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

of 22.2.2024

supplementing Regulation (EU) 2023/1114 of the European Parliament and of the Council by specifying the fees charged by the European Banking Authority to 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 137(1) of MiCA, the European Banking Authority (EBA) is to charge fees to issuers of significant ARTs and EMTs. Those fees are to cover EBA's expenditure on the execution of its supervisory tasks relating to issuers of significant ARTs and EMTs in accordance with Articles 117 and 119 of MiCA, as well as the reimbursement of costs that the competent authorities might incur when carrying out work under MiCA, in particular as a result of any delegation of tasks by EBA in accordance with Article 138 of MiCA.

In addition, Article 62 of 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/EC¹ provides that the EBA's revenues consist of fees paid to EBA in the cases specified in EU legislation, together with contributions from national public authorities and a subsidy from the EU.

Article 137(3) of MiCA empowers the Commission to adopt a delegated act to further specify types of fees, the matters for which fees are due, the amount of fees and the manner in which they are to be paid and the methodology to calculate the maximum amount per entity that EBA can charge.

This delegated act is to be adopted in accordance with Article 137(3) of MiCA and Article 290 of the Treaty on the Functioning of the European Union.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

Procedural aspects

On 21 December 2022, the Commission services sent a request for technical advice to EBA regarding delegated acts under MiCA concerning certain criteria for classification of ARTs and EMTs as significant and fees that are to be charged by EBA to issuers of significant ARTs and EMTs. On 29 September 2023, EBA responded by issuing technical advice to the Commission, upon which this delegated act draws.

The EBA organised two public workshops on the draft technical advice, during which EBA staff shared the EBA's preliminary and more developed proposals (on 17 May 2023 and 24 July 2023, respectively). The workshops were well attended by representatives of financial

¹ OJ L 331, 15.12.2010, p. 12.

institutions, issuers of crypto-assets, industry associations, academia, providers of crypto-asset services and other types of stakeholders. In addition to comments provided during the workshops, the participants were invited to provide written feedback. Only one comment was received regarding the fees to be charged by EBA, (it expressed support for the allocation of fees between different types of issuers and called for a further refinement based on the nature of the reserve assets in view of the different risks involved. EBA's advice also benefited from inputs from European Central Bank (ECB), Financial Stability Board (FSB), European Systemic Risk Board (ESRB) and European Securities and Markets Authority (ESMA) staff. Written feedback was also sought from EBA's Banking Stakeholder Group (BSG). EBA has also taken into account the experiences of national competent authorities, and other European Supervisory Authorities (ESAs) when setting supervisory fees for financial institutions, and to the joint-ESA response to the European Commission's call for advice on Regulation (EU) 2022/2554 on digital operational resilience (DORA), in particular regarding the criticality assessment for ICT third-party service providers (CTPPs), and oversight fees².

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 between 8 November to 6 December 2023. 1 response was received relating to this delegated act. The response is available on the Commission's website. In addition, 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. Those views mainly expressed the need to clarify certain elements in the determination of the amount of supervisory fees to be charged, (for example whether it is a forward-looking estimation of the costs of supervision, the data to be considered for this estimation and the details of competent authority and EBA cooperation and allocation of compensation for supervisory tasks performed).

A business organisation in the Have Your Say consultation expressed the view that fees should be capped, be determined in numbers, as well as for the regulator to envision assistance, including reduction, substitution, exemption, remission, or deferral of such fees and consider extension of deadlines when appropriate.

The Commission has fully considered all the feedback it has received, including the technical advice provided by EBA, the feedback received from the EGBPI and other input provided to the Commission by stakeholders. On this basis, the Commission is adopting under Article 137 of MiCA this delegated act further specifying the fees to be paid by the issuers of significant ARTs and EMTs.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 1 specifies that supervisory costs borne by the EBA will be recovered.

Article 2 specifies how the annual supervisory fee will be determined for issuers of significant ARTs and EMTs.

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https://www.eba.europa.eu/sites/default/documents/files/document_library/About%20Us/Missions%20and%20tasks/Call%20for%20Advice/2022/CfA%20DORA%20and%20MiCA/1050409/ESAs%20technical%20advice%20-%20DORA.pdf

Article 3 specifies how fees are to be adjusted if there is a surplus or a deficit.

Article 4 provides for the general modalities of payment of the EBA fees.

Article 5 provides for the reimbursement of competent authorities if they undertake supervisory tasks allocated to them by the EBA.

Article 6 lays down the date of entry into force of the delegated act.

