on supervisory measures, such as the right of persons subject to investigations or proceedings to be heard as soon as possible after the adoption of interim decisions imposing penalties.

Article 5 concerns access to the file by persons to whom a statement of findings has been sent and sets out the rules on the use of documents obtained through access to file.

Articles 6 and 7 lay down the limitation period for imposing fines and periodic penalty payments and enforcing penalties.

Article 8 lays down the rules for the collection of fines.

Article 9 sets out the date of entry into force of the delegated regulation.

4. BUDGETARY IMPLICATIONS OF THE DELEGATED ACT

Fines and periodic penalty payments collected by EBA from issuers of significant ARTs and EMTs do not constitute EBA's revenues as defined in Article 62 of Regulation 1093/2010. Fines and periodic penalty payments collected by EBA should be transferred to the Commission and entered in the general budget of the Union as general revenue.

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937¹, and in particular Article 134(10) thereof,

Whereas:

- (1) In order to give the person subject to investigation of an alleged infringement set out in Annex V or VI to Regulation (EU) 2023/1114 the opportunity to be heard, that person should have the right to make written comments on the statement of findings of the investigation within a reasonable time limit of not less than four weeks before the investigation officer is to submit its findings to the EBA. The person subject to investigation should be allowed to be assisted by a counsel of their choice during the investigation. The investigation officer should consider whether, as a result of the submissions made by the person subject to investigation, it is necessary to amend the statement of findings before submitting it to the EBA.
- (2) The EBA should check the completeness of the file submitted by the investigation officer based on a list of documents. To ensure that the person subject to investigation is able to adequately prepare their defence, before adopting a final decision with regard to fines or supervisory measures, the EBA should provide them with the right to provide further written comments.
- (3) To ensure that a person subject to investigation cooperates, the EBA should be able to take certain coercive measures. When the EBA has taken a decision requiring a person subject to investigation to bring an infringement to an end or has requested them to supply complete information or to submit complete records, data or any other material, or has taken a decision to conduct an on-site inspection, it may impose periodic penalty payments in order to compel that person to comply with the decision taken. Before imposing periodic penalty payments the EBA should provide the person subject to investigation with the opportunity to provide written submissions.

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¹ OJ L 150, 9.6.2023, p. 40, ELI: <http://data.europa.eu/eli/reg/2023/1114/oj>.

- (4) As the investigation officer carries out their work independently, the EBA should not be bound by the file the investigation officer has prepared. However, to ensure that the person subject to the investigation is able to adequately prepare their defence, whether the EBA disagrees or, agrees with all or part of the findings of the investigation officer, they should be informed and be given the opportunity to respond.
- (5) Where the EBA adopts an interim decision pursuant to Article 135(2) of Regulation (EU) 2023/1114, it should give the person subject to investigation the opportunity to be heard as soon as possible after adopting the interim decision and before a confirmatory decision is adopted. The procedure should nonetheless grant the right of the person subject to investigation to be heard in advance when the investigation is conducted by an investigation officer.
- (6) The EBA's power to impose a periodic penalty payment is to be exercised with due regard for the right to defence and is not to be maintained beyond the period necessary. Where the EBA decides to impose a periodic penalty payment, the person concerned should therefore be given the opportunity to be heard and any penalty payment should no longer be due as of the moment the person concerned complies with the decision the EBA has addressed to that person.
- (7) The files prepared by the EBA and the investigation officer contain information that is indispensable to the person concerned in preparing for judicial or administrative proceedings. A person subject to investigation should therefore, after having received the notification of statement of finding either from the investigation officer or from the EBA, be entitled to have access to the file subject to the legitimate interest of other persons in the protection of their business secrets. The use of file documents accessed should only be permitted for judicial or administrative proceedings in relation to infringements of Regulation (EU)2023/1114.
- (8) Both the power to impose fines and periodic penalty payments and the power to enforce fines and periodic penalty payments should be subject to a limitation period. For reasons of consistency, limitation periods for the imposition and enforcement of fines or periodic penalty payments should take into account existing Union legislation applicable to the imposition and enforcement of penalties on supervised entities and the EBA's experience in applying such legislation.
- (9) To ensure safekeeping of collected fines and periodic penalties, the EBA should deposit them on interest-bearing accounts that are opened exclusively for the purpose of a single fine or periodic penalty payments aiming at ending a single infringement. As a matter of budgetary prudence, the EBA should only transfer the amounts to the Commission once the decisions are final due to the rights to appeal being exhausted or lapsed,

HAS ADOPTED THIS REGULATION:

Article 1

Procedural rules in infringement proceedings before the investigation officer

1. Upon completion of an investigation of an alleged infringement as set out in Annex V or VI to Regulation (EU) 2023/1114 and before submitting the file to the European Banking Authority (EBA) pursuant to Article 134(2) of that Regulation, the investigation officer shall inform the person subject to investigation in writing of its findings and shall provide that person with the opportunity to make written submissions in accordance with Article 134(5) of that Regulation.

