

EBA/CP/2023/29

08 NOVEMBER 2023

Consultation Paper

Draft Regulatory Technical Standards

to specify the procedure and timeframe to adjust its own funds requirements for issuers of significant asset-referenced tokens or of e-money tokens subject to the requirements set out in Article 45(5) of Regulation (EU) 2023/1114 on markets in crypto-assets

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1. Responding to this consultation

The EBA invites comments on all proposals put forward in this paper and in particular on the specific questions summarised in 5.2.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/ rationale proposed; and
- describe any alternative regulatory choices the EBA should consider.

Submission of responses

To submit your comments, click on the “send your comments” button on the consultation page by 08 February 2023. Please note that comments submitted after this deadline, or submitted via other means may not be processed.

Publication of responses

Please clearly indicate in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from us in accordance with the EBA’s rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the EBA’s Board of Appeal and the European Ombudsman.

Data protection

The protection of individuals with regard to the processing of personal data by the EBA is based on Regulation (EU) 1725/2018 of the European Parliament and of the Council of 23 October 2018. Further information on data protection can be found under the Legal notice section of the EBA website.

2. Executive Summary

Pursuant to paragraph 1 of Article 35 of Regulation (EU) 2023/1114 issuers of asset-reference tokens are subject to own funds requirements, and in accordance with paragraph 5 of Article 45 of the same regulation issuers of significant asset-reference tokens should hold higher amounts of own funds (3% of the average amount of the reserve assets instead of 2%).

According to the mandate in Article 45(7)(c) of Regulation (EU) 2023/1114, the EBA has been mandated to developed Regulatory Technical Standards (RTS)¹ specifying the procedure and timeframe for an issuer of asset-referenced tokens to adjust its own funds to higher amounts when an asset-referenced token it issues, or has issued, is classified as significant.

The mentioned requirements apply as well to electronic money institutions issuing e-money tokens that are significant by virtue of Article 58(1), point b, of Regulation (EU) 2023/1114 and can be expanded to e-money institutions issuing e-money tokens that are not significant if the competent authority of the home Member State requires it so following Article 58(2) of that Regulation.

Given the novelty of asset-referenced tokens and their issuers, the fact no universal risks assessment framework exists and the rapid developments in this sector, these RTS have been developed with a certain degree of flexibility for competent authorities while keeping the main overall objective of harmonisation of rules and convergence of supervisory practices.

The EBA followed a more prescriptive approach when specifying the procedure for issuers of a significant asset-referenced token to submit a compliance plan, while provided more flexibility to competent authorities on the timeframe to grant an issuer of a significant asset-referenced token to adjust to higher own funds requirements (up to 3 months).

Next steps

The final draft RTS will be submitted to the Commission for adoption. Following the submission, the RTS will be subject to scrutiny by the European Parliament and the Council before being published in the Official Journal of the European Union.

¹ This Regulation is also relevant for issuers of e-money tokens that are subject to or required to comply with the requirements referred to in Article 45(5) of Regulation (EU) 2023/1114

3. Background and rationale

1. Article 35(1) of Regulation (EU) (EU) 2023/1114 introduces the own funds requirement for issuers of asset-referenced tokens. Issuers of asset-referenced tokens, shall at all times have own funds equal to an amount of at least the highest of:
 - a. EUR 350.000;
 - b. 2% of the average amount of the reserve assets (referred to in Article 36);
 - c. A quarter of the fixed overhead of the preceding year.
2. According to Article 45(5) of Regulation (EU) 2023/1114, the 2% percentage shall be set at 3% of the average amount of the reserve assets for issuers of significant asset-referenced tokens.
3. The EBA is mandated under Article 45(7)(c) of Regulation (EU) 2023/1114, in close cooperation with ESMA, to develop draft regulatory technical standards further specifying²:
 - c. the procedure and timeframe for an issuer of a significant asset-referenced token to adjust the amount of its own funds as required by paragraph 5.
4. The main purpose of these draft RTS is to provide the procedure and timeframe on how and when the issuers of asset-referenced tokens should adjust their level of own funds to 3% of the average amount of the reserve assets when their asset-referenced tokens are classified as significant asset-referenced tokens, either based on the criteria set out in Article 43 of Regulation (EU) 2023/1114 or on a voluntary basis as envisaged in Article 44 of Regulation (EU) 2023/1114.
5. Significant asset-referenced tokens could be used by a large number of holders and their use could raise specific challenges in terms of financial stability, monetary policy transmission or monetary sovereignty, therefore, issuers of significant asset-referenced tokens should be subject to more stringent requirements, also in terms of own funds.
6. Article 45(5) of Regulation (EU) 2023/1114 also apply to issuers of e-money tokens (either significant or, where decided, non-significant), as per Articles 58(1), point (b), and (2) of Regulation (EU) 2013/1114, of that Regulation. Therefore, these RTS should also be relevant and applicable for those.
7. As specified in recital 44 and recital 71 of Regulation (EU) 2023/1114, credit institutions that act as issuers of asset-referenced tokens or e-money tokens are not subject to own funds requirements. Therefore, these RTS to adjust the amount of its own funds to 3% as required by