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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) 2019/1937³, and in particular Article 137(3) thereof,

Whereas:

- (1) An annual supervisory fee should be established to cover the actual and estimated costs to be incurred by the European Banking Authority (EBA) when performing supervisory tasks in the context of Regulation (EU) 2023/1114, including its overheads. The annual supervisory fee should also cover the costs incurred by competent authorities to whom tasks are delegated by the EBA.
- (2) The crypto-asset market is dynamic and often fast-evolving, therefore the estimate as to the number of issuers likely to fall within the scope of the EBA's supervisory tasks is inherently uncertain. Additionally, the supervisory priorities may change from time to time in light of events. Against this backdrop, it is of the highest importance for the EBA, and the competent authorities to whom tasks may be delegated by the EBA, to have the necessary flexibility to estimate their likely expenditure from year-to-year, including the possibility to reassess the fees to be levied in relation to the EBA's supervisory tasks from one year to another.
- (3) Fees charged for the EBA's activities related to issuers of significant asset referenced tokens (ARTs) and issuers of significant e-money tokens (EMTs) should be set at a level such as to avoid a deficit or a significant accumulation of surplus. Where a significant positive or negative budget result becomes recurrent, the level of the fees should be revised.
- (4) The number of significant ARTs and significant EMTs under the supervision of the EBA will be identified only after the application of Titles III and IV of Regulation (EU) 2023/1114. It is therefore not possible to already determine fixed annual supervisory fees since neither the exact amount of supervision task expenditure nor the exact number of significant ARTs or significant EMTs will be known before the framework is fully established. Moreover the number of issuers of significant tokens

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³ OJ L 150, 9.6.2023, p. 40., ELI: <http://data.europa.eu/eli/reg/2023/1114/oj>.

may change from time to time and thus it is not possible to pre-determine the exact amount of fees in the delegated act.

- (5) In line with the principle of annuality and the principle of full cost recovery, the annual supervisory fees should be calculated on the basis of the estimated direct and indirect costs to be incurred by the EBA to perform its supervisory tasks. The annual supervisory fees should be adjusted every year to match the estimated costs. At entity level, the annual supervisory fee should be calculated based on a fully proportionate approach.
- (6) As the costs of the supervision tasks depend on the intensity of the supervision, the fees between issuers of significant ARTs and issuers of significant EMTs are not expected to be fully linear. Therefore, in accordance with the principle of proportionality, an activities-based estimates and monitoring system should be established that allows for the estimated costs to be attributed, respectively, to issuers of significant ARTs and issuers of significant EMTs,

HAS ADOPTED THIS REGULATION:

Article 1

Estimation of the expenditures of the EBA when performing its supervisory duties

1. In each year, the EBA shall estimate the overall annual costs that are expected to be incurred for the performance of its supervisory duties. The amount of the annual overall costs estimated shall be the basis for determining the overall amount of supervisory fees charged.
2. The fees charged to issuers of significant asset referenced tokens (ARTs) and to issuers of significant e-money tokens (EMTs) shall be established in accordance with the principle of full-cost recovery and following an activity-based management model elaborated by the European Banking Authority (EBA).
3. When estimating the annual overall costs, the EBA shall take into account the following direct and indirect costs:
 - (a) the annual estimate of all direct and indirect expenditure necessary for the supervisory tasks performed by the EBA relating to issuers of significant ARTs and issuers of significant EMTs, including staff resources directly involved in the defined tasks and the costs of the horizontal services like operational and administrative support provided to the staff directly involved;
 - (b) the annual estimate of expenditure necessary for the reimbursement of direct and indirect costs incurred by competent authorities to whom the EBA has delegated supervisory tasks in accordance with Article 138(1) of Regulation (EU) 2023/1114 relating to issuers of significant ARTs and issuers of significant EMTs, including staff resources of the competent authorities directly involved in the delegated supervisory tasks and the costs of the horizontal services like operational and administrative support provided to the directly-involved staff.
4. The fees charged to issuers of significant ARTs and issuers of significant EMTs shall cover the staff expenditure, infrastructure and operating expenditure as follows:
 - (a) the EBA's expenditure for the execution of its supervisory tasks relating to issuers of significant ARTs and issuers of significant EMTs in accordance with Regulation (EU) 2023/1114 such as:

- the determination of ARTs and EMTs as significant as referred to in Articles 43 and 56 of Regulation (EU) 2023/1114, including costs incurred in relation to data gathering and analysis, and engagement with the issuer, competent authorities, central banks and other relevant authorities;
 - the classification of ARTs and EMTs as significant based on voluntary basis as referred to in Articles 44 and 57 of Regulation (EU) 2023/1114, including all costs of a kind referred to in the classification process;
 - the supervision referred to in Article 117 of Regulation (EU) 2023/1114, including the establishment and functioning of the EBA crypto-asset committee referred to in Article 118 of Regulation (EU) 2023/1114, and the exercise of any powers and competences referred to in Title VII, Chapter 5 of Regulation (EU) 2023/1114;
 - the establishment and functioning of supervisory colleges as referred to in Article 119 of Regulation (EU) 2023/1114, including for significant EMTs issued by credit institutions;
- (b) the reimbursement of competent authorities that have carried out work pursuant to Regulation (EU) 2023/1114 as a result of any delegation of tasks in accordance with Article 138 of Regulation (EU) 2023/1114.

