ABBL’s Response to the Consultation on EBA Draft Regulatory Technical Standards to specify the requirements, templates and procedures for handling complaints under Article 31 of the Regulation (EU) 2023/1114 on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 (MICA)

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| **Questions** |
| **Q1: Do you consider that the approach proposed in the RTS strikes an appropriate balance between the various competing demands described? If not, please suggest an alternative approach and the underlying reasoning and evidence.** |
| Partially  In our perspective and in general, the proposed approach in the RTS strikes an appropriate balance between the various competing demands described.  However, we would welcome more harmonisation between EBA and ESMA in terms of compliance frameworks relating to complaints handling. ESMA should try in this case to align with the approach of EBA which is based on general principles. |
| **Q2: Do you have any comments on the requirements proposed in Articles 1, 2, 3 or 4 of the draft RTS?** |
| Yes  Article 1(c): “*For the purposes of this Regulation, the following definitions shall apply: […] ‘third-party entity’ means an entity that, based on the arrangements as referred to in Article 34(5) first subparagraph, point (h), of the Regulation (EU) 2023/114, distributes totally or partially the asset-referenced tokens to the public*.”  The EU Regulation on Markets in Crypto-Assets (“**MiCA**”) classifies crypto-assets into three types ([Recital (18) MiCA](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114)):   * the first type consists of electronic money tokens (“**EMT**”); * the second type concerns ‘asset-referenced tokens’ (“**ART**”); and * the third type consists of crypto-assets other than asset-referenced tokens and e-money tokens and covers a wide variety of crypto-assets (“**Other Crypto-Assets”** or **“OCs”**).   **For OCs**, **issuers** are **not** subject to supervision under MiCA **when** the issuer is not an offeror or a person seeking admission to trading ([Recital (98) MiCA](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114)). In other words, the offeror of OCs is the one subject to supervision – not the issuers. Therefore, most of MiCA’s obligations apply to the offeror of OCs (see [Article 4 and ss. MiCA](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114#d1e2031-40-1)). **One likely reason for this is that offerors maintain a direct contractual relationship / responsibility with the public**.  Conversely, **for ARTs**, this logic is shifted. MiCA provides that it “lays down rules” for **offerors** of OCs, whereas, with regards to ARTs, it lays down rules for **issuers** ([Recital (20) MiCA](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114)). This is namely because, under MiCA, the issuer of ARTs is the one who must maintain a reserve of assets ([Article 36 MiCA](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114#d1e4679-40-1)) and, consequently, **the only person who** **can offer ARTs to the public**: “*A person shall not make an offer to the public, or seek the admission to trading, of an asset-referenced token, within the Union,* ***unless*** *that person is the* ***issuer*** *of that asset-referenced token and […]*” ([Article 16-1 MiCA](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114#d1e2951-40-1)).  However, some exceptions to this rule are provided by MiCA. For instance, third-party entities may, based on arrangements, make a distribution of ARTs to the public ([Article 34-5(h) MiCA](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114#d1e4307-40-1)). The offer (or distribution) to the public is made by these third-party entities, rather than by the ARTs issuer, who would then have a direct contractual relationship with the holders of ARTs ([Draft Consultation Paper, page 5](https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Consultations/2023/Consultation%20on%20draft%20RTS%20on%20the%20requirements%2C%20templates%20and%20procedures%20for%20handling%20complaints%20under%20MiCAR/1057528/CP%20on%20draft%20RTS%20on%20complaints%20handling%20under%20MiCAR.pdf)). Thus, these third-party entities should be subject to specific provisions, particularly with regards to complaint handling. The Delegated Regulation duly addresses this – see Articles 1(c) and 6 of the Delegated Regulation.  Nevertheless, these third-party entities are not the only exception. [Article 34-5(i) MiCA](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114#d1e4307-40-1) further mentions some “other persons” who, based on a “written consent of the issuer of ARTs”, might **offer** ARTs. It is understood that this offer of ARTs is an “offer to the public” ([Article 16-1, para. 2, MiCA](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114#d1e2951-40-1)). Having regard to this, it appears to us that:   * these “other persons” (of Article 34-5**(i)** MiCA) align with the “third-party entities” (of Article 34-5**(h)** MiCA); * this “written consent” (of Article 34-5**(i)** MiCA) aligns with the “arrangements” (of Article 34-5**(h)** MiCA); and * this “offer to the public” (of Article 34-5**(i)** MiCA) is equivalent to the “the distribution to the public” (of Article 34-5**(h)** MiCA).   **SUGGESTION**: It is unclear whether the term “other persons” refers to the same persons as the “third-party entities”. To avoid any possible legal loopholes in the Delegated Regulation, and discrimination between analogue situations, we suggest including these “other persons” (of [Articles 34-5(i) MiCA](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114#d1e4307-40-1) and [16-1, para. 2, MiCA](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114#d1e2951-40-1)) in the definition of “third-party entity” of the Delegated Regulation.  