² Article 45(7)(a) relates to an RTS on governance arrangement on remuneration policies and (b) to an RTS on liquidity management policy and procedures.

paragraph 5 of Article 45 of Regulation (EU) 2023/1114 for significant asset-reference token is not applicable to credit institutions.

3.1 Own funds requirements of issuers of significant asset-referenced tokens

3.1.1 Procedure and timeframe

8. Within 25 working days from the classification of the asset-referenced token as significant asset-referenced token, the competent authority should provide the issuer of the significant asset-referenced token with the timeframe within which it should adjust its own funds. The issuer of the significant asset-referenced token should then provide within 20 working days from the notification the plan to adjust its own funds, which should include time-bound steps and procedures to carry out the adjustment within the set timeframe and ensure that the funds consist of the Common Equity Tier 1 items and instruments.
9. In order to ensure the effective and timely adjustment of own funds, the competent authority should closely monitor the implementation of the plan by the issuer of the significant asset-referenced token. Whenever necessary, the competent authority should be able to request additional information, and in case the measures do not progress as initially planned, an alternative course of action should be agreed.
10. When setting the timeframe for the issuer of a significant asset-referenced token to adjust its own funds the competent authority should take into account the potential impact on the issuer of the significant asset-referenced token and its specificities. In any case, the competent authority should not grant the issuer of a significant asset-referenced token more than 3 months to adjust its level of own funds.

4. Draft regulatory technical standards

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

of **XXX**

supplementing Regulation (EU) 2023/1114 of the European Parliament and of the Council with regard to regulatory technical standards specifying the procedure and timeframe for an issuer of a significant asset-referenced token or of e-money tokens subject to such requirements to adjust the amount of its own funds set out in Article 45(5)

(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 on Markets in Crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and Directive (EU) 2019/1937³, and in particular Article 45(7), fourth subparagraph, thereof,

Whereas:

- (1) Considering that requirements set out in Articles 35, points (2), (3) and (5) and Article 45(5) of Regulation (EU) 2023/1114 also apply to issuers of e-money tokens (either significant or, where decided, non-significant), as per Articles 58(1), point (b), and (2) of that Regulation, this Regulation should also apply to issuers of e-money tokens that are subject to or required to comply with those requirements.
- (2) Issuers of asset-referenced tokens or e-money tokens once classified as significant or, where applicable, in accordance with Article 58(2) of Regulation (EU) 2023/1114, should elaborate a plan to adjust the level of own funds to the required level within the timeframe required. Those should discuss and agree the feasibility of such plan with the relevant competent authorities. Implementation of such plan should be closely monitored by competent authorities and, for that purpose, issuers of asset-referenced or, where applicable, e-money tokens should notify to the competent authority steps taken, including a final notification of the adjustment completion.
- (3) Competent authorities are well suited to determine the timeframe to adjust their own funds for issuers of a significant asset-referenced or e-money tokens that becomes subject to the requirement set out in Article 45(5) of Regulation (EU) 2023/1114. Such timeframe should have a maximum deadline and, in principle, be as short as possible and based on a case-by-case assessment, having regard to the potential impact on the issuer of the significant asset-referenced or, where applicable, e-money token, its specificities and risks to the financial stability of the wider financial system.