Article 2

Method of calculation of the annual supervisory fee

1. The annual supervisory fee for a given issuer of significant ARTs shall be calculated as follows:
 - (a) expenditure relating to the supervision of issuers of significant ARTs and EMTs under Regulation (EU) 2023/1114 as included in the EBA's budget for that year;
 - (b) the costs referred to in point (a) assigned to issuers of significant ARTs shall be divided amongst all issuers of significant ARTs as follows:

$$\% \text{ of costs related to significant ART supervision paid by issuer} = \frac{\text{Reserve of significant ART}}{\text{Reserves of all significant ARTs}}$$
 - (c) if applicable, expenditure that is directly assigned to individual issuers of significant ARTs will be added to the annual supervisory fee of those issuers of significant ARTs.
2. The annual supervisory fee for a given issuer of significant EMTs shall be calculated as follows:
 - (a) staff related and administrative expenditures, costs related to supervisory tasks carried out by competent authorities pursuant to Article 138 of Regulation (EU) 2023/1114, as well as costs related to IT development and maintenance for the EBA supervision assigned, respectively, to issuers of significant ARTs and issuers of significant EMTs;
 - (b) the costs referred to in point (a) assigned to issuers of significant EMTs shall then be divided amongst all issuers of significant EMTs as follows:

$$\% \text{ of costs related to significant EMT supervision paid by issuer} = \frac{\text{Size of issuance of significant EMT}}{\text{Size of issuance of all significant EMTs}}$$

- (c) if applicable, expenditure that is directly assigned to individual issuers of significant EMTs will be added to the annual supervisory fee of those issuers of significant EMTs.
3. For the calculation of the size of the reserve of assets of issuers of significant ARTs, the EBA shall use data from the latest available independent audit of the reserve of assets as referred to in Article 36(9) of Regulation (EU) 2023/1114.
 4. For the calculation of the size of the issuance of issuers of significant EMTs, the EBA shall use data from the latest available independent audit as referred to in Article 58 of Regulation (EU) 2023/1114.
 5. If the reported reserve of assets for significant ARTs or the size of the issuance of significant EMTs are expressed in a currency other than the euro, the EBA shall convert them into an amount in euro using the average euro foreign exchange reference rate applicable to the period during which the values were recorded. For that purpose, the euro foreign exchange reference rate published by the European Central Bank shall be used.
 6. By way of derogation from paragraphs 1, 2 and 3, the first-year fee shall be calculated with the following formula by lessening the supervisory fee referred to in paragraphs 1 and 2 with a factor that is equal to the days between the date of transfer of supervision takes effect and the end of the year divided by the total number of days in that year:

$$\text{Coefficient} = \frac{\text{Number of calendar days from the date of transfer of supervision until 31 December}}{\text{Number of calendar days in year (n)}}$$

The supervisory fee of the first year shall be paid after an issuer of significant ARTs or an issuer of significant EMTs has been classified by the EBA as significant, as referred to in Articles 43, 44, 56 or 57 of Regulation (EU) 2023/1114 and within 30 days from the date of issuance of the EBA's relevant invoice.

By way of derogation from first sub paragraph, where an issuer of significant ARTs or an issuer of significant EMTs is classified as significant, as referred to in Articles 43, 44, 56 or 57 of Regulation (EU) 2023/1114 during the month of December, it shall not pay supervisory fee for that calendar year.

Article 3 *Adjustment of fees*

Annual supervisory fees charged to issuers of significant ARTs and issuers of significant EMTs shall be set at a level such as to cover the full cost of providing the services and to avoid a deficit or a significant accumulation of surplus.

Article 4 *Payment of annual supervisory fees*

1. The annual supervisory fee shall be paid in full to the EBA not later than 31 March of the calendar year for which it is due.
2. The EBA shall send the invoices to issuers of significant ARTs and issuers of significant EMTs at least 30 days before the payment is due. The annual supervisory fees shall be payable in euro.

3. Any late payments shall incur the default interest laid down in Article 99 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council⁴.
4. Communications between the EBA and issuers of significant ARTs or issuers of significant EMTs shall take place by electronic means.

Article 5

Reimbursement of competent authorities

1. In case of a delegation of tasks by the EBA to competent authorities in accordance with Article 138 of Regulation (EU) 2023/1114, only the EBA shall charge fees to issuers of significant ARTs and issuers of significant EMTs in respect of the costs incurred in relation to the performance of those tasks.
2. The EBA shall reimburse a competent authority for the estimated costs incurred as a result of carrying out tasks pursuant to Regulation (EU) 2023/1114 with an amount which fulfils the following conditions:
 - (a) the amount is agreed by the EBA and the competent authority before the delegation of tasks takes place;
 - (b) the amount is lower or equal than the total amount of annual supervisory fee paid to the EBA by the relevant issuers of significant ARTs or issuers of significant EMTs.

Article 6

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

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⁴ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1), ELI: <http://data.europa.eu/eli/reg/2018/1046/2022-12-14>.