It is also noteworthy that [Article 31-5 MiCA](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114#d1e4174-40-1), which serves as the legal basis for the Delegated Regulation, provides that the “*EBA, in close cooperation with ESMA, shall develop draft regulatory technical standards to further specify the requirements, templates and procedures for handling complaint*”. This article does not restrict the “requirements” or “procedures” to issuers, nor to “third-party entities”, and may therefore be extended to “other persons”.  **Other point to be mentioned**: It should be noted that, as a rule, *“an offer to the public of an asset-referenced token*” can only be made “*by* *the issuer of that asset-referenced token*” who has either “*been authorised by the competent authority*” or is “*a credit institution that complies* *with certain conditions*” ([Article 16-1 MiCA](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114#d1e2951-40-1)).  MiCA seems however to provide yet another exception to the rule. According to [Article 16-2](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114#d1e2951-40-1), this rule does not apply in two specific circumstances listed in this article. It is unclear whether this exemption to the rule only targets the authorisation requirement (as implied by [Recital (43) MiCA](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114)) or if the exemption also concerns the requirement for the offer to only be made by the issuer of the ART. In this last case, the persons that may offer ARTs to the public under the exemption of [Article 16-2](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114#d1e2951-40-1), and who are not issuers of ARTs, may also need to be included in the definition of “third-party entity” of the Delegated Regulation.  Article 2:   * It may be beneficial for certain actors to have the possibility to incorporate this policy into a broader General Complaints Management Policy. This consideration arises from the recognition that issuers may be subject to multiple sets of rules and additional obligations. This overarching policy would encompass a wide range of activities, including but not limited to the issuance of asset-referenced tokens. It may be prudent to refrain from creating a distinct policy exclusively for this particular activity. Instead, the adoption of a comprehensive policy encompassing these aspects might prove more efficient and practical.   Article 3-1: **“*The issuer of asset-referenced tokensshall provide, on request or when acknowledging receipt of a complaint, clear, accurate and up-to-date written information about the complaints-handling procedure to the complainants . The information provided by the issuer shall include, in particular:”***  Some spelling mistakes remain in the text: “tokensshall” should be “tokens shall”. Some spaces in the text are also unnecessary.  **SUGGESTION**: We suggest addressing the spelling mistakes and deleting the extra spaces.  We have also duly noted the position of the EBA that language requirements within the Delegated Regulation would “go beyond the existing MiCA mandate” ([Draft Consultation Paper, page 26](https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Consultations/2023/Consultation%20on%20draft%20RTS%20on%20the%20requirements%2C%20templates%20and%20procedures%20for%20handling%20complaints%20under%20MiCAR/1057528/CP%20on%20draft%20RTS%20on%20complaints%20handling%20under%20MiCAR.pdf)).  We believe nonetheless that the Delegated Regulation could provide that “*Member States may maintain or introduce in their national law language requirements regarding written information about the complaints-handling procedure, so as to ensure that such information is easily understood by the complainants*” (wording inspired by [Recital (15) and Article 6-7 Directive 2011/83/EU](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0083#d1e1089-64-1)).  This would also be in line with provisions of the Delegated Regulation on time limits, that provide national law with the responsibility to fix these time limits (Article 5-3(b) Delegated Regulation).  Article 4:   * We would suggest adding a specific section to the template to outline the underlying objectives of the complaint. This could facilitate a quick understanding of the complaint's ultimate goal by the recipient, whether it pertains to financial matters or other objectives. * What concerns the submission of complaints in paper form, this channel of communication with clients for complaints handling in the crypto-assets industry is used to a limited extent. We are of the opinion that the use of such mode of communication for the purposes of complaints handling will remain limited (as a share in the total volume of complaints) for the years to come, and its role will be decreasing since all operations of ART issuers and their interactions with clients are generally digital by design. Even though the paper channel of communication does not represent an operational challenge for ART issuers – due to its limited role and the obligation for ART issuers to use the same channel of communication chosen by complainants – we believe that it will be in the interest of both clients and ART issuers to use a digital channel of communication to gain speed and efficiencies, increase customer satisfaction, and reduce CO2 footprint. Resorting to post communications will increase the time required for complaints handling by default due to the time needed to convey a message from one party to another. Therefore, offering the possibility to file complaints in paper or by post might put an additional operational burden on issuers of asset-referenced tokens without however providing any real added value for their clients. |
| **Q3: Do you have any comments on the requirements proposed in Articles 5, 6 or 7 of the draft RTS?** |