2. The statement of findings shall set out the facts liable to constitute one or more of the infringements as set out in Annex V or VI to Regulation (EU) 2023/1114, including an assessment of the nature and seriousness of those infringements, taking into account the criteria set out in Article 130(3) of that Regulation.
3. The statement of findings shall set a reasonable time limit within which the person subject to investigation may make its written submissions. In investigations other than those referred to in Article 4, that time limit shall be at least four weeks. The investigation officer shall not be obliged to take into account written submissions received after the expiry of that time limit.
4. In its written submissions, the person subject to investigation may set out all the facts known to it which are relevant to its defence, and shall, if possible, attach documents as proof of those facts. The person subject to investigation may propose that the investigation officer hears other persons who may corroborate the facts set out in the submissions of the person subject to investigation. The person subject to investigation may be assisted by a counsel of their choice in the preparation of written submissions.
5. The investigation officer may invite a person subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The persons subject to investigation may be assisted by a counsel of their choice. Oral hearings shall not be public.

Article 2

Procedural rules in infringement proceedings before the EBA with regard to fines and supervisory measures

1. The complete file to be submitted by the investigation officer to the EBA shall include the following documents:
 - (a) the statement of findings and a copy thereof addressed to the person subject to investigation as well as any amended statement of findings as a result of the submissions made by the person subject to investigation;
 - (b) copy of the written submissions by the person subject to investigation;
 - (c) the minutes of an oral hearing, if applicable.
2. Where a file is incomplete, the EBA shall make a reasoned request for additional documents to the investigation officer.
3. Where the EBA considers that the facts described in the statement of findings of the investigation officer do not constitute an infringement as set out in Annex V or VI to Regulation (EU) 2023/1114, it shall decide to close the investigation and notify that decision to the person subject to investigation.
4. Where the EBA agrees with all or some of the findings of the investigation officer, it shall inform the person subject to investigation accordingly. Such communication shall set a time limit of at least two weeks in case the EBA agrees with all of the findings, and at least four weeks in case the EBA does not agree with all of the findings, within which period the person subject to investigation may make written submissions. The EBA shall not be obliged to take into account written submissions received after the expiry of that time limit for adopting a decision on an infringement and on supervisory measures and the imposition of a fine in accordance with Articles 130 and 131 of Regulation (EU) 2023/1114.

5. The EBA may invite the person subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The person subject to investigation may be assisted by a counsel of their choice. Oral hearings shall not be public.
6. If the EBA decides that one or more of the infringements set out in Annex V or VI of Regulation (EU) 2023/1114 has been committed by a person subject to investigation and has adopted a decision imposing a fine in accordance with Article 131 of that Regulation, it shall immediately notify that decision to the person subject to investigation.

Article 3

Procedural rules in infringement proceedings before the EBA with regard to periodic penalty payments

1. Before adopting a decision imposing a periodic penalty payment pursuant to Article 132 of Regulation (EU) 2023/1114, the EBA shall submit a statement of findings to the person subject to investigation setting out the reasons justifying the imposition of a periodic penalty payment and the amount of the periodic penalty payment per day of non-compliance.

The statement of findings shall set a time limit of at least four weeks within which the person subject to investigation may make written submissions. The EBA shall not be obliged to take into account written submissions received after the expiry of that time limit for deciding on the periodic penalty payment.

2. The EBA may invite the person subject to the proceedings to attend an oral hearing. The person subject to the proceedings may be assisted by a counsel of their choice. Oral hearings shall not be public.
3. A decision by the EBA to impose a periodic penalty payment shall indicate the legal basis and the reasons for the decision, the amount and the starting date of the periodic penalty payment.
4. Once the person subject to the relevant decision referred to in Article 132(1) of Regulation (EU) 2023/1114, has complied with that decision, a periodic penalty payment shall no longer be imposed.

Article 4

Rules of procedure for interim decisions on supervisory measures

1. Where the EBA adopts an interim decision as referred to in Article 135(2) of Regulation (EU) 2023/1114 imposing supervisory measures pursuant to Article 130 of that Regulation, it shall immediately notify that interim decision to the person concerned.

