

**EDPS Formal comments on the draft Commission Delegated Regulation supplementing Regulation (EU) 2023/1114 of the European Parliament and of the Council with regard to regulatory technical standards specifying the information to be included in an application for authorisation as crypto-asset service provider**

**THE EUROPEAN DATA PROTECTION SUPERVISOR,**

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

Having regard to Regulation (EU) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC ('EUDPR')<sup>1</sup>, and in particular Article 42(1) thereof,

**HAS ADOPTED THE FOLLOWING FORMAL COMMENTS:**

**1. Introduction and background**

1. On 21 May 2024, the European Commission consulted the EDPS on the draft Commission Delegated Regulation supplementing Regulation (EU) 2023/1114 of the European Parliament and of the Council ('MICA Regulation')<sup>2</sup> with regard to regulatory technical standards ('RTS') specifying the information to be included in an application for authorisation as crypto-asset service provider ('the draft Delegated Regulation').
2. The objective of the draft Delegated Regulation is to further specify the information to be provided in an application for authorisation as crypto-asset service provider<sup>3</sup>.
3. The draft Delegated Regulation is adopted pursuant to Article 62(5), third subparagraph, of the MICA Regulation.
4. The EDPS previously issued Opinion 9/2021 on the MICA Regulation<sup>4</sup>.

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<sup>1</sup> OJ L 295, 21.11.2018, p. 39.

<sup>2</sup> 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) 2019/1937 (Text with EEA relevance), OJ L 150, 9.6.2023, p. 40.

<sup>3</sup> Recital 1 of the draft Delegated Regulation.

<sup>4</sup> [EDPS Opinion 9/2021 on the Proposal for a Regulation on Markets in Crypto-assets, and amending Directive \(EU\) 2019/1937](#), issued on 24 June 2021.

5. The present formal comments of the EDPS are issued in response to a consultation by the European Commission pursuant to Article 42(1) of EUDPR.
6. These formal comments do not preclude any additional comments by the EDPS in the future, in particular if further issues are identified or new information becomes available, for example as a result of the adoption of other related Implementing or Delegated acts<sup>5</sup>.
7. Furthermore, these formal comments are without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Article 58 of the EUDPR and are limited to the provisions of the draft Delegated Regulation that are relevant from a data protection perspective.

## 2. Comments

### 2.1 Applicable EU data protection law

8. The EDPS welcomes Recital 3 of the draft Delegated Regulation, recalling the applicability of Regulation (EU) 2016/679 ('the GDPR')<sup>6</sup> when competent national authorities assess an application for authorisation as crypto-asset service provider. The EDPS also welcomes the specific reference made to data minimisation in this regard.
9. With regard to the reference to the processing of personal data by the ECB, ESMA and EBA, it is not clear whether these EU institutions and bodies would indeed be processing the personal data provided for in the context of the application for authorisation as crypto-asset service provider<sup>7</sup>.
10. Should the ECB, ESMA and/or EBA process personal data obtained in accordance with the draft Delegated Regulation, then the EDPS recommends further clarifying the circumstances under which such processing would take place. On the other hand, if no EU institutions or bodies are entitled to process personal data provided for in

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<sup>5</sup> In case of other Implementing or Delegated acts with an impact on the protection of individuals' rights and freedoms with regard to the processing of personal data, the EDPS would like to remind that he needs to be consulted on those acts as well. The same applies in case of future amendments that would introduce new or modify existing provisions that directly or indirectly concern the processing of personal data.

<sup>6</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1.

<sup>7</sup> The EDPS notes that Article 62 of the MICA Regulation only refers to ESMA and EBA only with regard to the development of draft regulatory technical standards. In addition, Article 63 (on the assessment of the application for authorisation and the granting or refusal of authorisation) introduces an obligation for ESMA and EBA to develop guidelines on the assessment of the suitability of the members of the management body of the applicant crypto-asset service provider and of relevant shareholders or members, which also does not appear to require the processing of the personal data submitted in the application form for authorisation as a crypto-asset service provider.

the context of the application, the EDPS recommends removing the reference to Regulation (EU) 2018/1725 ('the EUDPR')<sup>8</sup> from Recital (3) of the draft delegated regulation.

## 2.2 Categories of personal data

11. The EDPS considers that the types of information to be collected as part of the 'personal history' of the members of the management body of the applicant should be listed exhaustively. Therefore, the EDPS recommends replacing the word "*including*" in the first sentence of Article 7(1)(f) of the draft Delegated Regulation with the word "namely", so as to ensure that the types information listed thereunder constitute an exhaustive list.
12. In addition, the EDPS notes that Article 7(1)(f)(i) includes among the personal history of the members of the management body information about "[...] *criminal records, including criminal convictions and any ancillary penalties and information on pending criminal proceedings or investigations or penalties (including relating to commercial law, financial services law, money laundering, and terrorist financing, fraud or professional liability)[...]*" (emphasis added).
13. Recital 11 explains that "[...] *the applicant should provide the competent authorities with all information about past criminal convictions and with information on pending criminal investigations, civil and administrative cases, penalties, enforcement actions and other adjudicatory proceedings of the members of the management body relating to commercial law, insolvency law, anti-money laundering, counter-terrorist financing, fraud, professional liability*". (emphasis added)
14. The EDPS recalls that processing of personal data relating to criminal convictions and offences is subject to the enhanced protection of Article 10 GDPR<sup>9</sup>. Moreover, in line with the principle of data minimisation laid down in Article 5(1)(c) of the GDPR, the collection of personal data should be limited to what is necessary to fulfil the purposes for which they are processed.
15. Article 62(3) of the MICA Regulation, which the draft Delegated Regulation seeks to implement, states that an applicant crypto-asset service provider shall provide *proof of the absence* of a criminal record in respect of convictions and the absence of penalties imposed under the applicable commercial law, insolvency law and financial services law, or in relation to anti-money laundering, and counter-terrorist financing, to fraud or to professional liability. Such information must be provided both in relation to the members of the management body of the applicant and or all

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<sup>9</sup> See in this regard also the Judgment of the Court of Justice of the European Union of 22 June 2021, *B. v. Latvijas Republikas Saeima*, Case C-439/19, ECLI:EU:C:2021:504, paragraph 74 and following.

shareholders and members, whether direct or indirect, that have qualifying holdings in the applicant.

16. The EDPS recommends ensuring that the information requested about criminal records is limited to what is relevant for the assessment of the authorisation as crypto-asset service provider by bringing the wording of Article 7(1)(f)(i) of the draft Delegated Regulation fully in line with Article 62(3)(a) and (c) of the MICA Regulation.
17. In particular, the EDPS considers that Article 7(f)(i) of the draft Delegated Regulation should make reference to proof of *the absence of* a criminal record and the *absence of* penalties. Moreover the EDPS recommends replacing the word “including” with the word “relating” in the sentence between parenthesis that reads: “(*including relating to commercial law, financial services law, money laundering, and terrorist financing, fraud or professional liability*)”.
18. The EDPS notes the absence of a reference to this consultation in a recital of the draft Delegated Regulation. The EDPS recommends inserting such a reference in a recital of the draft Delegated Regulation.

Brussels, 21 June 2024

(e-signed)

Wojciech Rafał WIEWIÓROWSKI