³ 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) 2019/193 (OJ L 150, 9.6.2023, p. 40–205).

- (4) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Banking Authority.
- (5) The European Banking Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council,⁴

HAS ADOPTED THIS REGULATION:

Article 1
Procedure

1. Within 25 working days from the notification referred to either in Article 43(6) or Article 44(3) of Regulation (EU) 2013/1114, the competent authority shall notify the issuer of the significant asset-referenced token or, where applicable, the issuer of e-money tokens issued by electronic money institutions the timeframe within which it shall adjust its own funds to meet the requirements in Article 45(5) of that Regulation.
2. Within 20 working days from receipt of the notification on the timeframe referred to in paragraph 1, the issuer of the significant asset-referenced token or, where applicable, the issuer of e-money tokens issued by electronic money institutions shall submit to the competent authority a detailed plan on how its own funds will be adjusted to meet the requirements in Article 45(5) of Regulation (EU) (EU) 2013/1114.
3. The plan referred to in paragraph 2 shall:
 - (a) include time-bound steps and procedures to carry out the own funds' adjustment within the timeframe set in article 2; and
 - (b) ensure that the funds consist of the Common Equity Tier 1 items and instruments referred to in Articles 26 to 30 of Regulation (EU) No 575/2013⁵ after the deductions referred to in Article 36 of Regulation (EU) No 575/2013 have been applied in full and the threshold exemptions referred to in Article 46(4) and Article 48 of that Regulation have been disapplied, including a reference to the composition of such items and instruments.

⁴ 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, 15.12.2020, p. 12).

⁵ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and amending Regulation (EU) No 648/2012 (OJ L 176 27.6.2013, p. 1).

4. The issuer of a significant asset-referenced token or, where applicable, the issuer of e-money tokens issued by electronic money institutions shall inform the competent authority immediately and in writing in case any step or procedure of the plan in paragraph 2 cannot be achieved in a timely manner. In such a case, the said issuer shall submit to the competent authority an update of the plan, including alternative steps or procedures that allow the issuer to adjust its own funds in the set timeframe.
5. The competent authority shall closely monitor the implementation of the plan in paragraph 2.
6. The issuer of the asset-referenced token or, where applicable, the issuer of e-money tokens issued by electronic money institutions shall inform the competent authority of the completion of the steps provided in the plan, including a final notification to the competent authority when the required own funds adjustment has been completed, within a maximum of 20 working days as from the completion.

Article 2

Timeframe

1. When an issuer of asset-referenced token or, where applicable e-money token are required to comply with the requirements set out in Article 45(5) of Regulation (EU) 2013/1114, the relevant issuer of such tokens shall adjust its own funds to meet the requirements in Article 45(5) of that Regulation within the timeframe set by the competent authority in Article 1(1).
2. In setting the timeframe referred to in Article 1(1), the competent authority shall not grant more than 3 months as from the notification referred to in Article 43(6) or 44(3) of Regulation (EU) 2023/1114 to the issuer of a significant asset-referenced token or, where applicable, the issuer of e-money tokens issued by electronic money institutions to adjust its own funds, having regard to the potential impact on the relevant issuer, its specificities and risks to the financial stability of the wider financial system.

Explanatory box:

Issuers that become 'significant' should follow a specific procedure when adjusting the own funds. The procedure starts with the competent authority notifies the issuer the timeframe within which it shall adjust its own funds to meet the requirements. The issuer has 20 working days from receipt of the notification to submit to the competent authority a detailed plan on how its own funds will be increased.

Questions for consultation:

- Question 1.** Is the procedure clear and the timelines for the issuer to submit the plan reasonable?
- Question 2.** Are the timeframes for issuers to adjust to higher own funds requirements feasible?
- Question 3.** During the period when own funds need to be increased by the issuer, should there be more restrictions on the issuer to ensure timely implementation of the additional own funds requirements, for example banning the issuance of further tokens?