| Yes   * **Article 5-1, para. (b) “*The Issuer of Asset-referenced tokens shall assess all complaints in a timely and fair manner: […] where the issuer of assets referenced token conclude that a complaint is unclear or incomplete, it shall promptly request to the complainant any additional information or evidence necessary for the proper handling of the complaint*”.**   Some spelling mistakes remain in the text: “assets referenced token” should be “asset-referenced tokens”. Instead of “request to the complainant”, we suggest it should be “request from the complainant”.  Additionally, with regards to the article under analysis, we believe it may be necessary, in some cases, to confirm the identity of the complainant - for instance, if its complaint relates to a specific acquisition of ARTs by a specific individual (quantities, conditions, etc.).  **SUGGESTION**: We suggest addressing the spelling mistakes and wording.  **SUGGESTION**: We also suggest adding a paragraph providing that the issuer of asset-referenced tokens may request the complainant to provide additional information necessary to confirm the complainant’s identity where the issuer of asset-referenced tokens has reasonable doubts concerning the identity of the person making the complaint (wording inspired by [Article 12-6 GDPR](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02016R0679-20160504#tocId18)).  It is also worth noting that articles of the Delegated Regulation do not mention personal data, the processing of complainant’s personal data, or GDPR provisions.  However, the Delegated Regulation provides that a complainant may be a “natural person”. Page 1 of the Template in the Annex to the Delegated Regulation also mentions the “*Personal data of the complainant*”.  On the other hand, MiCA refers to “personal data” as defined by the GDPR ([Article 3-1(45) MiCA](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114#d1e1390-40-1)). It further provides that “*the* ***issuance****,* ***offer*** *or seeking of admission to trading* ***of crypto-assets*** *and the provision of crypto-asset services could involve the processing of personal data.* ***Any processing of personal data*** *under this Regulation should be carried out in accordance with applicable Union law on the protection of personal data*” ([Recital (117) MiCA](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114)).  **SUGGESTION**: We suggest adding a definition of “personal data” to the Delegated Regulation, and a paragraph stating that “*Any processing of personal data under this Regulation, with regards to complaints handling procedures, should be carried out in accordance with applicable Union law on the protection of personal data*”.  **Article 5-3, para. (a) “*The issuer of asset-referenced tokens shall communicate the outcome of investigations on filed complaints to the complainants in plain language that can be clearly understood*”.**  The requirement that plain language must be “clearly understood” seems ambiguous. The terms usually used in regulations are “clear and comprehensible/plain language” (e.g., [Articles 5-1, 6-1 and 8-2 Directive 2011/83/EU](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0083#d1e1005-64-1); [Articles 7-2, 12-1 and 34-2 GDPR](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02016R0679-20160504#tocId8)). Furthermore, no reference is made to the means of communication.  **SUGGESTION:** We would suggest *“[…] the outcome of investigations of filed complaints to the complainants with information that is complete, fair, clear and not misleading, using clear and plain language.*” (wording inspired by MiCA’s provisions on white papers and on marketing communications - [Articles 19-2 and 29-1(b) MiCA](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1114#d1e3346-40-1) – and by [Articles 7-2 and 12-1 GDPR](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02016R0679-20160504#tocId18)).  We would like to outline the issue with the variety of language options for complaints filing. Considering 24 official languages in the European Union, having all of them to be used by the issuer of ART will represent a challenge from budgetary and operational perspective. For instance, if a complaint is submitted in a language for which internal resources at the in-scope entity are absent or not sufficient, it may create complications in effectively addressing the complaint. We believe that to the extent the contractual documentation is provided to the clients in a language they can understand, the description of the procedure and the templates should be published only in languages used in the contractual documentation concluded with the clients and the issuer of ARTs should have capacity to address client complaints only in the same languages.  **Articles 5-3(b) and (c), and Article 6(c)(iv)**  These articles use different terms to express the same meaning: “*where national rules require it*” and “*national timing requirements*”. Furthermore, the term “*rules*” is not a common term used in other regulations and may also be ambiguous: it probably does not intend to refer to national customary rules (“national rules”), nor to rules applied in some national private sectors (“national rules”).  **SUGGESTION**: In line with other regulations, we would suggest harmonising the wording and preferably use the term “national law”. Hereinafter, are our suggested amendments:   * + Article 5-3(b): *“[…] at least within the time limits set* ***in*** *national* ***law*** *to address complaints filed by complainants,* *[…]*”   + Article 5-3(c): *“(or any final decision, where* ***required by*** *national* ***law****)*”   + Article 6(c)(iv): *“[…] within a reasonable period of time or in accordance with* ***requirements of national law, where*** *applicabl****e.*”** |

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