The EBA shall set a time limit of at least four weeks within which the person subject to the interim decision may make written submissions on that decision. The EBA shall not be obliged to take into account written submissions received after the expiry of that time limit.

Upon request, the EBA shall grant access to the file to the person subject to the interim decision. File documents accessed shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) 2023/1114.

The EBA may invite the person subject to the interim decision to attend an oral hearing. The persons subject to the interim decision may be assisted by a counsel of their choice. Oral hearings shall not be public.

2. The EBA shall take a final decision as soon as possible after the adoption of the interim decision.

Where the EBA considers, after having heard the person subject to the interim decision, that an infringement as set out in Annex V or VI to Regulation (EU) 2023/1114 has been committed by the person subject to the interim decision, it shall adopt a confirmatory decision imposing one or more supervisory measures laid down in Article 130 of Regulation (EU) 2023/1114. The EBA shall immediately notify that decision to the person subject to the interim decision.

3. Where the EBA adopts a final decision that does not confirm the interim decision, the interim decision shall be deemed to be repealed.

Article 5

Access to the file and use of documents

1. Upon request, the EBA shall grant access to the file to the person subject to investigation to whom the investigation officer or the EBA has sent a statement of findings. Access shall be granted following the notification of any statement of findings in accordance with Article 134(7) of Regulation (EU) 2023/1114.
2. File documents accessed shall be used by the person referred to in paragraph 1 only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) 2023/1114.

Article 6

Limitation periods for the imposition of fines and periodic penalty payments

1. Fines and periodic penalty payments on persons subject to investigation shall be subject to a limitation period of five years.
2. The limitation period referred to in paragraph 1 shall begin on the day following that on which the infringement is committed. In the case of continuing or repeated infringements, that limitation period shall begin on the day on which the infringement ceases.
3. Any action taken by the EBA, or by the competent authority acting at the request of the EBA in accordance with Article 138(1) of Regulation (EU) 2023/1114 for the purpose of the investigation in respect of an infringement listed in Annex V or VI to Regulation (EU) 2023/1114 shall interrupt the limitation period for the imposition of fines and periodic penalty payments. That limitation period shall be interrupted with effect from the date on which the action is notified to the person subject to investigation in respect of an infringement listed in Annex V or VI of Regulation (EU) 2023/1114.
4. Any interruption referred to in paragraph 3 shall restart the limitation period. The limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the EBA having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 5.

5. The limitation period for imposing fines and periodic penalty payments shall be suspended for as long as the decision of the EBA is subject to proceedings pending before the Board of Appeal referred to in Article 60 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council², or is subject to a review by the Court of Justice of the European Union in accordance with Article 136 of Regulation (EU) 2023/1114.

Article 7

Limitation periods for the enforcement of penalties

1. The power of the EBA to enforce decisions taken pursuant to Articles 131 and 132 of Regulation (EU) 2023/1114 shall be subject to a limitation period of five years
2. The limitation period referred to in paragraph 1 shall be calculated from the day following that on which the decision becomes final.
3. The limitation period for the enforcement of penalties shall be interrupted by any action of EBA, or of a competent authority acting at the request of the EBA in accordance with Article 138 of Regulation (EU) 2023/1114, designed to enforce payment or payment terms and conditions of the fine or periodic penalty payment.
4. Each interruption referred to in paragraph 3 shall restart the limitation period.
5. The limitation period for the enforcement of penalties shall be suspended for so long as:
 - (a) time to pay is allowed;
 - (b) enforcement of payment is suspended pursuant to a pending decision of the EBA Board of Appeal in accordance with Article 60 of Regulation (EU) No 1093/2010, and a review by the Court of Justice of the European Union in accordance with Article 136 of Regulation (EU) 2023/1114.

Article 8

Collection of fines and periodic penalty payments

1. The amounts of fines and periodic penalty payments collected by the EBA shall be lodged to an interest-bearing account opened by the EBA until they become final. In case of multiple fines and periodic penalty payments collected by the EBA in parallel the EBA shall ensure that they are lodged to different accounts or subaccounts. Fines and periodic penalty payments paid shall not be entered into the EBA's budget or recorded as budgetary amounts.
2. Once the EBA has established that the fines or periodic penalty payments have become final following the exhaustion of all appeal rights the EBA shall transfer those amounts and potential interest accruing to the Commission. Those amounts shall then be entered in the general budget of the Union.

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² Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12, ELI: <http://data.europa.eu/eli/reg/2010/1093/oj>).

3. The EBA shall report on a regular basis to the Commission on the amounts of fines and periodic penalty payments imposed and their status.

Article 9
Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 22.2.2024

For the Commission
The President
Ursula VON DER LEYEN