Article 3

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,

For the Commission
The President

[For the Commission
On behalf of the President
[Position]

5. Accompanying documents

5.1 Draft cost-benefit analysis / impact assessment

1. Following Article 10 of Regulation (EU) No 1093/2010 (EBA Regulation), the EBA shall analyse the potential costs and benefits of draft Regulatory Technical Standards. RTS developed by the EBA shall therefore be accompanied by an Impact Assessment (IA) that analyses ‘the potential related costs and benefits’.
2. This analysis presents the IA of the main policy options discussed and assessed in the elaboration of the draft RTS on the procedure and timeframe for an issuer of significant asset-referenced tokens to adjust the amount of its own funds, which the EBA is mandated to develop under Article 45(7) of Regulation (EU) 2023/1114⁶.

A. Problem identification and baseline scenario

3. Significant issuers of asset-referenced tokens would have a considerable market penetration and be used by a large number of holders. As such, they could pose challenges in terms of monetary policy transmission and monetary sovereignty, as well as the overall stability of the financial system if they were not adequately capitalised. They should therefore be subject to more stringent own-funds requirements than non-significant issuers. To ensure consistency among the EU Member States, it is important that the set of rules regulating the procedure and timeframe to adjust to these requirements is harmonised throughout the Union.
4. In the baseline scenario, issuers of significant asset-referenced tokens would be subject to own-funds requirements as per Regulation (EU) 2023/1114, excluding any additional specification provided by this RTS. In the absence of this harmonised set of rules, competent authorities may adopt divergent approaches throughout the EU, which could jeopardise financial stability and compromise the level-playing field among issuers and Member States.

B. Policy objectives

5. The aim of this RTS is to provide competent authorities and significant issuers of asset-referenced tokens with a harmonised procedure and timeframe for significant issuers to adjust their amount of own funds when demanded by the competent authority.

⁶ This Regulation is also relevant for issuers of e-money tokens that are subject to or required to comply with the requirements referred to in Article 45(5) of Regulation (EU) 2023/1114

C. Policy options

General Approach

6. The EBA has adopted a prescriptive approach in outlining the procedure for significant issuers to submit their compliance plan, while providing competent authorities with a relatively larger degree of flexibility in setting the timeframe for significant issuers to adjust their amount of own funds (up to 3 months).

Procedure and timeframe

7. In drafting this RTS, the EBA could have either adopted a rule-based approach (option A), providing a detailed set of rules to be strictly followed by significant issuers and competent authorities, or a principle-based approach (option B), leaving a high degree of flexibility to competent authorities.
8. Under option A, issuers of significant asset-referenced tokens should follow a strict procedure in adjusting their own funds when demanded by the competent authority. The steps of these procedure would refer to a detailed timeframe, with little room for the competent authority to adjust its requests to any potential specificities. This would favour an easy and harmonised implementation throughout the Union, but could also lead to a lack of effectiveness given the disregard to contingent circumstances.
9. Option B envisions a more flexible procedure for significant issuers and competent authorities to follow, allowing the latter to adjust the timeframe within which the former should comply to the new own-funds requirement. While this approach would enable competent authorities to adjust their demands also based on contingent circumstances, it also risks to push them to adopt divergent procedures across Member States, thus jeopardising the level-playing field in the Union.
10. In both cases, the maximum timeframe within which significant issuers should be allowed to adapt is shorter than for own funds adjustments for non-significant issuers under Article 35(6) of MiCAR, given their potential to affect not only the market of asset-referenced tokens, but also the stability of the overall financial system.

Preferred option

11. In determining the procedure and timeframe for issuers of significant asset-referenced tokens to adapt to higher own-funds requirements, the preferred option is a combination of options A and B.
12. On the one hand, the EBA has adopted a relatively strict procedure that competent authorities and significant issuers must follow in adjusting own-funds requirements, providing a clear and harmonised implementation framework. On the other hand, a reasonable degree of flexibility is left to competent authorities in determining the timeframe for significant issuers to comply, as long as it does not exceed 3 months. Within the limits ensuring supervisory convergence

throughout the EU, this will allow competent authorities to adjust their demands also based on the specificities that could apply to each case.

5.2 Overview of questions for consultation

- Question 1.** Is the procedure clear and the timelines for the issuer to submit the plan reasonable?
- Question 2.** Are the timeframes for issuers to adjust to higher own funds requirements feasible?
- Question 3.** During the period when own funds need to be increased by the issuer, should there be more restrictions on the issuer to ensure timely implementation of the additional own funds' requirements, for example banning the issuance of further tokens?